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HUMAN DILIGENCE PPLY

Corporate Human Rights Due Diligence in Global Supply Chains

A Comparative Analysis of the Potential and Limitations of Mandatory Human Rights Due Diligence Legislation in Europe

Sarah Masoud

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Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ 5.7.2024, L series.

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List of Abbreviations

ABLJ	American Business Law Journal
AMJIL	American Journal of International Law
approx.	approximately
art.	article
BAFA	German Federal Office of Economic Affairs and Export Control
BBI	Bundesblatt (Swiss Federal Gazette)
BEQ	Business Ethics Quarterly
BGBI	Bundesgesetzblatt (German Federal Gazette)
BGE	Bundesgerichtsentscheid (German, decision of the Federal Supreme Court of Switzerland)
BGer	unpublizierter Bundesgerichtsentscheid (German, unpublished decision of the Federal Supreme Court of Switzerland)
BHRJ	Business and Human Rights Journal
BIICL	British Institute of International and Comparative Law
BMAS	German Federal Ministry for Labour and Social Affairs
BMWK	German Federal Ministry for Economic Affairs and Climate Action
Bull. Joly Soc. — Bulletin Joly Société (French law journal)	
CB	Compliance-Berater (German law journal)
C. C.	French Constitutional Council
C. civ.	French Civil Code
C. comm.	French Commercial Code
CCZ	Corporate Compliance Zeitschrift (German law journal)
CDU	Christian Democratic Union
CEDAW	Committee on the Elimination of Discrimination against Women / Convention on the Elimination of All Forms of Discrimination against Women
C. envir.	French Environmental Code
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
cf.	confer
CHF	Swiss francs
ChiJIntL	Chicago Journal of International Law
CJIL	Connecticut Journal of International Law
CLDDA	Dutch Child Labour Due Diligence Act 2019
CLL & PJ	Comparative Labor Law & Policy Journal
CO	Swiss Code of Obligations

CRC	Committee on the Rights of the Child / Convention on the Rights of the Child
CSDDD	European Union Sustainability Due Diligence Directive
CSR	Corporate Social Responsibility
CSRD	European Union Corporate Sustainability Reporting Directive
CSU	Christian Social Union
e.g.	for example
EC	European Commission
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECL	European Company Law Journal
ECtHR	European Court of Human Rights
ed.	editor
eds.	editors
EIJIL	European Journal of International Law
EJCL	European Journal of Comparative Law and Governance
ECJ	European Court of Justice
ELR	Erasmus Law Review
ESG	Environmental, Social, and Governance
et al.	et alii / et aliae / et alia (Latin, and others)
etc.	et cetera (Latin, and so on/and so forth)
EU	European Union
EUR	Euro/Euros
EuZ	Zeitschrift für Europarecht (Swiss law journal)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (German law journal)
fn.	footnote
FOJ	Swiss Federal Office of Justice
GIHR	German Institute for Human Rights
GesKR	Zeitschrift für Gesellschafts- und Kapitalmarktrecht (Swiss law journal)
HILJ	Harvard International Law Journal
HLR	Harvard Law Review
HR Committee	— Human Rights Committee
HR & ILD	Journal for Human Rights & International Legal Discourse
HRC	Human Rights Council
HRDD	Human Rights Due Diligence
HRLR	Human Rights Law Review
HRQ	Human Rights Quarterly
HRR	Human Rights Review

ICT	Information and Communication Technology
i.e.	id est (Latin, that is)
Ibid.	Ibidem (Latin, in the same place)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IJCJ & SD	International Journal for Crime, Justice and Social Democracy
ICLQ	International & Comparative Law Quarterly
IHRL	International Human Rights Law
IISD	International Institute for Sustainable Development
ILA	International Law Association
IPIS	International Peace Information Service
ILO	International Labour Organization
JAR	Journal of Accounting Research
J Bus Ethics	Journal of Business Ethics
JCP E	La Semaine Juridique – Entreprise et Affaires (French Law Journal)
JETL	Journal of European Tort Law
JHR	Journal of Human Rights
JHRE	Journal of Human Rights and the Environment
JHRP	Journal of Human Rights Practice
JILP	New York University Journal of International Law and Politics
JPP	Journal of Political Philosophy
JSF&I	Journal of Sustainable Finance & Investment
JWIT	Journal of World Investment & Trade
let.	letter
LdV	French Duty of Vigilance Act 2017
MJIL	Melbourne Journal of International Law
MOSOP	Movement for the Survival of the Ogoni People
n.	note
NANHRI	Network of African National Human Rights Institutions
NAP	National Action Plan
NFRD	European Union's Non-Financial Reporting Directive
NGO	Non-governmental organisation
NILR	Netherlands International Law Review
NJIHR	Northwestern Journal of International Human Rights
NJW	Neue Juristische Wochenschrift (German law journal)
No./no./nos.	number/numbers

NQHR	Netherlands Quarterly of Human Rights
NZG	Neue Zeitschrift für Gesellschaftsrecht (German law journal)
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OHLJ	Osgoode Hall Law Journal
OJ	Official Journal of the European Union
para.	paragraph
RBI	Swiss Responsible Business Initiative
RdA	Recht der Arbeit
RD	Recueil Dalloz (French law journal)
RDH	La Revue des Droits de l'Homme (French law journal)
RdS	Revue des Sociétés (French law journal)
RICEA	Revue Internationale de la Compliance et de l'Ethique des Affaires (French law journal)
RLDA	Revue Lamy Droit des Affaires (French law journal)
SCC	Swiss Criminal Code
SCDDA	German Supply Chain Due Diligence Act 2021
SDG	Sustainable Development Goals
sec.	section
SPD	Social Democratic Party of Germany
SPDC	Shell Petroleum Development Company
SR	Systematische Rechtssammlung (German, Classified Compilation of Federal Legislation)
SRIEL	Swiss Review of International and European Law
SRSG	Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises
SZW	Schweizerische Zeitschrift für Wirtschafts- und Finanzmarkt-recht (Swiss law journal)
Trade L. & Dev.	— Trade, Law and Development Journal
UFLPA	United States' Uyghur Forced Labor Prevention Act
ULR	Utrecht Law Review
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNICEF	United Nations Children's Fund
UNTS	United Nations Treaty Series
URP	Umweltrecht in der Praxis (Swiss law journal)

US	United States
VJIL	Virginia Journal of International Law
WGBHR	Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises
WTO	World Trade Organization
YLJ	The Yale Law Journal
ZeuP	Zeitschrift für Europäisches Privatrecht (German law journal)
ZfMR	Zeitschrift für Menschenrechte (German law journal)
ZIP	Zeitschrift für Wirtschaftsrecht (German law journal)
ZVertriebsR	Zeitschrift für Vertriebsrecht (German law journal)
ZvglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft (German law journal)

Introduction

I. Context

In the past decades, reports on the involvement of Western parent companies in human rights abuses occurring abroad, such as the deaths of thousands of people caused by a leakage of toxic gas from a pesticide plant in India[1], and the destruction of the environment and livelihoods by the extractive industry in Nigeria following large scale oil spills[2], have sparked public outrage and contributed to a movement advocating for corporate accountability. While this movement has traditionally focused on the involvement of multinational enterprises headquartered in the Global North in human rights abuses in the Global South[3], it has increasingly started to pay more attention to the conduct of all companies, irrespective of their size[4] and region in which they operate[5].

To regulate transnational corporate conduct with regard to human rights, various instruments from different legal disciplines such as international economic law and international human rights law have been discussed over the

1 See, e.g., BAXI UPENDRA, Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?, Business and Human Rights Journal (BHRJ) 2016, 21 ff., 28 ff. See further, Chapter 1 II 2.2 a.

2 The multinational enterprise Shell has been involved in multiple lawsuits with regard to environmental degradation and various human rights abuses, see, e.g., Amnesty International, 'Nigeria: On trial: Shell in Nigeria: Legal Actions Against the Oil Multinational', Report (10 February 2020). See further, Chapter 1 II 2.2 b.

3 See, e.g., RAMASASTRY ANITA, Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability, Journal of Human Rights (JHR) 2015, 237 ff., 240 ff. See further, Chapter 1 II.

4 See, e.g., ADDO MICHAEL, Business and Human Rights and the Challenges for Small and Medium-Sized Enterprises, in: Rensmann (ed.), Small and Medium-Sized Enterprises in International Economic Law, Oxford 2017, 311-338., 314; Business & Human Rights Resource Centre, 'Towards EU Mandatory Due Diligence Legislation: Perspectives from Business, Public Sector, Academia and Civil Society' (November 2020), 32 ff.

5 Transnational business activities within the Global North have notably also increasingly been scrutinised, see, e.g., Society for Threatened Peoples, 'Conclusion of Arbitration: BKW to Assume more Corporate Responsibility in the Future', Press Release (26 August 2021). Furthermore, the global activities of companies in the technology sector (e.g. artificial intelligence and social media platforms) are increasingly receiving attention in the business and human rights space beyond any Noth-South distinction, see, e.g., Office of the High Commissioner for Human Rights (OHCHR), 'Business and Human Rights in Technology Project ("B-Tech Project")'.

years.[6] Currently, the most prominent instrument is a set of soft law norms called the United Nations' Guiding Principles on Business and Human Rights (UNGPs)[7]. The UNGPs encourage, but do not legally oblige, 'all business enterprises' to respect human rights.[8] This means that companies should 'avoid causing or contributing to adverse human rights impacts through their own activities' and that they should 'seek to prevent or mitigate adverse human rights impacts' which are 'directly linked to their operations, products or services by their business relationships'.[9] To do so, companies should exercise human rights due diligence (HRDD) throughout their value chains.[10] The UNGPs describe HRDD as a process by which business enterprises should assess actual or potential human rights impacts, prevent and mitigate these impacts through appropriate measures, track the effectiveness of these measures and communicate how human rights impacts are addressed.[11] In the event that adverse human rights impacts occur, businesses should remedy the harm they caused or contributed to.[12] Despite their legally non-binding nature, the UNGPs have been referenced in judgments of national courts[13] and incorporated in international[14] as well as national instruments[15] aimed at promoting responsible business conduct. These instruments range from voluntary initiatives[16] to soft[17] and hard law[18].

6 For an overview of different instruments see, e.g., BERNAZ NADIA, Business and Human Rights, History, Law and Policy – Bridging the Accountability Gap, Abingdon / New York 2017, 79 ff.

7 UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. A/HRC/17/31 (21 March 2011).

8 UNGP 11 and UNGP 12 with Commentary.

9 UNGP 13.

10 UNGP 17 (b).

11 UNGPs 18-21.

12 UNGP 22.

13 See, e.g., District Court of The Hague, Milieudefensie et al. v. Royal Dutch Shell PLC, judgement of 26 May 2021, C/09/571932/HA ZA 19-379, English version, paras. 4.4.11. ff.

14 See, e.g., Organisation for Economic Co-operation and Development (OECD), Guidelines for Multinational Enterprises (OECD Publishing 2011).

15 See, e.g., the UK Modern Slavery Act 2015, the French Duty of Vigilance Act 2017, and the German Corporate Due Diligence in Supply Chains Act 2021.

16 See, e.g., UN Global Compact.

17 See, e.g., OECD Guidelines for Multinational Enterprises (2011).

18 See, e.g., the UK Modern Slavery Act 2015, the French Duty of Vigilance Act 2017, and the German Corporate Due Diligence in Supply Chains Act 2021.

II. Current State of Research in the Field

At present, there is only little research on how hard law approaches to HRDD compare to existing soft law instruments, and whether, and if so how, these instruments could complement each other.[19] Answering these questions is important, as many may view the development of hard law HRDD instruments as a leap forward in the protection of rights-holders from corporate human rights abuses.[20]

The lack of research regarding this question is connected to the fact that a clear trend towards the 'hardening' of HRDD, both at the international as well as the national level, has only recently started to emerge.[21] At the international level, United Nations (UN) human rights treaty monitoring bodies have begun to formulate extraterritorial state obligations to protect rights-holders from corporate human rights abuses.[22] These UN bodies have notably increasingly started to urge state parties to establish a regulatory framework ensuring that all companies domiciled on their territory or under their jurisdiction exercise HRDD in order to identify, prevent, and address human rights abuses throughout their global supply chains.[23] Moreover, there is an international binding treaty on business and human rights being discussed, which would oblige state parties to regulate transnational corporate conduct.[24] This would include

19 DEVA SURYA, The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface, Business and Human Rights Journal (BHRJ) 2021, 336-351, 337. See also, RASCHE ANDREAS / WADDOCK SANDRA, The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research, Business and Human Rights Journal (BHRJ) 2021, 227-240, 239.

20 LANDAU INGRID, Human Rights Due Diligence and the Risk of Cosmetic Compliance, Melbourne Journal of International Law (MJIL) 2019, 221-248, 232 ff.

21 QUIJANO GABRIELA / LOPEZ CARLOS, Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?, Business and Human Rights Journal (BHRJ) 2021, 241-254, 243 ff.

22 See, e.g., UN Committee on the Rights of the Child (CRC), General Comment No. 16 (2013), 'State Obligations regarding the Impact of the Business Sector on Children's Rights', UN Doc. CRC/C/GC/16 (17 April 2013), paras. 38 ff.; UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 24 (2017), 'State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', UN Doc. E/C.12/GC/24 (10 August 2017), paras. 25 ff.

23 See, e.g., CESCR, Concluding Observations on the Sixth Periodic Report of Germany, UN Doc. E/C.12/DEU/CO/6 (27 November 2018), paras. 8 and 10; CESCR, Concluding Observations on the Fourth Periodic Report of Switzerland, UN Doc. E/C.12/CHE/CO/4 (18 November 2019), para. 11.

24 Open-Ended Intergovernmental Working Group (OEIGWG), 'Text of the Updated Draft Legally Binding Instrument With the Textual Proposals Submitted by States

ensuring that companies within their territory, jurisdiction, or otherwise under their control, conduct HRDD.[25] At the national level, an increasing number of states, particularly in Europe, are passing legislation to regulate transnational corporate conduct with regard to human rights.[26] However, these domestic laws differ considerably in their personal scope[27], material scope[28], content[29] and enforcement[30]. These differences have significant implications for the protection of rights-holders from corporate misconduct.[31]

While many scholars generally welcome the trend towards hard law approaches to HRDD, some also warn against the pitfalls of relying too heavily on the UNGPs for the formulation of corporate human rights obligations.[32] This caution is connected to perceived weaknesses of the UNGPs' HRDD concept. These perceived weaknesses include the ambiguity of its material scope in terms of covered human rights, its depth concerning covered business activities, the wording of its content, and the unclarity with regard to its limits.

III. Research Questions, Scope and Structure of the Thesis

Based on the hypothesis that mandatory HRDD legislation is not necessarily a leap forward in the protection of rights-holders from corporate human rights abuses, my doctoral thesis explores how emerging mandatory HRDD laws

During the Ninth and Tenth Sessions of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', UN Doc. A/HRC/58/46/Add.1 (21 January 2025) (hereinafter: 10th Session BHR Treaty Draft), art. 6.1.

25 Art. 6.2 (c) in conjunction with art. 6.1 of the 10th Session BHR Treaty Draft.

26 See, e.g., the French Duty of Vigilance Act 2017, the Dutch Child Labour Due Diligence Act 2019, the German Corporate Due Diligence in Supply Chains Act 2021, and the EU Corporate Sustainability Due Diligence Directive.

27 I.e. covered companies.

28 I.e. covered human rights, severity of human rights abuses and depth of covered business activities into the supply chain.

29 I.e. types of obligations.

30 Public and/or private enforcement or lack thereof.

31 The Office of the High Commissioner for Human Rights (OHCHR), 'Issues Paper on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies' (June 2020) (hereinafter: OHCHR Issues Paper), 3; MCCORQUODALE ROBERT / NOLAN JUSTINE, The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses, Netherlands International Law Review (NILR) 2021, 455-478, 469.

32 LANDAU, MJIL 2019, 232 ff.; QUIJANO/LOPEZ, BHRJ 2021, 248 ff.; MCCORQUODALE/NOLAN NILR 2021, 471.

compare to existing soft law and voluntary instruments, and whether, and if so how, these instruments could complement each other. My thesis seeks to clarify the scope, content and limitations of different HRDD instruments and determine the implications of the HRDD conceptions reflected in these instruments for the protection of rights-holders from corporate misconduct. I will do so in three steps.

First, I will define the term 'multinational enterprise', outline the role of these enterprises in globalisation and their impact on the full enjoyment of human rights, and thereby explain the evolution of the business and human rights movement. I will then highlight key challenges of regulating transnational corporate conduct both from an international as well as national law perspective and illustrate these challenges using cases of alleged human rights abuses in the Global South.

Second, I will assess the international framework for responsible business conduct and demonstrate the development, application, and refinement of HRDD standards therein. To do so, I will examine the development of the UNGPs, their concept of HRDD and its main critique. In a next step, I will analyse the adoption of the UNGPs' HRDD concept in the Organisation for Economic Co-operation and Development (OECD) and illustrate its operationalisation and refinement through the analysis of cases brought before National Contact Points (NCPs), i.e. the OECD's non-judicial enforcement mechanism. In this analysis, I will particularly include the role of voluntary initiatives that seek to address human rights challenges related to transnational business activities in effective HRDD.

Third, I will explore different HRDD conceptions in selected (supra-) national legislation in Europe and investigate whether and, if so, how the previously highlighted points of criticism brought against the UNGPs have been tackled therein. Generally, three types of mandatory HRDD laws can be distinguished: disclosure laws requiring companies to report on human rights risks, laws describing human rights due diligence obligations that may contain sanctions for non-compliance, and laws which in addition to due diligence obligations contain civil liability provisions for corporate misconduct. I will analyse the mandatory HRDD legislation in Switzerland[33], Germany[34], France[35], and the European Union (EU)[36]. Each of these laws exemplifies one

33 I.e. art. 964a-964c and 964j-964l of the Swiss Code of Obligations.

34 I.e. the German Corporate Due Diligence in Supply Chains Act 2021.

35 I.e. the French Duty of Vigilance Act 2017.

36 I.e. the EU Corporate Sustainability Reporting Directive and the EU Corporate Sustainability Due Diligence Directive.

of the aforementioned types of HRDD laws. I will evaluate the alignment of these laws with the previously outlined international framework, compare and contrast their potential for the protection of rights-holders from transnational corporate misconduct, and explore the complementary role the previously analysed soft law and voluntary instruments could play in informing effective human rights due diligence in domestic legislation.

The selected instruments will be analysed from a human rights law perspective and assessed based on their potential, by design, to contribute to the protection of rights-holders from transnational corporate human rights abuses. The focus of this research is on different conceptions of HRDD, i.e. material law. Access to remedy and enforcement of HRDD obligations will only be discussed insofar as they are relevant for the typology of HRDD laws. Thus, questions arising in connection with private international law are beyond the scope of this research. Moreover, procedural aspects as well as monitoring and compliance mechanisms will not be detailed.

IV. Methodology

The research method used is doctrinal: the systematisation and interpretation of existing norms, the analysis of legal scholarship and case law, and the application of comparative methods.

The comparability of the selected mandatory HRDD laws can be affirmed for four reasons. First, all of the national HRDD laws are rooted in similar legal traditions, i.e. civil law traditions that originate from Roman law.[37] Second, Switzerland, Germany, and France are all members of the European Convention on Human Rights (ECHR)[38].[39] These states therefore are also all, at the very least, bound by the human rights enshrined in the ECHR.[40] Third, Germany and France are both EU Member States and thus fall under the same supranational legal framework and share core values, including values related to human rights and fundamental freedoms.[41] Fourth, while Switzerland is not

37 MOUSOURAKIS GEORGE, Roman Law and the Origins of the Civil Law Tradition, Cham 2015, 287 ff.

38 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950).

39 Council of Europe, Member States.

40 Art. 1 ECHR.

41 These values are enshrined in art. 2 of the Treaty on European Union (TEU) and in the EU Charter of Fundamental Rights.

a member of the EU, the relationship between the two is governed by several bilateral agreements and the selective voluntary alignment of Swiss legislation with EU law for competitive reasons.[42] The EU HRDD legislation selected for the purpose of the present analysis does not form part of any bilateral agreement, and is thus non-binding for Switzerland.[43] Nevertheless, the close economic ties between the two jurisdictions as well as the effects of the selected EU HRDD legislation on Swiss companies, especially through direct and indirect obligations arising from the EU Corporate Sustainability Due Diligence Directive, render a comparative analysis not only possible, but particularly pertinent.[44]

V. Relevance and Impact

The aim of this research is to provide a comparative study of tools for the regulation of transnational corporate conduct. It seeks to present a critical analysis of the scope, content and limitations of HRDD conceptions in different instruments and compare and contrast these instruments with regard to their potential to contribute to the protection of rights-holders from corporate human rights abuses worldwide. This will close the previously outlined research gap, can support businesses in evaluating their HRDD practices, and can help policy- and lawmakers assess present laws and legislative projects. The two latter points are not only relevant to EU Member States, being required to transpose and effectively implement the EU Corporate Sustainability Due Diligence Directive, but also to Switzerland, having the opportunity to review its HRDD legislation and assess whether to adapt to the legislative trend in Europe.

42 On the relationship between Switzerland and the EU, see, e.g., OESCH MATTHIAS, Europarecht, Zurich 2019, 491 ff. and 520 ff.

43 However, this did not prevent Switzerland from modelling its mandatory reporting law after the predecessor of the EU's Corporate Sustainability Reporting Directive, see Chapter 3 I.

44 Art. 2(2) of the EU Corporate Sustainability Due Diligence Directive notably stipulates far-reaching HRDD obligations for non-EU companies that are active in the EU. The Directive will also indirectly affect how companies outside its personal scope operate. This is because the Directive requires companies to seek contractual assurances from their business partners to ensure compliance with the human rights and environmental standards set out therein, see Chapter 5 II.

Part I:
Transnational Corporate Conduct and Human Rights: Global Governance Challenges

Chapter 1: Multinational Enterprises, Globalisation, and Human Rights

The aim of this Chapter is to provide working definitions of key terminology used, demonstrate the ignition and evolution of the business and human rights movement, map the wider business and human rights landscape, and demonstrate key challenges to the regulation of transnational corporate conduct with regard to human rights.

The Chapter is divided into three sections. Section I tackles the definition of key terminology. Section II then provides context to the business and human rights movement. It notably discusses how the liberalisation of trade and the quest to attract foreign direct investment have contributed to structural challenges with regard to the protection of human rights from corporate misconduct in the Global South. Section II then continues to present landmark cases that have considerably shaped the business and human rights movement. Section II ends with a brief analysis of the differences between corporate social responsibility and the business and human rights movement. Section III examines obstacles to the effective regulation of transnational corporate conduct from an international and national law perspective. With regard to challenges from the perspective of public international law, the issue of legal subjectivity, the extraterritorial state duty to protect human rights, and the development of a binding business and human rights treaty will be discussed. With regard to challenges from a national law perspective, the Section will investigate the lawfulness and legitimacy of home state regulation, and analyse issues arising from the separation of entities principle under company law related to the prevention of corporate involvement in human rights abuses and the provision of access to remedy for rights-holders.

I. Definitions

1. Human Rights Abuses

States are the primary duty bearers under international human rights law. This means that generally only states are directly bound by human rights

obligations.[45] The relationship between states as duty-bearers and individuals (or rights-holders) as beneficiaries of these human rights obligations is sometimes described as 'vertical'. The vertical relationship between states and rights-holders in international human rights law principally arises from the fact that solely states can become parties to human rights treaties and, as such, be directly required to comply with the obligations therein. Moreover, individual complaints and cases before international treaty monitoring bodies and regional human rights courts can only be brought against states.[46]

Under the prevailing doctrine and jurisprudence of international human rights law, states have both negative and positive human rights obligations. Negative obligations refer to the state duty to respect human rights, i.e. refrain from violating human rights.[47] The concept of human rights violations is well defined in international human rights law. Human rights violations are infringements of human rights by states that are not permissible. Human rights infringements by states can be permissible if the human right in question is not an absolute right (e.g. the right to be free from torture) and if the infringement in question meets the conditions of legality, legitimacy, and necessity.[48]

Positive obligations refer to the state duty to protect and fulfil human rights. The duty to protect requires states to take reasonable measures to protect human rights against threats posed by non-state actors and natural hazards.[49] For instance, under art. 6 of the International Covenant on Civil and Political Rights (ICCPR)[50], states are required to protect the right to life. One crucial measure to meet this obligation is the adoption of criminal law provisions prohibiting and sanctioning the killing of an individual by another.[51] By

45 KÄLIN WALTER / KÜNZLI JÖRG, The Law of International Human Rights Protection, Second Edition, Oxford 2019, 69. See further, Section III 1.1 of this Chapter.

46 LANE LOTTIE, The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies, European Journal of Comparative Law and Governance (EJCL) 2018, 5 ff., 15. See further, Section III 1.1 of this Chapter.

47 Cf. Human Rights Committee, General Comment No. 31 (2004), 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 6-7; DE SCHUTTER OLIVIER, International Human Rights Law, Cases, Materials, Commentary, Third Edition, Cambridge 2019, 292 ff.; KÄLIN/KÜNZLI, International Human Rights Protection, 87.

48 DE SCHUTTER, International Human Rights Law, 307 and 344 ff.; KÄLIN/KÜNZLI, International Human Rights Protection, 90 ff.

49 DE SCHUTTER, International Human Rights Law, 436 ff.; KÄLIN/KÜNZLI, International Human Rights Protection, 87.

50 International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171 (adopted on 16 December 1966).

51 Human Rights Committee, General Comment No. 36 (2019), 'Art. 6: Right to Life', UN Doc. CCPR/C/GC/36 (3 September 2019), para. 18 ff.

virtue of these criminal provisions, human rights obligations are indirectly extended to the private sphere and enforced in relations between private actors.[52] This is also referred to as the 'indirect horizontal effect' of human rights.[53] However, it is states that remain responsible for meeting their human rights obligations, such as those arising from art. 6 ICCPR.[54]

The business and human rights movement seeks to extend this responsibility to companies. Either by advocating for the imposition of direct human rights obligations onto companies or by urging states to adopt relevant legal measures to regulate corporate conduct.[55] In the literature on business and human rights, the term 'human rights violation' is sometimes also used for human rights infringements committed by companies.[56] In addition, some scholars argue that, similarly to states, companies should not only have negative human rights obligations, i.e. refrain from infringing the rights of individuals, but also positive ones and contribute to the progressive realisation of human rights.[57] From this perspective, a human rights violation would thus also arise whenever a positive human rights obligation has not been met by a company. However, for the purpose of this thesis, the term 'human rights violation' will be used in a traditional sense, i.e. to refer to interferences with human rights by states that are not permissible. The term 'human rights abuses' will be used to describe the human rights infringements committed by companies

52 KÄLIN/KÜNZLI, International Human Rights Protection, 87; LANE, EJCL 2018, 26; MONNHEIMER MARIA, Due Diligence Obligations in International Human Rights Law, Cambridge 2021, 24 f. See further, Section III 1.1 of this Chapter.

53 LANE, EJCL 2018, 26 and 29.

54 KÄLIN/KÜNZLI, International Human Rights Protection, 87; LANE, EJCL 2018, 26; MONNHEIMER MARIA, Due Diligence Obligations in International Human Rights Law, Cambridge 2021, 24 f. See further, Section III 1.1 of this Chapter.

55 See Section II and III of this Chapter.

56 See, e.g., RATNER STEVEN R., Corporations and Human Rights: A Theory of Legal Responsibility, The Yale Law Journal (YLJ) 2001, 443 ff.; DEVA SURYA, Human Rights Violations By Multinational Corporations and International Law: Where from Here?, Connecticut Journal of International Law (CJIL) 2003, 1 ff.; NOLAN JUSTINE / TAYLOR LUKE, Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?, Journal of Business Ethics (J Bus Ethics) 2009, 433 ff.; MUCHLINSKI PETER, Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation, Business Ethics Quarterly (BEQ) 2012, 145 ff.; BERNAZ NADIA, Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap, Abingdon / New York 2016; JÄGERS NICOLE, Sustainable Development Goals and the Business and Human Rights Discourse: Ships Passing in the Night?, Human Rights Quarterly (HRQ) 2020, 145 ff.

57 See, e.g., BILCHITZ DAVID, A Chasm between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, Beyond the Corporate Responsibility to Respect?, Cambridge 2013, 271-294, 126 ff.

and infringements jointly committed by states and companies. This is in line with the UNGPs which conceptualise the corporate responsibility to respect human rights as a responsibility to 'do no harm'[58] and employ the term 'human rights abuses'[59] in connection with corporate misconduct.[60]

2. Multinational Enterprise

Multinational enterprises (MNEs) have been the subject of heated debates since the late 1960s.[61] They are often referred to as powerful global players with turnovers exceeding the gross domestic product (GDP) of many of nation states.[62] They are said to be so powerful that they are able to play by their own rules and evade national regulation.[63] Despite being at the heart of countless debates, the term 'multinational enterprise' lacks a concise, uniform, legal definition.[64]

Economists have defined an MNE as a company that 'owns (in whole or in part), controls and manages income generating assets in more than one country'.[65] According to this conception, MNEs are thus enterprises which engage in foreign direct investment.[66] According to another definition borrowed from the business literature, an MNE is 'a cluster of corporations of diverse nationality joined together by ties of common ownership and a responsive common management strategy.'[67] While MNEs may economically be viewed as one entity, they are a conglomerate of several legally separate

58 Cf. UNGP 11 and 13.

59 See, e.g., Commentary to UNGP 17 and 23.

60 For an in-depth analysis of the corporate responsibility to respect human rights according to the UNGPs, see Chapter 2 I 3.1.

61 MUCHLINSKI PETER, Multinational Enterprises and the Law, Third Edition, Oxford 2021, 3.

62 However, such comparisons are misleading, see, e.g., May Christopher, Global Corporations in Global Governance, London / New York 2015, 83 and Worstall Tim, 'GDP for a Country is Not the Same Thing as Turnover for a Business' (28 June 2011), Forbes article.

63 See, e.g., BARNET RICHARD / MULLER RONALD E., Global Reach: The Power of the Multinational Corporations, New York 1974; KORTEN DAVID, When Corporations Rule the World, Oakland, Second Edition 2001; HERTZ NOREENA, The Silent Takeover: Global Capitalism and the Death of Democracy, London 2002.

64 PALOMBO, Business & Human Rights, 5.

65 HOOD NEIL / YOUNG STEPHEN, The Economics of the Multinational Enterprise, London 1979, 3.

66 MUCHLINSKI, Multinational Enterprises, 6.

67 VERNON RAYMOND, Economic Sovereignty at Bay, Foreign Affairs 1968, 110 ff., 114; VAGTS DETLEV F., Multinational Enterprise: A New Challenge for Transnational Law, Harvard Law Review (HLR) 1970, 739 ff., 740.

entities established in multiple jurisdictions from a legal perspective.[68] The separate legal entities are affiliated by different relationships and governed by the domestic law of the jurisdiction they are based in.[69] MNEs are often thought of as corporate groups with parent-subsidiary relationships.[70] This means that 'the parent is a shareholder (or any other holder of equity interest, however they are called under the laws of the relevant jurisdiction) of the subsidiary(ies)'.[71] However, the relationship between the various entities can also take other, non-equity-based forms.[72] Depending on the conception of the enterprise, these can range from contract-based structures, e.g. franchise agreements, to joint ventures between independent firms.[73] For contract-based structures, the decisive factor is the ability to exert significant control over another entity that creates a degree of integration into the enterprise.[74] This seems consistent with the OECD's broad definition of MNEs.[75] In the current version of its Guidelines for Multinational Enterprises, the OECD defines MNEs as follows:

> '[Multinational enterprises] usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed.'[76]

68 See, e.g., PALOMBO DALIA, Business & Human Rights, The Obligations of the European Home States, Oxford / New York / Dublin 2019, 6.

69 PALOMBO DALIA, The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals, Business and Human Rights Journal (BHRJ) 2019, 265 ff., 266. For the various forms of MNEs see, e.g., MUCHLINSKI, Multinational Enterprises, 42–79.

70 MUCHLINSKI, Multinational Enterprises, 53.

71 PALOMBO, Business & Human Rights, 6.

72 Ibid.; MUCHLINSKI, Multinational Enterprises, 49.

73 MUCHLINSKI, Multinational Enterprises, 49.

74 Ibid., 49 f. MUCHLINSKI writes: 'Such enterprises may lie beyond the normal distinction between corporation and contract, forming a distinct type of business association that applies both corporate and contractual methods of organization.' (MUCHLINSKI, Multinational Enterprises, 50). He later refers to this structure as 'network enterprise' (MUCHLINSKI, Multinational Enterprises, 317).

75 MUCHLINSKI, Multinational Enterprises, 49.

76 Organisation for Economic Co-operation and Development (OECD), Guidelines for Multinational Enterprises on Responsible Business Conduct (Paris 2023) (hereinafter: OECD Guidelines 2023), I. Concepts and Principles, para. 4.

The OECD's definition emphasises 'the ability to coordinate activities between enterprises' across national borders.[77] This transnational component is especially highlighted in the realm of the United Nations where the term 'transnational corporation' (TNC) is predominantly used.[78] For instance, the UN Draft Norms defined the term 'transnational corporation' as

> 'an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively'.[79]

The term 'transnational corporation' is also employed by the Human Rights Council related to the mandate for the elaboration of a Draft Treaty on Business and Human Rights[80] and used by UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises[81].

Over the years, the terms 'multinational enterprise' and 'transnational corporation' have both, often interchangeably, been used in the literature on business and human rights. Some authors have also employed variations of the term 'multinational enterprise', i.e. 'multinational company', 'multinational corporation', and 'transnational enterprise', without clear differentiation.[82]

77 MUCHLINSKI, Multinational Enterprises, 7.

78 The United Nations Conference on Trade and Development (UNCTAD) seems to be an exception to this rule. In 2015, it moved from using the term TNC to MNE, cf., UNCTAD, 'World Investment Report 2015', and UNCTAD, 'World Investment Report 2014'; Muchlinski, Multinational Enterprises, 6.

79 UN Sub-Commission, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003), para. 20.

80 Human Rights Council, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', UN Doc. A/HRC/26/L.22/Rev.1 (25 June 2014).

81 Office of the High Commissioner for Human Rights (OHCHR), Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Overview.

82 See, e.g., ADDO MICHAEL K., Human Rights Standards and the Responsibility of Transnational Corporations, The Hague / London/Boston 1999; RATNER, YLJ 2001, 443 ff.; DEVA, CJIL 2003, 1 ff.; JOSEPH SARAH, Corporations and Transnational Human Rights Litigation, Oxford 2004; CLAPHAM ANDREW, Human Rights Obligations of Non-State Actors, Oxford 2006; MCCORQUODALE ROBERT, Corporate Social Responsibility and International Human Rights Law, Journal of Business Ethics (J Bus Ethics) 2009, 385 ff.; DEVA SURYA / BILCHITZ DAVID (eds.), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?, Cambridge 2013; BAUMANN-PAULY DOROTHÉE / NOLAN JUSTINE (eds.), Business and Human Rights: From Principles to Practice, Abingdon / New York 2016; MONNHEIMER, Due Diligence Obligations in IHRL. MUCHLINSKI favours the use of the term 'multinational enterprise' over 'multinational

For the purpose of this thesis, unless expressly stated otherwise, the term multinational enterprise will be used to refer to a single economic unit that conducts transnational business activities through multiple, legally separate companies which are based in different jurisdictions.[83]

3. Company v. Corporation

For the purpose of this thesis, unless expressly stated otherwise, both of the terms 'company' and 'corporation' will be used to refer to all business enterprises, irrespective of their legal form or structure of incorporation. This is because in the literature on business and human rights, both of these terms are used without clear differentiation, for instance, when referring to both 'multinational companies' and 'multinational corporations'.

4. Global Supply Chain

The obligations of MNEs for human rights abuses occurring in their global supply chains is a prominent point of discussion in the literature on business and human rights.[84] In contrast to the relationship between entities in MNEs, the relationship between entities in supply chains is purely contract-based. Depending on the conception of the MNE, entities in the supply chain are either viewed as forming part of the 'network enterprise'[85] or as distinct entities[86].

Legally, entities in the supply chain are separate from entities in the MNE and contractual obligations are owed between contracting parties. However, there have been attempts to 'pierce the contractual veil' and render companies liable for the human rights abuses of business partners such as direct and indirect suppliers.[87]

corporation', as it encompasses various legal forms (MUCHLINSKI, Multinational Enterprises, 6).

83 PALOMBO, Business & Human Rights, 6.

84 See, e.g., NOLAN JUSTINE, Human Rights and Global Corporate Supply Chains, Is Effective Supply Chain Accountability Possible?, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours, Cambridge 2017, 238-265. For an overview of the issue supply chain accountability, see also, MUCHLINSKI, Multinational Enterprises, 317 ff. and 533 ff.

85 DEVA, CJIL 2003, 3; MUCHLINSKI, Multinational Enterprises, 49 f. and 317.

86 International Law Association, The Hague Conference 2010: International Civil Litigation and the Interests of the Public, Interim Report, 'Private International Law Aspects of Civil Litigation for Human Rights Violations', para. 45.

87 MUCHLINSKI, Multinational Enterprises, 317 ff. and 533 f. See also, Section III. 2.2 of this Chapter.

For the purpose of this thesis, unless expressly stated otherwise, a distinction will be made between the entities in the MNE and entities in its supply chain. This distinction is adopted to reflect a legal understanding of the supply chain.

II. Mapping the Business and Human Rights Landscape

1. Post World War II

The 1970s were marked by an increasing concern about Western MNEs meddling in the internal affairs of developing countries. This was a consequence of the alleged role of MNEs in the destabilisation of the governments of Guatemala in the 1950s and Chile in the early 1970s.[88] In 1974, the UN established the Centre for Transnational Corporations to draft a Code of Conduct that sought to address the rights and obligations of MNEs in host countries. The obligations of MNEs were set to include respect for the domestic laws of host states, adherence to their economic goals and development objectives, policies and priorities as well as non-interference in their internal political affairs.[89] There were two drafts of the UN Code of Conduct. One published in 1983 and one in 1990. The 1983 Draft included a provision on corporate respect for human rights.[90] Neither of the texts were ever formally adopted due to a lack of consensus and the Centre for Transnational Corporations was dissolved in 1990s.[91] As will be demonstrated throughout this Chapter, the struggle of achieving a broad consensus for a legally binding instrument regulating transnational corporate conduct at the international level is a defining feature of the business and human rights movement.

88 RATNER, YLJ 2001, 457; BIJLMAKERS, CSR, 15.

89 UN Economic and Social Council, Commission on Transnational Corporations, Report on the Special Session (7-18 March and 9-21 May 1983) Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev. 1), Annex II. (hereinafter: UN Draft Code of Conduct 1983); UN Economic and Social Council, Commission on Transnational Corporations, Second Session, UN Doc. E/1990/94 (1990). See further, JOSEPH SARAH / KYRIAKAKIS JOANNA, From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power, Leiden Journal of International Law (LJIL) 2023, 335 ff., 338.

90 UN Draft Code of Conduct 1983, para. 13.

91 RATNER, YLJ 2001, 458; BIJLMAKERS, CSR, 15; WETTSTEIN FLORIAN, The History of 'Business and Human Rights' and its Relationship With Corporate Social Responsibility, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, 23-45, 26; MUCHLINSKI PETER, The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights, Business and Human Rights Journal (BHRJ) 2021, 212 ff., 215.

In response to the developments at UN level, the OECD adopted its Guidelines for Multinational Enterprises (OECD Guidelines) in 1976. At the time, the OECD Guidelines aimed at harmonising the relationship between MNEs and host states and improving the international investment climate.[92] The 1976 version of the Guidelines did not impose any considerable constraints on corporate freedom and focused on 'voluntary corporate cooperation with states in their socio-economic policies'.[93] It contained one single paragraph on the human rights responsibilities of corporations.[94]

In 1977, the ILO adopted the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration). The Declaration is a soft law instrument that was elaborated to offer guidance on employment issues, training, conditions of work and life, industrial relations, and general policies.[95] The principles in the MNE Declaration are addressed to MNEs, Member States, and employers' and workers organisations and aimed at encouraging 'the positive contribution which multinational enterprises can make to economic and social progress and the realization of decent work for all'.[96] The Declaration therefore provides a systemic framework of international standards that states and corporations are recommended to adhere to.[97]

The same year, another set of international principles aimed at promoting responsible corporate conduct was adopted: the Sullivan Principles. The Sullivan Principles were named after Reverend Leon Sullivan, a civil rights advocate and the first African American board member of General Motors. At the time, General Motors was one of the largest corporations of the United States (US) that operated in South Africa during Apartheid. The Sullivan Principles were the first voluntary corporate human rights instrument that required adhering companies to report on their human rights practices.[98] The Sullivan Principles stated that adhering MNEs should promote industrial relations, employment, and social policies aimed at the desegregation of the workplace and the general improvement of the lives of black and other non-white South Africans during the Apartheid regime.[99] However, the premise of the Sullivan

92 BIJLMAKERS, CSR, 16.

93 MUCHLINSKI, BHRJ 2021, 215.

94 WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 26.

95 International Labour Organization (ILO), Areas of Work, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration).

96 International Labour Organization (ILO), Areas of Work, MNE Declaration, 'What is the ILO MNE Declaration?'.

97 CLAPHAM, Human Rights Obligations of Non-State Actors, 212.

98 MUCHLINSKI, BHRJ 2021, 216.

99 BIJLMAKERS, CSR, 17; MUCHLINSKI, BHRJ 2021, 216.

Principles was the acceptability of continued business engagement in a regime that enforced racist laws and policies. This was controversial, as continued business engagement arguably contributed to the sustenance of the Apartheid regime.[100] Indeed, the South African Truth and Reconciliation Commission later found that 'business was central to the economy that sustained the South African state during the apartheid years [...] and that [...] most businesses benefited from operating in a racially structured context.'[101] Many activists advocated for divestment rather than the implementation of the Sullivan Principles. The Sullivan Principles were abandoned in the late 1980s, when Reverend Sullivan resigned from the supervisory board of the Principles and started endorsing complete divestment himself.[102] In any case, the Anti-Apartheid movement sparked some of the earliest scholarly contributions to the literature in the field of business and human rights.[103]

2. Putting Profit before People?

While the state policies of the 1960s and 1970s were characterised by scepticism towards MNEs and fear of their economic power and political influence, the 1980s were marked by a push for economic liberalisation in the Global North.[104] The push for the liberalisation of international trade and the deregulation of economies was fuelled by the idea 'that the market allocates resources most efficiently'. Proponents of such reform believed that states should therefore create a regulatory system that allows for the efficient international division of labour and therefore the emergence of global production chains. This would increase the accumulation of capital.[105] Such neoliberalist-inspired approaches dominated by the end of the 1980s and transformed the image of MNEs. MNEs started to be viewed in a very positive light, namely 'as embodiments of progress, competitiveness and globalization.'[106] Their capacity to create wealth, jobs, and income, thereby generating great opportunities for economic growth, the eradication of poverty, innovation, and the integration of developing countries in the global economy, was highlighted.[107]

100 MUCHLINSKI, BHRJ 2021, 216 f.

101 South African Truth and Reconciliation Commission, Final Report, Volume 4, Chapter 2, para. 161.

102 MUCHLINSKI, BHRJ 2021, 217.

103 WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 25.

104 BERNAZ, Business and Human Rights, 118; BIJLMAKERS, CSR, 18.

105 MUCHLINSKI, Multinational Enterprises, 91.

106 BIJLMAKERS, CSR, 19.

107 Ibid., 20.

2.1 The Competition for Foreign Direct Investment

Since achieving independence, developing states have looked at international economic law, particularly international investment law, with considerable scepticism.[108] This attitude towards international investment law emanated from what developing states considered to be a regime that fostered their post-colonial exploitation. It was this objection to international economic law, which prompted their demand for a New International Economic Order (NIEO) from the 1960s to 1980s.[109] The NIEO embodied the post-colonial efforts of developing nations to restructure international economic relations in order to establish a balance between developing and industrial economies, thus challenging what was perceived as unfair international trading, investment, and finance rules, put in place by developed states.[110] The push for a NIEO was unsuccessful due to opposition from developed states, who argued that by their ascendancy to statehood, developing states impliedly consented to the established rules governing the international economic system. Upon the onset of globalisation in the 1980s, calls for a NIEO started to dwindle, as developing states were forced to accept the *status quo* of the rules governing international economic law.[111]

Towards the end of the Cold War in the late 1980s, many dept-ridden developing states were no longer able to rely on economic support from either side of the iron curtain. Moreover, international banks, dismayed by the inability of numerous developing nations to pay back their debt, halted a significant portion of their lending activities. As a result, developing countries became desperate to attract foreign direct investment.[112] The conclusion of trade and investment agreements between host states and home states enabled MNEs to set up their operations on the basis of their perception of optimal business conditions.[113] The foreign direct investment generated through the minimisation of obstacles to free trade and the favourable investment environment

108 MILES KATE, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital, Cambridge 2013, 80 f.; HIPPOLYTE ANTONIUS R., Foreign Investment Law and Developing Countries, in: Krajewski/Hoffmann (eds.), Research Handbook on Foreign Direct Investment, Cheltenham 2019, 72-125, 72.

109 HIPPOLYTE, in: Krajewski/Hoffmann (eds.), Research Handbook on Foreign Direct Investment, 72.

110 Ibid. For a detailed exploration of the themes and principles of the NIEO, see, e.g., LINARELLI JOHN / SALOMON MARGOT E. / SORNARAJAH MUTHUCUMARASWAMY, The Misery of International Law: Confrontations in the Global Economy, Oxford 2018, 78 ff.

111 HIPPOLYTE, in: Krajewski/Hoffmann (eds.), Research Handbook on Foreign Direct Investment, 72 and 99.

112 RATNER, YLJ 2001, 458.

113 BERNAZ, Business and Human Rights, 118; BIJLMAKERS, CSR, 21.

granted through investment agreements promised an increase in tax revenue for host states, the promotion of job opportunities for the local population, as well as the facilitation of technological transfers, and thus an overall improvement of the standard of living in host states.[114]

Nevertheless, it is increasingly becoming evident that the benefits of globalisation have not been evenly distributed between the home states and the host states of MNEs.[115] A contributing factor to this situation is the way in which trade and investment agreements have been concluded and designed, particularly as a result of power imbalances between states in the Global North and the Global South.[116] It is beyond the scope of this thesis to provide an in-depth analysis of how the international trade law and international investment law regime may foster corporate human rights abuses.[117] However, the present Section will provide an overview of how trade and investment agreements may create structural challenges with regard to the protection of human rights, particularly from corporate misconduct, for host states. This is not only crucial for the understanding of the wider business and human rights landscape and for situating mandatory human rights due diligence legislation therein, but also for the analysis of the potential and limitations of this instrument in protecting rights-holders from human rights abuses overall.

a) Potential Conflicts between International Trade Agreements and Human Rights

The conclusion of trade agreements may result in conflicts between the hosts state's duty to protect human rights and its obligations under these agreements.[118] This is because the protection of human rights, particularly social and economic rights, necessitates effective national policies. The implementation of these policies is contingent upon the availability of regulatory space and the flexibility to adapt domestic regulatory policies to the exigencies of the respective state and society. Furthermore, they may need to consider the particularities of different human rights. However, international trade agree-

114 DE SCHUTTER, International Human Rights Law, 541.

115 BIJLMAKERS, CSR, 20.

116 See, e.g., MILLER RICHARD, Globalizing Justice: The Ethics of Poverty and Power, New York / Oxford 2010; JOSEPH SARAH, Blame it on the WTO? A Human Rights Critique, Oxford 2011; LINARELLI/SALOMON/SORNARAJAH, The Misery of International Law.

117 For a critical in-depth investigation on how these regimes have historically been used to promote the interests of powerful states and their MNEs at the expense of notions of global justice and the protection of human rights see, e.g., LINARELLI/SALOMON/SORNARAJAH, The Misery of International Law, 110 ff. and 145 ff.

118 DE SCHUTTER OLIVIER, International Human Rights Law, 541.

ments frequently restrict national regulatory freedom and discretion by prohibiting the use of trade barriers, such as tariffs, quotas, and subsidies, to protect domestic businesses. If international trade agreements limit governmental discretion and regulatory flexibility in an area where such discretion and flexibility is necessary to protect human rights, these agreements are at odds with international human rights obligations.[119]

Besides directly reducing the regulatory space of governments, trade agreements often also have economic and social effects which may interfere with the enjoyment of human rights. Trade agreements typically reduce tariffs and consequently diminish the potential revenue basis of the importing state. This may have detrimental effects on the government budget and therefore deplete the state's resources necessary to comply with its human rights obligations.[120] Art. 7(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[121], for example, requires State parties to ensure safe and healthy working conditions. To do so, State parties should adopt relevant policies and take appropriate measures to monitor and enforce safe working environments in businesses, including through effective workplace investigations, the imposition of adequate penalties in case of detected breaches, and the suspension of the operation of unsafe businesses.[122] However, in order to meet these obligations under art. 7(b) ICESCR, competent state authorities need sufficient funding and human resources.

In addition to the general implications of trade liberalisation, distinct effects have also been observed. For instance, opening up markets to foreign agricultural products may negatively impact local production and the right of local small-scale farmers or small-scale retailers to an adequate standard of living pursuant to art. 11 ICESCR, which may create a ripple effect on the enjoyment of other human rights.[123] This is because foreign competitors may benefit from competitive advantages resulting from the financial support they receive from their own governments (e.g. through policies promoting the

119 KRAJEWSKI MARKUS, Framing the Broader Context of Business and Human Rights: The Impact of Trade Agreements on Human Rights, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, 269-289, 275 f.

120 Ibid., 277.

121 International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 (adopted on 16 December 1966).

122 Committee on Social, Economic and Cultural Rights (CESCR), General Comment No. 23 (2016): 'Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)', UN Doc. E/C.12/GC/23 (27 April 2016), para. 29.

123 Cf. KRAJEWSKI, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 277.

export of subsidised agricultural products to developing countries).[124] Under international human rights law, states would be required to protect poor and vulnerable groups. However, trade agreements may prevent them from using trade barriers such as tariffs or import restrictions or non-tariff barriers, i.e. regulations, standards, or bureaucratic procedures that hinder the flow of goods across borders, to meet this human rights obligation.[125] Other effects of trade liberalisation may include increased pressure on host states to maintain or even depress poor standards of production, particularly labour standards such as low wages and environmental standards, to improve their competitiveness on international markets.[126]

Business and human rights scholarship and practice thus focuses on proposing means to resolve these conflicts and prevent future ones, e.g., through interpreting trade agreements in a way compatible with human rights obligations, conducting human rights impact assessments prior to the conclusion of trade agreements, and inserting clauses ensuring the primacy of human rights obligations.[127] UN treaty monitoring bodies, such as the Committee on Economic, Social and Cultural Rights, have notably urged host states to identify potential conflicts between their obligations under human rights treaties and obligations under trade agreements prior to entering into the latter.[128] At the same time, they have called on home states to refrain from obstructing other states from complying with their human rights obligations, including when negotiating trade agreements.[129] This is as crucial development, as uncovering and resolving potential and existing conflicts between human rights obligations and trade agreements can help address structural challenges with regard to the protection of human rights in host states and close related governance gaps.

124 DE SCHUTTER OLIVIER, International Human Rights Law, 541.

125 KRAJEWSKI, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 277.

126 JOSEPH SARAH, Blame it on the WTO? A Human Rights Critique, Oxford 2011, 131; DE SCHUTTER OLIVIER, International Human Rights Law, 541.

127 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 24 (2017), 'State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', UN Doc. E/C.12/GC/24 (10 August 2017), para. 13 and 29; KRAJEWSKI, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 279 ff.

128 CESCR, General Comment No. 23 (2016), para. 72; CESCR, General Comment No. 24 (2017), para. 13.

129 CESCR, General Comment No. 23 (2016), para. 72; CESCR, General Comment No. 24 (2017), para. 29.

b) Potential Conflicts between International Investment Agreements and Human Rights

In order to attract foreign direct investment, developing states also started concluding international investment agreements.[130] International investment agreements are commonly divided into two categories: bilateral investment treaties (BITs) and treaties with investment provisions, such as free trade agreements with investment chapters.[131] International investment agreements are concluded between states with the objective of facilitating economic growth by ensuring a stable and predictable legal environment for foreign investors.[132] They typically shield investors based in their home states against non-commercial risks in the investment-receiving host state.[133] Critically, they also give investors the right to bring claims against host states before international arbitral tribunals for allegedly breaching the terms of the respective investment agreement.[134]

In business and human rights scholarship and practice, international investment agreements are mainly criticised for three reasons.[135] First, for limiting the regulatory space of host states to protect human rights and the environment.[136] Second, for failing to grant rights-holders affected by foreign

130 RATNER, YLJ 2001, 458; HIPPOLYTE, in: Krajewski/Hoffmann (eds.), Research Handbook on Foreign Direct Investment, 96 ff.

131 UN Conference on Trade and Development (UNCTAD) 'International Investment Agreement Navigator: Terminology'; KRAJEWSKI MARKUS, A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application, Business and Human Rights Journal (BHRJ) 2020, 105 ff., 108; MUCHLINSKI, Multinational Enterprises, 651.

132 BERNAZ, Business and Human Rights, 122.

133 YILMAZ VASTARDIS ANIL, From Risk to Rights: Reorienting the Paradigms at the Heart of Corporate Legal Form and Investment Treaty Standards in Foreign Investment Governance, in: Ho/Sattorova (eds.), Investors' International Law, London 2021, 98–130, 99 and 109; BUENO NICOLAS / YILMAZ VASTARDIS ANIL / NGUEULEU DJEUGA ISIDORE, Investor Human Rights and Environmental Obligations: The Need to Redesign Corporate Social Responsibility Clauses, Journal of World Investment and Trade (JWIT) 2023, 179 ff., 182.

134 COLEMAN JESSE / CORDES KAITLIN Y. / JOHNSON LISE, Human Rights Law and the Investment Treaty Regime, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, 290–314, 292; KRAJEWSKI BHRJ 2020, 108.

135 For an overview with further references see, e.g., UN General Assembly, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (WGBHR): Human Rights-Compatible International Investment Agreements', UN Doc. A/76/238 (27 July 2021) (hereinafter: WGBHR, Report on International Investment Agreements), paras. 20 ff., 24 ff., 26 f.

136 See, e.g., COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 297 ff.; UN General Assembly, 'Report of the Working Group

investment projects equal footing to investors in resolving grievances related to such projects.[137] Third, for the asymmetry between investor rights and investor obligations.[138]

As previously seen, compliance with obligations under international human rights law often requires states to adopt and enforce relevant legislation, policies, and other measures to protect human rights. While investment agreements do not prohibit such measures, they may restrict or constrain the regulatory space of host states by penalising or holding states financially accountable for the implementation or enforcement of such measures.[139] This restriction of host states' ability to regulate can take several forms. The threat of lengthy and costly investor-state arbitration may notably suffice to halt the adoption or enforcement of measures intended to regulate investors and their activities.[140] For instance, in Guatemala, a domestic court suspended a hydroelectric dam project due to a company's failure to consult an affected local community. However, it appears that the suspension was lifted after the company concerned threatened to initiate investor-state arbitration.[141] This threat may also dissuade host states from pursuing other policy objectives that are not specifically targeted at regulating investors and their activities, but which may ultimately still affect them.[142] For instance, host states may be hesitant to enact laws improving health and safety standards in the mining sector or enforce existing laws effectively, as this could potentially trigger investors claims alleging that such actions lead to an increase in cost and are therefore

on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (WGBHR): Human Rights-Compatible International Investment Agreements', UN Doc. A/76/238 (27 July 2021) (hereinafter: WGBHR, Report on International Investment Agreements), para. 3. For an in-depth exploration of this issue, see, e.g., WANDAHL MOUYAL LONE, International Investment Law and the Right to Regulate: A Human Rights Perspective, Abingdon / New York 2016.

137 COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 300; WGBHR, Report on International Investment Agreements), paras. 26 f.

138 See, e.g., YILMAZ VASTARDIS, in: Ho/Sattorova (eds.), Investors' International Law, 109 ff.; BUENO / YILMAZ VASTARDIS / NGUEULEU DJEUGA, JWIT 2023, 182 ff.

139 COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 297; TRIEFUS STEPHANIE, The UNGPs and ISDS: Should Businesses Assess the Human Rights Impacts of Investor-State Arbitration?, Business and Human rights Journal (BHRJ) 2023, 329 ff., 335.

140 COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 297.

141 Ibid., with further references.

142 COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 297.

contrary to the conditions set out in the investment agreement.[143] Furthermore, so-called 'stabilisation clauses', which seek to 'freeze' the law at a certain point in time to protect investors from ramifications connected to legal reforms, may directly preclude host states from improving human rights and environmental standards through legal reforms.[144] Such stabilisation clauses are regularly found in investment agreements related to the exploitation of natural resources.[145]

In addition to the extensive protections against changes in the operating context of the investment, it is also the interpretation of provisions in investment agreements by arbitrators that may promote 'regulatory chill'. Investment agreements typically contain vague and brief standards.[146] Their interpretation therefore requires considerable input from arbitrators who frequently justify their extensive interpretation of investment protection with the objective of enhancing investment flows. Consequently, international investment agreements have been interpreted as mandating host states to safeguard investors from a wide range of risks, without acknowledging the competing obligations of host states to safeguard the interests and rights of other groups in society. Arbitral tribunals have notoriously failed to balance the interests of investors and the legitimate aims pursued by hosts states to protect human rights and the environment.[147]

Where investors indeed bring claims before arbitral tribunals, host states may lose and be compelled to pay exorbitant compensation for claimed damages, which would undoubtedly hit developing states particularly hard.[148] In the past, numerous 'mega-awards' have been granted to investors, wherein the sum reached approximately 2% of the GDP of the respondent state.[149] The

143 BERNAZ, Business and Human Rights, 122.

144 YILMAZ VASTARDIS ANIL / VAN HO TARA, Integrating Human Rights into the Extractive Industries: How Investment Contracts Can Achieve Protection, in: Jacur/Bonfanti/Seatzu (eds.), Natural Resources Grabbing: An International Law Perspective, Leiden/Boston 2015, 223-244, 231 f.; BERNAZ, Business and Human Rights, 129.

145 WOUTERS JAN / HACHEZ NICOLAS, When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured, Human Rights & International Legal Discourse (HR&ILD) 2009, 301 ff., 303 fn. 3.

146 YILMAZ VASTARDIS, in: Ho/Sattorova (eds), Investors' International Law, 110; TRIEFUS, BHRJ 2023, 335.

147 YILMAZ VASTARDIS, in: Ho/Sattorova (eds), Investors' International Law, 110.

148 COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 297; TRIEFUS, BHRJ 2023, 338.

149 MARZAL TONI, Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS, The Journal of World Investment & Trade (JWIT) 2021, 249 ff., 251; TRIEFUS, BHRJ 2023, 338.

capacity of the respondent state to pay the compensation award is not factored in by tribunals, when determining the compensation, even when the amount would be crippling.[150] If a state is confronted with a substantial compensation award, or in some instances, multiple such awards, yet is already experiencing difficulties in fulfilling its human rights obligations due to poverty, it may be forced to divert funds from budgetary areas such as the monitoring and enforcement of living wages and social security policies. Reduced expenditure in these areas is likely to have a ripple effect on the enjoyment of other human rights.[151] Moreover, compensation is not the sole expense related to investment arbitration.[152] Defending arbitration claims is time- and resource-intensive; the costs incurred by responding states for the proceedings notably amount to USD 4.7 million per case on average.[153] Thus, even if a state is able to successfully defend a disputed measure, the resources invested in the arbitration may not only divert valuable resources away from the protection and realisation of human rights, but also discourage both the state involved in the claim as well as bystander states from adopting comparable measures in the future. The latter may therefore further exacerbate the issue of regulatory chill described above.[154]

While foreign investors, despite their third-party status, have the right to pursue remedy against states under international investment agreements, rights-holders affected by these agreements, such as indigenous peoples, do not enjoy the same right and are largely overlooked in arbitral proceedings.[155] Although individuals and communities impacted by investment projects at the centre of a dispute may request to partake in arbitral proceedings as *amicus curiae,* this form of intervention primarily serves to assist the tribunal, rather than provide an effective remedial mechanism for rights-holders. Arbitral tribunals, which possess significant discretion in granting such requests,

150 TRIEFUS, BHRJ 2023, 338.

151 Cf. COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 298; TRIEFUS, BHRJ 2023, 338.

152 Cf. WGBHR, Report on International Investment Agreements, para. 21; TRIEFUS, BHRJ 2023, 338.

153 HODGSON MATTHEW / KRYVOI YARIK / HRCKA DANIEL, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', British Institute of International and Comparative Law (June 2021), 4 and 11; TRIEFUS, BHRJ 2023, 338.

154 Cf. COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 297; WGBHR, Report on International Investment Agreements, para. 21.

155 COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 300; WGBHR, Report on International Investment Agreements, para. 21.

have yet to devise a precise and transparent approach for evaluating applications from prospective *amici*.[156] Even where investment-affected rights-holders have been allowed to intervene as *amicus curiae,* tribunals typically accord limited consideration to their arguments.[157] Furthermore, the resources and expertise required to prepare *amicus* submissions may discourage or impede rights-holders from seeking to participate in arbitral proceedings in this constraining form.[158]

Given the limitations of *amicus* participation, investment-affected rights-holders are mainly left with the option to depend on host states to defend their interests in investor-state arbitration. Yet, relying on host state representation does not ensure effective remedy, as respondent states may be unwilling or unable to present arguments focusing on the rights and interests of affected individuals and communities.[159]

As the above illustrates, investors benefit from extensive protections against various risks and the right to initiate investor-state arbitration proceedings. These rights are not matched with obligations of investors towards local communities and the environment in host states.[160] Typically, international investment agreements notably do not contain any provisions on enforceable obligations related to the human rights and environmental conduct of foreign investors. In the last decade, states have slowly started considering the rights of host communities in their investment treaty practice. Nonetheless, the inclusion of these non-economic concerns must continuously justify itself as a legitimate restriction of investor rights.[161] When the rights of host communities are incorporated into an investment agreement, they are typically expressed in diluted language as a result of the concessions made during negotiations. With few exceptions, this new generation of investment agreements tends to encourage the parties to strive to promote sustainable development and socially responsible business conduct on a voluntary basis, rather than containing clear, enforceable investor obligations with regard to human

156 COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 300.

157 Cf. COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 300; WGBHR, Report on International Investment Agreements, para. 26; TRIEFUS, BHRJ 2023, 342.

158 COLEMAN/CORDES/JOHNSON, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 300.

159 Ibid.

160 WGBHR, Report on International Investment Agreements, para. 24; YILMAZ VASTARDIS, in: Ho/Sattorova (eds.), Investors' International Law, 109.

161 YILMAZ VASTARDIS, in: Ho/Sattorova (eds.), Investors' International Law, 109.

rights and environmental standards.[162] Even states that purportedly aim to curtail the interference of international investment law with their regulatory space continue to conclude unbalanced agreements.[163] This is because not concluding such agreements may lead to a competitive disadvantage. Similarly, the notion of incorporating investor obligations into investment agreements is frequently framed as a competitive disadvantage that is likely to discourage investment into the host state.[164]

Business and human rights scholarship and practice thus focuses on proposing means to resolve these conflicts, e.g. through reforming existing international investment agreements[165], and prevent future ones. The latter includes the conclusion of impact assessments on human rights, the environment, and regulatory space, prior to signing investment agreements[166], the incorporation of clear and enforceable human rights obligations of investors vis-à-vis rights-holders[167], and the insertion of clauses ensuring that human rights considerations are taken into account in investor-state arbitration[168]. UN treaty monitoring bodies, such as the Committee on Economic, Social and Cultural Rights, have highlighted both the obligations of host states and the obligations of home states in this regard.[169] This is as crucial development, as the identification and resolution of potential and existing conflicts between human rights obligations and investment agreements can help address structural challenges with regard to the protection of human rights in host states and close related governance gaps.

2.2 Wake-Up Calls

Against this backdrop of structural challenges to the protection and realisation of human rights and related governance gaps, the scale of corporate involvement in human rights abuses in host states in the Global South is unsurprising. Three events deeply marked the business and human rights dis-

162 WGBHR, Report on International Investment Agreements, paras. 24 and 41; YILMAZ VASTARDIS, in: Ho/Sattorova (eds.), Investors' International Law, 109; BUENO / YILMAZ VASTARDIS / NGUEULEU DJEUGA, JWIT 2023, 197 f.

163 YILMAZ VASTARDIS, in: Ho/Sattorova (eds.), Investors' International Law, 109 f.

164 Ibid., 110.

165 See, e.g., WGBHR, Report on International Investment Agreements, para. 76 (c).

166 See, e.g., CESCR, General Comment No. 24 (2017), para. 13; WGBHR, Report on International Investment Agreements, para. 76 (g).

167 See, e.g. BUENO / YILMAZ VASTARDIS / NGUEULEU DJEUGA, JWIT 2023, 197 ff. and 216.

168 See, e.g., CESCR, General Comment No. 24 (2017), para. 13.

169 CESCR, General Comment No. 23 (2016), para. 72; CESCR, General Comment No. 24 (2017), para. 13 and 29.

course between the mid-1980s and the mid- to late 1990s in this regard: the Bhopal disaster in India, the alleged involvement of Shell in human rights abuses in the Niger Delta, and allegations against Nike regarding the use of so called 'sweatshop labour' in its supply chains.[170]

a) The Bhopal Disaster

On the night of 2 December 1984, there was a leakage of 47 tons of highly toxic gas from a pesticide plant in an Indian city named Bhopal. The factory belonged to Union Carbide India, a subsidiary of Union Carbide Corporation, a company based in the US.[171] The leakage led to the death of several thousand people and injured hundreds of thousands of survivors.[172] It also polluted the environment around the plant site and contaminated the ground water.[173] A large number of survivors continuously suffered from various medical conditions such as respiratory illness, eye disease, immunity impairment, neurological damage, cancers, and miscarriages.[174] What happened in Bhopal in 1984 is regarded as the 'largest industrial disaster in history' today.[175]

The direct cause of the gas leakage was identified as water entering a methyl isocyanate storage tank in the plant. However, it remains unclear how the water got into the tank. While the Union Carbide Corporation suspected sabotage, the Indian government noted that water may have gotten into the tank during a routine cleaning of the pipes on the night of the disaster.[176] Some

170 NOLAN JUSTINE, Business and Human Rights in Context, in: Baumann-Pauly/Nolan (eds.), Business and Human Rights: From Principles to Practice, Abingdon / New York, 2016, 2-11, 3 ff. and 6 f.; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 26; MUCHLINSKI, BHRJ 2021, 217.

171 BAXI UPENDRA, Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?, Business and Human Rights Journal (BHRJ) 2016, 21 ff., 28; DEVA SURYA, Bhopal: The Saga Continues 31 Years on, in: Baumann-Pauly/Nolan (eds.), Business and Human Rights: From Principles to Practice, Abingdon / New York 2016, 22-26, 22; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 26.

172 BAXI, BHRJ 2016, 28; DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 22; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 26.

173 Amnesty International, 'Clouds of Injustice, Bhopal Disaster 20 Years on', Report (2004) (hereinafter: Amnesty International, Bhopal Report 2004) (last accessed 7 October 2022), 12 ff.; DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 22.

174 Amnesty International, Bhopal Report 2004, 22 ff.; DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 26.

175 WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 26.

176 DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 22.

accused Union Carbide Corporation of systematically discounting warnings related to the inadequacy of safety systems at the Bhopal plant.[177] Others blamed the Indian government for its inconsistent enforcement of safety laws and chaotic planning permissions.[178] Decades of legal battles ensued. Victims of the disaster sought to hold Union Carbide Corporation and Union Carbide India liable before courts in the US and India, respectively.[179] The victims decided to pursue litigation in the US against Union Carbide Corporation first because it held the majority of shares of its subsidiary Union Carbide India and exercised significant control over operational decisions. Furthermore, it had provided the technology for the Bhopal plant as well as the training of the staff there, and the subsidiary had less assets to compensate the victims.[180] In addition, victims feared the long delays which were considered 'endemic' to the Indian judicial system.[181]

The lawsuit in the US was dismissed on the grounds of *forum non conveniens*.[182] This doctrine is applicable in many common law countries such as the US and Canada.[183] It provides courts with the option to

> 'prevent a case from moving forward in the jurisdiction in which it is filed on the basis that another jurisdiction is the more appropriate venue for the case due to the location of the parties, witnesses, evidence, and given that the local court is more familiar with the local law, which is often the law applied in the case. In cases against businesses, this usually means that the case is dismissed under the theory that it can be filed in the host State.'[184]

177 BAXI, BHRJ 2016, 28 f. For a more in-depth analysis of the Bhopal disaster, see, DEVA SURYA, Regulating Corporate Human Rights Violations, Humanizing Business, London / New York 201, 24 ff.

178 NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 3 f.

179 DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 23; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 26 f.

180 BAXI, BHRJ 2016, 28; DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 23.

181 DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 23.

182 Ibid.

183 The European Court of Justice (ECJ) held that the doctrine of *forum non conveniens* is not applicable in claims against companies domiciled in Member States of the European Union. The doctrine may be reintroduced in the United Kindom following its withdrawal from the European Union (MARX AXEL / BRIGHT CLAIRE / WOUTERS JAN, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', Study requested by the European Parliament's Subcommittee on Human Rights (February 2019) (hereinafter: MARX/BRIGHT/WOUTERS, Access to Legal Remedies), 15 f.).

184 SKINNER GWYNNE / MCCORQUODALE ROBERT / DE SCHUTTER OLIVIER, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business',

As result of the dismissal by the US court, victims turned to the Indian court system. In 1989, the Indian Supreme Court settled Union Carbide Corporation's civil liability for 470 million US Dollars (USD).[185] In exchange, it granted Union Carbide Corporation and its global affiliates immunity from criminal liability.[186] The settlement garnered fierce criticism for being unfair, particularly in view of the initial damage claim which amounted to three billion USD. The criminal immunity was later cancelled by the Indian Supreme Court.[187] However, there was no criminal conviction until years later. In 2010, an Indian court convicted Union Carbide India and several of its executives for criminal negligence.[188] Union Carbide India was ordered to pay a fine of 500,000 Rupees (approx. USD 10,870 at the time). Each of the executives was sentenced to two years in prison and a fine of 100,000 Rupees (approx. USD 2,175 at the time).[189] Today, the Bhopal disaster is considered one of the 'historical hallmarks' of the business and human rights movement and a tragic reminder of the struggle for justice victims of corporate human rights abuses regularly face.[190]

b) Shell in the Niger Delta

In the 1990s, civil society organisations increasingly started to raise awareness on corporate human rights abuses. One of the cases that left a lasting mark on the business and human rights movement concerned the operations of Anglo-Dutch oil giant Shell in the Niger Delta.[191] The Niger Delta belongs to the largest wetlands globally and is home to the third largest mangrove forest worldwide. Mangroves are considered to be amongst the world's most productive natural ecosystems; they are vital for the ecological equilibrium in the Niger Delta. Being a natural nursery for fish, mangroves are also crucial for the

Report (December 2013) (hereinafter: SKINNER / MCCORQUODALE / DE SCHUTTER, The Third Pillar), 6.

185 Union Carbide Corporation v. Union of India AIR 1990 SC 273; BAXI, BHRJ 2016, 29; DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 23.

186 Union Carbide Corporation v. Union of India AIR 1990 SC 273; BAXI, BHRJ 2016, 29.

187 Union Carbide Corporation v. Union of India AIR 1992 SC 248; BAXI, BHRJ 2016, 29; DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 23.

188 State of Madhya Pradesh v. Anderson and Others, Case No. 8460/1996; DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 23.

189 State of Madhya Pradesh v. Anderson and Others, Case No. 8460/1996; Business & Human Rights Resource Centre, overview on Union Carbide India / Dow Lawsuit; BBC News article, 'Bhopal Trial: Eight Convicted over India Gas Disaster' (7 June 2010).

190 DEVA, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 23; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 26.

191 NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 6; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 27; MUCHLINSKI, BHRJ 2021, 217.

livelihood and food security of local communities such as the Ogoni people in the Niger Delta.[192]

Besides its rich biodiversity, the region is also known for its massive oil reserves.[193] The oil industry in the Niger Delta is dominated by subsidiaries of MNEs and the government of Nigeria. The oil and gas industry have made up the majority of Nigeria's foreign exchange and government revenues and generated hundreds of billions of US Dollars, since the discovery of crude oil in the 1950s.[194] Following the discovery of crude oil, a high number of oil spills and oil well fires have devastated the Niger Delta, resulting in the contamination of ground water and soil, and the overall pollution of the environment.[195] This has greatly impacted the health and livelihood of the people living in the region which have relied on agriculture and fishing as a means to survive.[196] Moreover, the region has remained poor despite the wealth generated by the oil industry and suffered from endemic conflict and corruption. The situation in the Niger Delta has become one of the most shocking examples of the 'resource curse'.[197]

Shell began exploring oil in Nigeria in 1958 and developed into the most dominant company to explore and produce oil there.[198] Shell's operations in

192 United Nations Environment Programme (UNEP), Environmental Assessment of Ogoniland (2011) (hereinafter: UNEP, Environmental Assessment of Ogoniland), 154.

193 Amnesty International, 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta', Report (June 2009) (hereinafter: Amnesty International, Nigeria: Petroleum, Pollution and Poverty), 9.

194 Amnesty International, 'The True Tragedy: Delays and Failures in Tackling Oil Spills in the Niger Delta', Report (May 2011) (hereinafter: Amnesty International, The True Tragedy), 26.

195 For a summary of findings regarding the environmental degradation in the Niger Delta as a result of oil exploration and production, see, e.g., UNEP, Environmental Assessment of Ogoniland, 9 ff.

196 Amnesty International, Nigeria: Petroleum, Pollution and Poverty, 4, 10 and 21 ff.; UNEP, Environmental Assessment of Ogoniland, 10 f., 175 ff., and 183 ff.; Amnesty International, The True Tragedy, 11 ff.

197 Amnesty International, Nigeria: Petroleum, Pollution and Poverty, 9. The resource curse refers to the paradox that the exploration of natural resources such as oil, gas, and minerals in resource-rich countries does not necessarily translate to an increase of wealth and overall quality of life for the population in these countries. On the contrary, resource-rich countries are regularly linked to corruption, increased inequality, conflicts and systemic human rights violations (see, e.g., VEGA-CARDENAS YENNY / URTEAGA-CROVETTO PATRICIA, The Concept of Global Justice and Its Contribution toward Better Understanding and Resolving Natural Resource Conflicts, in: Manirabona / Vega Cardenas [eds.], Extractive Industries and Human Rights in an Era of Global Justice: New Ways of Resolving and Preventing Conflicts, Toronto 2019, 11-37, 27 ff.).

198 BLACKBURN DANIEL, 'Removing Barriers to Justice: How a Treaty on Business and Human Rights Could Improve Access to Remedy for Victims' (August 2017), 21; MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 74.

Nigeria are representative for many of the human rights challenges companies face in the extractive sector.[199] Shell has operated in Nigeria through its subsidiary, Shell Petroleum Development Company (SPDC), for decades and continuously faced opposition from local communities and allegations of corporate complicity in human rights abuses.[200] Similarly to various other companies in the extractive sector, Shell hired security forces, including government police and military staff, to protect its facilities.[201] One of the most high-profile corporate complicity cases in the Niger Delta concerned Shell's alleged involvement in the unlawful arrest, detention and execution of writer and human rights activist Ken Saro-Wiwa, and eight other leaders of the Movement for the Survival of the Ogoni People (MOSOP).[202] MOSOP had drawn attention to the disastrous impacts the exploration and production of oil had had on the environment and the livelihoods of people in the Niger Delta. MOSOP leaders had notably argued that while 'others had grown rich on the oil that was pumped from under their soil', their homeland had been devastated by environmental pollution.[203] The movement had campaigned for Shell to leave the region.[204]

The execution of the so-called Ogoni Nine in November 1995 lead to worldwide condemnation. Officially, these men were tried for murder. According to non-governmental organisations (NGOs), the men were put on trial for their

199 NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 6.

200 Over the course of the last two decades, Shell was subject to litigation in the US, the United Kingdom, and the Netherlands for its alleged involvement in human rights abuses in the Niger Delta. For an overview of the cases filed in the United Kingdom and the Netherlands, see e.g., Amnesty International, 'Nigeria: 2020 Could be Shell's Year of Reckoning' (10 February 2020).

201 NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 6.

202 NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 6 f.; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 27; MUCHLINSKI, BHRJ 2021, 217.

203 Amnesty International, 'A Criminal Enterprise? Shell's Involvement in Human Rights Violations in Nigeria in the 1990s', Report (November 2017) (hereinafter: Amnesty International, Shell Nigeria – A Criminal Enterprise?), 5 and 18. Shell argued that the majority of the oil pollution in Ogoniland had been the result of locals deliberately sabotaging pipelines 'to win compensation and make political gains'. However, emerged evidence suggests that 'ageing, poorly maintained and leaky pipelines' had likely caused the spills and that Shell executives were aware of this maintenance issue (Amnesty International, Shell Nigeria – A Criminal Enterprise?, 49). In the case of oil spills occurring between 2004 and 2007 in the villages of Oruma and Goi in the Niger Delta, Shell was held liable for damage caused by oil spills and ordered to pay compensation to the Nigerian claimants and to implement appropriate measures to prevent future spills (see, e.g., ROORDA LUCAS / LEADER DANIEL, Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court, Business and Human Rights Journal (BHRJ) 2021, 368 ff., 371 ff.).

204 Amnesty International, Shell Nigeria – A Criminal Enterprise?, 5 and 18.

activism against the impacts of Shell's oil production in the Ogoni region. The trial was allegedly the 'culmination of a brutal campaign by Nigeria's military to silence the protests of the Movement for the Survival of the Ogoni People.'[205] Shell was accused of encouraging Nigerian security forces and military authorities to 'deal with' Ken Saro-Wiwa and stop the protests, even though the company's executives supposedly knew that this would lead to human rights abuses against Ken Saro-Wiwa, other leaders of MOSOP, and protesters.[206] After years of legal battles following the execution of Ken Saro-Wiwa, an out-of-court-settlement was reached on the eve of the trial in the case Wiwa v. Royal Dutch Petroleum in 2009.[207] Shell agreed to pay USD 15.5 million to the ten claimants, including the son of Ken Saro-Wiwa. Nevertheless, Shell continuously denied involvement in the execution of the activists and any other human rights abuses in the Niger Delta. The company stated that the sum was a 'humanitarian gesture'. Part of the settlement was dedicated to an educational and social trust fund set up for the Ogoni people.[208]

205 Amnesty International, 'Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni Nine as Writ served in Dutch Court', Press Release (29 June 2017). See also, Human Rights Watch, 'The Ogoni Crisis: A Case-Study of Military Repression in Southeastern Nigeria', Report (1995).

206 KAEB CAROLINE, Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks, Northwestern Journal of International Human Rights (NJIHR) 2008, 327 ff., 332; Amnesty International, 'In the Dock: Shell's Complicity in the Arbitrary Execution of the Ogoni Nine', Report (June 2017), 12 f.; Amnesty International, Shell Nigeria – A Criminal Enterprise?, 41 ff., 52 ff., and 72 ff.

207 There were multiple lawsuits brought against Shell in US courts for the company's alleged complicity in human rights abuses in the Niger Delta, including Wiwa v. Royal Dutch Petroleum and Kiobel v. Royal Dutch Petroleum. A settlement was only reached in the former case, for a discussion of both cases, see, e.g., KAEB, NJIHR 2008, 329 ff. See also overview on Earthrights International, Wiwa v. Royal Dutch Shell. From the mid-1990s until the early 2010s, one of the principal instruments to seek to hold MNEs accountable for human rights abuses abroad were claims brought under the US Alien Tort Statute. However, a series of decisions by the US Supreme Court, including its ruling in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013), significantly limited the chances of success of such lawsuits in the US. Ever since, the significance of the Alien Tort Statute in business and human rights litigation has been considerably diminished (see, e.g., DODGE WILLIAM S., Business and Human Rights Litigation in US Courts before and after Kiobel, in: Baumann-Pauly/Nolan [eds.], Business and Human Rights: From Principles to Practice, Abingdon / New York 2016, 244252, 248 ff. See further, VAN HO TARA, Corporate Complicity for Human Rights Violations: Using Transnational Civil and Criminal Litigation, in: Michalowski (ed.), Corporate Accountability in the Context of Transitional Justice, New York 2013, 5272, 57 ff.).

208 MOUAWAD JAD, 'Shell to Pay $15.5 Million to Settle Nigerian Case' (8 June 2009), New York Times article; NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 7.

In response to the allegations of corporate involvement in human rights abuses in the 1990s, Shell purportedly overhauled its corporate governance systems and adopted a new policy to guide its operations with respect to human rights.[209] Moreover, Shell engaged in multistakeholder dialogues which eventually resulted in the establishment of the Voluntary Principles on Security and Human Rights.[210] The Voluntary Principles aimed at guiding companies in difficult governance contexts with regard to their arrangements with state security forces and private security providers, and help companies avoid involvement in human rights abuses.[211]

c) Child Labour and Health and Safety Issues in Nike's Global Supply Chains

In the mid-1990s, Nike started facing considerable backlash for the working conditions in the factories its products were manufactured in.[212] In 1996, Life Magazine featured a story on children stitching leather pieces for Nike footballs in Pakistan for few cents an hour. The report illustrated how endemic child labour was to the region and how the global supply chains of many MNEs were tarnished by it.[213] One year later, an audit report related to the labour conditions inside one of Nike's subcontracting factories in Vietnam named Tae Kwang Vina Industrial Ltd. Co. was leaked to the public.[214] The report's findings were subsequently published in an article by the New York Times.[215] At the time, Tae Kwang Vina Industrial Ltd. Co employed 9,200 workers and produced more than 400,000 athletic shoes per month for Nike.[216] The audit

209 NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 7; MUCHLINSKI, BHRJ 2021, 217.

210 JERBI SCOTT, Extractives and Multistakeholder Initiatives: the Voluntary Principles on Security and Human Rights; the Extractive Industries Transparency Initiative; the Kimberly Process Certification Scheme, in: Baumann-Pauly/Nolan (eds.), Business and Human Rights: From Principles to Practice, Abingdon / New York 2016, 147-160, 148 f.; NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 7.

211 JERBI, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 149.

212 NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 4.

213 SCHANBERG SYDNEY H., 'Six Cents an Hour', Life Magazine article (June 1996).

214 O'ROURKE DARA, 'Smoke from a Hired Gun: A Critique of Nike's Labor and Environmental Auditing in Vietnam as Performed by Ernst & Young', Transnational Resource and Action Center (1997) (hereinafter: O'ROURKE, Nike's Labor and Environmental Auditing in Vietnam), 6. See also the reproduction of the leaked Ernst & Young report of 13 January 1997 by Corpwatch: 'Ernst & Young Environmental and Labor Practice Audit of the Tae Kwang Vina Industrial Ltd. Co., Vietnam'.

215 GREENHOUSE STEVEN, 'Nike Shoe Plant in Vietnam Is Called Unsafe for Workers' (8 November 1997), New York Times article.

216 O'ROURKE, Nike's Labor and Environmental Auditing in Vietnam, 6.

report revealed that workers in the factory were subjected to hazardous working conditions such as exposure to carcinogens which exceeded Vietnamese legal standards by 177 times. Moreover, it was noted that relevant protective equipment such as gloves and masks was not handed out to workers daily and workers were not trained to handle chemicals properly. The report uncovered that a high percentage of employees suffered from respiratory illnesses (77.57%) and that an increasing number of workers had skin and heart diseases as well as allergic reactions. The audit report also exposed overall harsh and exploitative working conditions. For instance, employees who talked during working hours would receive fines. They would also be required to work more hours than permitted by labour laws.[217]

However, interviews of employees conducted for the Transnational Resource and Action Centre, a civil society organisation focusing on corporate accountability for human rights abuses, painted an even more concerning picture of labour conditions in the factory. In these interviews, workers reported standard work weeks consisting of working '10.5 hours per day, six days per week'.[218] The wages were reportedly 'extremely low'.[219] Workers also shared that they were coerced into working overtime. They stated that if they resisted this demand more than twice, they would likely be laid off. There were also multiple accounts of workers being physically and verbally abused by managers and Vietnamese media reports alleging the attempted rape of two female workers by a manager.[220]

The revelations generated a public outcry and resulted in consumer boycotts and plummeting sales.[221] In 1998, Phillip Knight, CEO of Nike at the time, addressed the accusations of human rights abuses the company faced. He admitted that '[t]he Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse' and promised reforms. These promises included improving the air quality standards in factories, raising the minimum age, involving civil society organisations in factory monitoring, and publishing factory audit results. However, there was no mention of ensuring a living wage.[222] In 2005, Nike became the first company to publish the names and locations of its contracted factories. Today, Nike is a member of the Fair

217 O'ROURKE, Nike's Labor and Environmental Auditing in Vietnam, 7.

218 Ibid., 9.

219 Ibid., 8.

220 Ibid., 9.

221 WAZIR BURHAN, 'Nike Accused of Tolerating Sweatshops, New Report Says Workers Still on Low Wages Despite Pledge' (20 May 2001), Guardian article.

222 CUSHMAN JOHN H., 'Nike Pledges to End Child Labor And Apply U.S. Rules Abroad' (13 May 1998), New York Times article.

Labor Association, a voluntary initiative whose objective it is to improve labour conditions in global supply chains.[223]

None of these cases served as a catalyst for the business and human rights movement on their own; however, they all converged to present a consistent image of victims of human rights abuses in the Global South suffering due to corporate involvement with repressive regimes and/or corporations benefitting from governance gaps in host states.[224]

3. The Relationship between CSR and the Business and Human Rights Movement

In 1984, Edward Freeman, American philosopher and professor of business administration, published his award-winning book on stakeholder theory which outlined why and how corporations should take the interests of their stakeholders into account.[225] His work was undoubtedly one of the driving forces behind the conceptualisation of Corporate Social Responsibility (CSR). The underlying idea of CSR is that companies owe responsibility not only to their shareholders, but to society, or different 'stakeholders' at large, which may have environmental and social expectations.[226] This idea marked a stark shift in the predominant conception of the responsibility of corporations. In the 1960s, American economist Milton Friedman famously wrote that the sole responsibility of a corporation was to increase its profits. According to him, the idea that a company may have a responsibility beyond the one owed to its shareholders

> '[...] shows a fundamental misconception of the character and nature of a free economy. In such an economy, there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.'[227]

223 NOLAN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 5.

224 RAMASASTRY ANITA, Corporate Social Responsibility versus Business and Human Rights: Bridging the Gap between Responsibility and Accountability, Journal of Human Rights (JHR) 2015, 237 ff., 242.

225 FREEMAN EDWARD, Strategic Management: A Stakeholder Approach, Boston/London 1984.

226 UTTING PETER / CLAPP JENNIFER, Corporate Responsibility, Accountability, and Law: An Introduction, in: Utting/Clapp (eds.), Corporate Accountability and Sustainable Development, New Delhi 2010, 1-33, 4.

227 FRIEDMAN MILTON, Capitalism and Freedom, Fortieth Anniversary Edition, Chicago/London 2002, 133.

MNEs started adopting the concept of CSR in the late 1980s to 1990s.[228] The adoption of CSR policies and procedures was largely responsive: corporate self-regulation in the form of codes of conduct, for instance, was more likely to emerge in sectors which marketed products to consumers, and corporations were thus directly exposed to their scrutiny.[229] CSR was viewed as a strategic tool to exhibit commitment to address the concerns of consumers and civil society organisations. It was also embraced as a means to pre-empt the adoption of binding national and international law.[230] As a result of exposed corporate misconduct, the credibility of these responsive exhibitions of CSR and self-regulation increasingly became scrutinised in the 1990s.[231] In the perception of the public, CSR and self-regulation started to be regarded as 'public relations exercises' and 'greenwashing' instead of legitimate, coherent, and meaningful attempts to address key human rights, labour and environmental issues.[232]

Both CSR and the business and human rights movement are the product of the realisation that businesses have a responsibility beyond the creation of wealth and the maximisation of profits. However, CSR encompasses a broader range of issues than the business and human rights movement; CSR is notably based on a company's individual decision-making and target setting and employs diverse instruments to address identified issues. This wide scope can contribute to the perceived vagueness of the concept: responsibility in the context of CSR has a variety of meanings.[233] These meanings can range from corporate engagement in charitable projects and the sponsoring of culturally significant events, to the implementation of codes of conduct with or without independent verification and monitoring.[234] In any case, CSR has historically conceptualised corporate responsibility as private and voluntary in nature.[235]

228 BIJLMAKERS, CSR, 22.

229 Ibid., 23.

230 Ibid., 22.

231 UTTING/CLAPP, in: Utting/Clapp (eds.), Corporate Accountability and Sustainable Development, 3; BIJLMAKERS, 23.

232 BIJLMAKERS, CSR, 23.

233 RAMASASTRY, JHR 2015, 239; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 32 f.

234 WETTSTEIN FLORIAN, From Side Show to Main Act: Can Business and Human Rights Save Corporate Responsibility?, in: Baumann-Pauly/Nolan (eds.), Business and Human Rights: From Principles to Practice, Abingdon / New York 2016, 78-87, 80; RAMASASTRY, JHR 2015, 237; BIJLMAKERS, CSR, 23.

235 RAMASASTRY, JHR 2015, 237; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 39; AUGENSTEIN DANIEL, Towards a New Legal Consensus on Business and Human Rights: A 10th Anniversary Essay, Netherlands Quarterly of Human Rights (NQHR) 2022, 35 ff., 39.

Furthermore, CSR has not put human rights at the centre of its programmes.[236] Rather, human rights have traditionally been considered a CSR issue amongst others, if at all.[237] This has left companies with significant discretion as to whether, when, and how to prioritise human rights issues and how to address them.[238]

On 31 January 1999, a bridge between the CSR and the business and human rights movement was built when the late UN Secretary-General Kofi Annan introduced the so-called UN Global Compact at the World Economic Forum in Davos, Switzerland. The UN Global Compact was an effort to foster a partnership between the UN and the private sector to promote corporate commitment to core UN standards in the field of human rights, labour rights, the environment, and anti-corruption on a voluntary basis. It was officially launched at UN Headquarters in New York City on 26 July 2000.[239] Under the UN Global Compact, adhering companies are called on to assess their conduct against international human rights treaties and the ILO Core Labour Standards.[240] To do so, participating companies are required to annually report on their compliance with the principles of the UN Global Compact. These reports are not audited. However, members that fail to report annually are downgraded from an active status to a non-communicating one. Companies that fail to fulfil their duty to report for two years consecutively, are expelled from the initiative and their names are published.[241] Albeit a voluntary initiative, the UN Global Compact marked a step towards cautiously institutionalising responsible business conduct by grounding it in international human rights law. In this sense, the UN Global Compact can be regarded as an overlap between CSR and the business and human rights movement.[242]

The business and human rights movement is rooted in legal scholarship and therefore uses language centred on rights, i.e. human rights.[243] Rights and obligations are inherently connected; they can be regarded as 'two sides

236 WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 34; AUGENSTEIN, NQHR 2022, 39.

237 RAMASASTRY, JHR 2015, 239; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 34.

238 WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 39.

239 UN Global Compact: About the UN Global Compact; RAMASASTRY, JHR 2015, 243; MUCHLINSKI, BHRJ 2021, 218.

240 RAMASASTRY, JHR 2015, 243; MUCHLINSKI, BHRJ 2021, 218.

241 UN Global Compact: Frequently Asked Questions.

242 RAMASASTRY, JHR 2015, 243.

243 Ibid., 237; BIJLMAKERS, CSR, 27; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 34.

of the same coin'.[244] Human rights are universal, unconditional, inalienable entitlements that seek to safeguard 'fundamental characteristics of the human person and his or her dignity'.[245] The notion of human rights as unconditional moral obligations owed to individuals as a result of their humanity collides with the premise of moral voluntarism in CSR.[246] The business and human rights movement can therefore be conceived as a critique of CSR and its perceived failure to address human rights abuses.[247]

The business and human rights movement draws on international human rights law to articulate the constituents of responsible business conduct.[248] The movement typically advocates for binding legislation and access to legal remedies for victims of human rights abuses.[249] It highlights the connection between the human rights duties of states and the human rights responsibilities of corporations. While states have been designated the role of observers in CSR, the business and human rights movement emphasises state obligations under international human rights law to protect rights-holders from corporate misconduct.[250] Thus, the business and human rights movement 'extends public accountability for human rights into the private domain'.[251]

4. Concluding Remarks

The emergence of the business and human rights movement was the result of an accelerated globalisation process in combination with the increase of MNEs in numbers, size, and influence, and the uncovering of governance gaps, i.e. host states being unable or unwilling to protect rights-holders from corporate misconduct and provide access to remedy.[252] Traditionally, the business and human rights movement has thus focused on the business activities of MNEs:[253] Shaken by human rights tragedies between the mid-1980s and

244 WETTSTEIN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 80.

245 KÄLIN/KÜNZLI, International Human Rights Protection, 28 f.

246 WETTSTEIN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 80.

247 RAMASASTRY, JHR 2015, 238; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 35.

248 WETTSTEIN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 82; BIJLMAKERS, CSR, 27.

249 BIJLMAKERS, CSR, 26 f.; WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 34.

250 WETTSTEIN, in: Baumann-Pauly/Nolan (eds.), From Principles to Practice, 81.

251 WETTSTEIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 39.

252 Ibid., 25.

253 RAMASASTRY, JHR 2015, 240.

the mid- to late 1990s that garnered worldwide media coverage, the business and human rights movement has been marked by Western parent or lead companies benefitting from governance gaps in states in the Global South and the plight of victims of corporate human rights abuses in these countries to access justice.[254] Such government gaps emerge as a result of host states being unable or unwilling to regulate corporate conduct with regard to human rights and provide access to effective remedy to victims of corporate human rights abuses. Host states may notably be unable to effectively regulate corporate conduct as a result of concluded trade and investment agreements that limit their available regulatory space. Reasons why host states may be unwilling to provide access to effective remedy include the threat of investor-state arbitration and investors pulling their investments out of the country.[255]

III. Key Challenges of Regulating Transnational Corporate Conduct

1. Key Challenges from a Public International Law Perspective

1.1 The Corporation's (Lack of) Subjectivity under Public International Law

a) No Direct Obligations Arising for Corporations under International Human Rights Law

From the perspective of international law, the main obstacle to regulating transnational corporate conduct is rooted in corporations' lack of legal subjectivity. A subject of international law is frequently described as an entity that possesses international rights and obligations and has the capacity to maintain its rights by bringing international claims as well as bear responsibility for its breaches of obligations by being subjected to such claims.[256] Originally, when international law was considered to solely govern the relationships between states, states were viewed as the only subjects of international law. This doctrine is embedded in the concept of state sovereignty. Sovereignty refers to the right of states to rule themselves. As states are sovereign, they have the

254 See Section II 2.2 of this Chapter.

255 See Section II 2.1 of this Chapter.

256 CRAWFORD JAMES, Brownlie's Principles of Public International Law, Ninth Edition, Oxford 2019, 105. See also, PENTIKÄINEN MERJA, Changing International 'Subjectivity' and Rights and Obligations under International Law – Status of Corporations, Utrecht Law Review (ULR) 2012, 145 ff., 145.

power to create international law by concluding treaties with other sovereign states, thereby regulating their own conduct.[257] However, over the years there was a departure from this exclusively state-centric model of the international legal system and more entities were considered to fall under the scope of international law subjects. Today, the 'subjectivity' of international organisations such as the UN, albeit with limited capacities, is widely recognised.[258] In contemporary literature, other non-state actors, such as belligerents or insurgents and national liberation movements, are also considered to be subjects of international law.[259] Even individuals (natural persons) are ascribed international subjectivity by some scholars. This is because they have international rights, i.e. human rights, and (limited) obligations under international criminal law for instance.[260] Under international criminal law, individuals namely have the duty not to commit certain crimes, codified in art. 5(1) of the Rome Statute of the International Criminal Court (Rome Statute)[261], and can be held responsible[262] if they do so.[263] The status of corporations, is even more contentious.[264] The debate on the status of corporations under international law is especially relevant in the field of business and human rights:[265] As a result of the traditional view whereby corporations lack legal subjectivity under international law, generally no human rights obligations directly apply to them.[266] This means that normally human rights obligations only bind corporations indirectly, i.e. by virtue of states enacting relevant domestic legislation.[267] Nevertheless, it is argued that international human rights instruments could be interpreted in a way that allows for the deduction of direct human rights

257 DIXON MARTIN, Textbook on International Law, Seventh Edition, Oxford 2013, 115; KLABBERS JAN, International Law, Third Edition, Cambridge 2020, 67 and 74 ff.

258 PENTIKÄINEN, ULR 2012, 146; CRAWFORD, Brownlie's Principles of Public International Law, 110 and 156 ff.

259 PENTIKÄINEN, ULR 2012, 146; CRAWFORD, Brownlie's Principles of Public International Law, 109.

260 PENTIKÄINEN, ULR 2012, 146; BERNAZ, Business and Human Rights, 87 f.

261 Rome Statute of the International Criminal Court (Rome Statute), 2187 UNTS 3 (adopted on 17 July 1998).

262 Pursuant to art. 25(1) Rome Statute, the International Criminal Court has jurisdiction over natural persons only.

263 PENTIKÄINEN, ULR 2012, 146 f.; BERNAZ, Business and Human Rights, 88.

264 PENTIKÄINEN, ULR 2012, 147; CRAWFORD, Brownlie's Principles of Public International Law, 111.

265 Cf. BERNAZ, Business and Human Rights, 86 ff.; KRAJEWSKI MARKUS, Mandatory Human Rights Due Diligence Laws: Blurring the Lines between State Duty to Protect and Corporate Responsibility to Respect?, Nordic Journal of Human Rights (NJHR) 2023, 265 ff., 270.

266 KÄLIN/KÜNZLI, International Human Rights Protection, 72.

267 Ibid., 73.

obligations for corporations.[268] The Universal Declaration of Human Rights (UDHR)[269] is often used as a basis to support this claim.[270] The Preamble of the UDHR states that 'every individual and every organ of society [...] shall strive [...] to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance'. The term 'every organ of society' inevitably includes everyone, i.e. non-state actors, such as corporations.[271] However, the use of the word 'strive' indicates an aspirational goal rather than a direct legally binding obligation.[272] Similarly, while it is true that according to art. 29(1) UDHR, 'everyone has duties to the community', the content of these duties is not sketched out any further and the implications of this provision for corporations thus remain unclear.[273] Lastly, the absence of any mention of obligations for 'every organ of society' in any of the UN Covenants following the adoption of the UDHR challenges the idea that directly binding human rights obligations comparable to those of states were intended to apply to corporations at the time.[274]

An interpretation of the existing obligations under international human rights law as it currently stands, according to which these obligations also apply directly to corporations, has not garnered a majority of support.[275] However, there are good reasons why obligations *should* directly apply to corporations.[276] Two arguments are particularly worth pointing out: First,

268 For an in-depth analysis of this claim, see, MONNHEIMER, Due Diligence Obligations in IHRL, 17 ff.

269 General Assembly, Universal Declaration of Human Rights (UDHR), Resolution 217A III (adopted 10 December 1948).

270 MONNHEIMER, Due Diligence Obligations in IHRL, 19.

271 HENKIN LOUIS, The Universal Declaration at 50 and the Challenge of Global Markets, Brooklyn Journal of International Law (BJIL) 1999, 17 ff., 24 f.

272 Cf. Human Rights Council, 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises', UN Doc. A/HRC/4/35 (19 February 2007), para. 37; KARAVIAS MARKOS, Corporate Obligations under International Law, Oxford 2013, 76.

273 KÄLIN/KÜNZLI, International Human Rights Protection, 72. See further, KARAVIAS MARKOS, Corporate Obligations under International Law, Oxford 2013, 79 ff.

274 KARAVIAS MARKOS, Corporate Obligations under International Law, Oxford 2013, 77; CURZI CHIUSSI LUDOVICA, General Principles for Business and Human Rights in International Law, Leiden/Boston 2020, 104.

275 PENTIKÄINEN, ULR 2012, 149; MONNHEIMER, Due Diligence Obligations in IHRL, 29.

276 For a recent discussion of this position, see, e.g., LÓPEZ LATORRE ANDRÉS FELIPE, In Defence of Direct Obligations for Businesses Under International Human Rights Law, Business and Human Rights Journal (BHRJ) 2020, 56 ff.

as demonstrated in the previous Section, corporations do affect the enjoyment of human rights in various ways. Globalisation and trade liberalisation have namely enhanced the economic and political influence of multinational enterprises in particular, thereby increasing their potential to be both promoters of human rights and perpetrators of human rights abuses. The latter is especially pertinent in states that lack comprehensive human rights protection and/or the capacity to effectively enforce it. It is thus not possible to exclusively rely on hosts states to hold corporations to account for human rights abuses.[277] Second, corporations enjoy rights under international law (e.g. certain human rights and the right under international investment law to bring claims against states) and should consequently also have obligations.[278] The most ambitious attempt at formulating direct corporate human rights obligations was the development of the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Draft Norms)[279].[280]

b) The UN Draft Norms: An Attempted Paradigm Shift

The late 1990s marked the first endeavour of a UN human rights body to define corporate human rights obligations in detail.[281] In 1997, the UN Sub-Commission on the Promotion and Protection of Human Rights (UN Sub-Commission) mandated one of its members with the preparation of a document on the question of the relationship between the activities of transnational corporations and human rights.[282] Upon receipt of the report on the Impact of the Activities

277 ZERK JENNIFER A., Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law, Cambridge 2006, 83 ff.; KARP DAVID JASON, Responsibility for Human Rights: Transnational Corporations in Imperfect States, Cambridge 2014, 102. See also, PENTIKÄINEN, ULR 2012, 149.

278 MCCORQUODALE ROBERT, Overlegalizing Silences: Human Rights and Nonstate Actors, Proceedings of the Annual Meeting of the American Society of International Law (ASIL) 2002, 384 ff., 387; ZERK, Multinationals and Corporate Social Responsibility, 76 ff. See also, PENTIKÄINEN, ULR 2012, 149.

279 UN Sub-Commission, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

280 MONNHEIMER, Due Diligence Obligations in IHRL, 11.

281 MUCHLINSKI, BHRJ 2021, 220. See further, WEISSBRODT DAVID / KRUGER MARIA, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, American Journal of International Law (AMJIL) 2003, 91 ff.

282 UN Sub-Commission, Resolution 1997/11, 'The Relationship between the Enjoyment of Economic, Social and Cultural Rights and the Right to Development, and the Working Methods and Activities of Transnational Corporations', UN Doc. E/CN.4/Sub.2/1997/50 (5 November 1997). The UN Sub-Commission acted as a subsidiary body of the UN Commission of Human Rights which was the predecessor of today's UN Human Rights Council.

of Transnational Corporations on the Realisation of Economic, Social and Cultural Rights[283], the UN Sub-Commission opted for the establishment of a working group. This working group was tasked with the examination of the methods and activities of transnational corporations.[284] In 1999, the UN Sub-Commission initiated the preparation of a draft on standards for responsible conduct of transnational corporations. After various consultations with stakeholders, the UN Sub-Commission eventually approved the UN Draft Norms and forwarded them to the Commission on Human Rights in 2003 for adoption.[285]

The UN Draft Norms sought to restate existing human rights obligations, found in diverse treaties, and apply these principles to transnational corporations and other business enterprises, thereby moving towards holding businesses accountable for their human rights abuses.[286] The UN Draft Norms were perceived to essentially aim at shifting the traditional state-centric focus of international human rights law. While the UN Draft Norms reaffirmed states as the primary duty-bearers, they conceived the application of direct obligations on 'transnational corporations and other business enterprises' 'to promote, secure the fulfilment of, respect, ensure respect of and protect human rights' within their 'spheres of activity and influence'.[287] The UN Draft Norms defined the term 'transnational corporation' as an 'economic entity operating in more than one country or a cluster of economic entities operating in two or more countries' irrespective of their legal form.[288] Pursuant to Paragraph 21 of the UN Draft Norms, the terminology 'other business enterprise' referred to all business entities, irrespective of the international or domestic nature of their activities, legal form and ownership, that maintained 'any relation to a transnational corporation', engaged in activities that result in impacts that were not 'entirely local', or activities involving violations of the right to security as described in Paragraphs 3 and 4.[289]

283 UN Sub-Commission, 'Working Document on the Impact of the Activities of Transnational Corporations on the Realization of Economic, Social and Cultural Rights', prepared by El Hadji Guissé, pursuant to Sub-Commission Resolution 1997/11, UN Doc. E/CN.4/Sub.2/1998/6 (10 June 1998).

284 UN Sub-Commission, 'Report of the Sessional Working Group on the Working Methods and Activities of Transnational Corporations on Its First Session, UN Doc. E/CN.4/Sub.2/1999/9 (12 August 1999).

285 UN Sub-Commission, 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

286 Cf. WEISSBRODT/KRUGER, AMJIL 2003, 901.

287 UN Draft Norms, para. 1.

288 UN Draft Norms, para. 20.

289 UN Draft Norms, para. 21.

The UN Draft Norms were met with harsh criticism and never formally adopted by the Commission on Human Rights.[290] Opponents of the Draft Norms argued that they were vague and distorted international human rights doctrine. They insisted that the responsibilities placed on corporations exceeded the standards applied onto states. They argued that this shift towards extensive corporate human rights obligations would essentially equate to a privatisation of human rights protection.[291] Although the Draft Norms were written as if they establish binding obligations, as the work of a group of independent experts, they could have no direct legal implications. Indeed, they were unable to directly trigger any binding obligations, even if the Commission on Human Rights had adopted them. Nevertheless, the Norms at least in theory opened up the possibility of potentially influencing the development of human rights law, either by forming the basis for a later treaty or relevant practice and *opinio juris*.[292] In practice, finding consensus in times of decades-long stagnation of multilateral law-making is already a challenging endeavour;[293] even more so for a project breaking with the state-centricity of international human rights law.

In any case, as a result of the UN Draft Norms' failure, the Commission on Human Rights requested the UN Secretary-General to appoint a Special Representative to identify and clarify the roles and responsibilities of states, transnational corporations and other business enterprises with regard to standards of corporate responsibility and accountability.[294]

c) Emerging Soft Corporate Human Rights Responsibilities as a Result of the UN Draft Norms' Failure

In 2005, Harvard Professor John Ruggie was appointed as UN Special Representative of the Secretary-General on Human Rights and Transnational

290 RAMASASTRY, JHR 2015, 244; MUCHLINSKI, BHRJ 2021, 220 f.

291 UN Commission on Human Rights, 'Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/2005/91 (15 February 2005), para. 20.

292 KNOX JOHN H., The Ruggie Rules: Applying Human Rights Law to Corporations, in: Mares (ed.), The UN Guiding Principles on Business and Human Rights: Foundations and Implementation, Leiden/Boston 2012, 51–83, 54; RAMASASTRY, JHR 2015, 244.

293 See, e.g., PAUWELYN JOOST / WESSEL RAMSES A. / WOUTERS JAN, When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking, European Journal of International Law (EJIL) 2014, 733 ff.; MOTZFELDT KRAVIK ANDREAS, An Analysis of Stagnation in Multilateral Law-Making – and Why the Law of the Sea has Transcended the Stagnation Trend, Leiden Journal of International Law (LJIL) 2021, 935 ff.

294 UN Commission on Human Rights, Resolution 2005/69, 'Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. E/CN.4/RES/2005/69 (20 April 2005) (hereinafter: UN Human Rights Council, Resolution 2005/69).

Corporations and Other Business Enterprises.[295] In 2008, Professor Ruggie presented his framework to the UN Human Rights Council. His framework consists of three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy for victims of human rights abuses.[296] To operationalise this framework, Professor Ruggie developed the UNGPs.[297] The UNGPs are a set of soft law norms for states and all companies, irrespective of their size, sector, operational context, ownership, and structure, that offer guidance on how to prevent, address and remedy corporate human rights abuses.[298] The UNGPs were unanimously endorsed by the Human Rights Council in 2011.[299] Their content will be analysed in depth in Chapter 2 I.

Since their endorsement, the UNGPs have developed into *the* globally agreed upon authoritative standard for responsible business conduct.[300] Their endorsement led to an amendment of soft law instruments for responsible business conduct: the OECD namely updated its OECD Guidelines in 2011[301] and the ILO adjusted its MNE Declaration in 2017[302] and incorporated the UNGPs as a reference point in its programmes and guidance tools, such

295 UN Human Rights Council, Resolution 2005/69, para. 1.

296 UN Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie', UN Doc. A/HRC/8/5 (7 April 2008) (hereinafter: SRSG UN Framework Report (2008)).

297 UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. A/HRC/17/31 (21 March 2011).

298 For an in-depth analysis of the content of the UNGPs, see Chapter 2 I.

299 UN Human Rights Council, Resolution 17/4, 'Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. A/HRC/RES/17/4 (6 July 2011) (hereinafter: UN Human Rights Council, Resolution 17/4 (2011)), para. 6 (a).

300 UN Working Group on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises (WGBHR), 'Guiding Principles on Business and Human Rights at 10: Taking Stock of the First Decade', UN Doc. A/HRC/47/39 (June 2021) (hereinafter: WGBHR, UNGPs: Taking Stock of the First Decade (2021)), 5 ff. See also, JOSEPH/KYRIAKAKIS, LJIL 2023, 340 f.

301 Organisation for Economic Co-operation and Development (OECD), Guidelines for Multinational Enterprises on Responsible Business Conduct (Paris 2011) (hereinafter: OECD Guidelines 2011). The OECD Guidelines were last updated in 2023, see further Chapter 2 II.

302 ILO MNE Declaration (Version 2017), General policies, para. 10. The ILO MNE Declaration has been last updated in 2022.

as the ILO-IOE Child Labour Guidance Tool for Business[303].[304] Furthermore, the updated MNE Declaration calls on all state parties to contribute to the realisation of the ILO Declaration on Fundamental Principles and Rights at Work[305], which enshrines the ILO Core Labour Standards, and highlights the responsibility of MNEs to contribute to the attainment of the latter's objectives.[306] The ILO Core Labour Standards include rights related to freedom of association and collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation, and a safe and healthy working environment.[307] The MNE Declaration can be regarded as an authoritative interpretation of the ILO Conventions.[308]

Over the years, the UNGPs also inspired change at the international and national level in terms of hard law.[309] At the international level, UN treaty monitoring bodies are increasingly urging State Parties to adopt measures ensuring that companies respect human rights in their operations abroad.[310] Furthermore, a binding human rights treaty is being negotiated that would require State Parties to regulate transnational corporate conduct vis-à-vis human rights.[311] At the national level, particularly in Europe, the UNGPs lead to a clear trend towards the adoption of home state laws that impose human rights obligations onto companies.[312]

These developments reflect an increasing recognition of the need to 'harden' the UNGPs' soft corporate responsibility to respect human rights[313] by way of indirectly, i.e. through relevant state measures, imposing human

303 ILO-IOE, Child Labour Guidance Tool for Business, 'How to Do Business With Respect for Children's Right to be Free From Child Labour', 2015 (hereinafter: ILO-IOE Child Labour Guidance Tool for Business (2015)).

304 JOSEPH/KYRIAKAKIS, LJIL 2023, 340 f.; MUCHLINSKI, BHRJ 2021, 214.

305 The ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, was adopted at the 86th Session of the International Labour Conference (1998) and amended at the 110th Session (2022) (hereinafter: ILO Declaration on Fundamental Principles and Rights at Work (2022)).

306 ILO MNE Declaration (Version 2017 and Version 2022), General policies, para. 9 and 13 ff. for more concrete recommendations.

307 ILO Declaration on Fundamental Principles and Rights at Work (2022), para. 2.

308 CURZI, General Principles for BHR, 34.

309 WGBHR, UNGPs: Taking Stock of the First Decade (2021), 9 f.

310 CURZI, General Principles for BHR, 181. See further, Section III 1.2 of this Chapter.

311 WGBHR, UNGPs: Taking Stock of the First Decade (2021), 10. For more on the binding business and human rights treaty, see Section III 1.3 of this Chapter.

312 WGBHR, UNGPs: Taking Stock of the First Decade (2021), 9 f.

313 Ibid., 9.

rights obligations onto corporations. Moreover, they have prompted scholars to discuss whether states could even be required to regulate the conduct of their corporate nationals under international human rights law.

1.2 Contested Terrain: (No) Extraterritorial State Duty to Regulate Corporate Conduct with Regard to Human Rights

As seen, under the prevailing doctrine and jurisprudence of international human rights law, states are not only obliged to respect human rights, i.e. refrain from violating human rights, but also to take reasonable measures to protect rights-holders from human rights abuses by non-state actors.[314] In the context of business and human rights, the state's duty to protect human rights encompasses both the duty to regulate business activities that may lead to human rights abuses and to enforce corresponding regulations, as well as the duty to grant access to remedy in the event that harm occurs.[315] While these principles are largely undisputed,[316] determining the (extra-)territorial scope of the state duty to protect human rights is more contentious.[317]

There is consensus that the territorial scope of the duty to protect is delimited by a state's sovereign power.[318] This means that states are obliged to protect rights-holders from human rights abuses by non-state actors on their own territory. In addition, states have a duty to protect rights-holders whenever they exercise power or effective control over a geographical area or an individual outside their territory.[319] However, it remains unclear whether an extraterritorial duty to protect also arises if the state lacks power or effective control

314 Human Rights Committee, General Comment No. 31 (2004), para. 6-7; DE SCHUTTER OLIVIER, International Human Rights Law, 436 ff.; KÄLIN/KÜNZLI, International Human Rights Protection, 87.

315 Cf. DE SCHUTTER, International Human Rights Law, 436 and 465 ff.

316 METHVEN O'BRIEN, BHRJ 2018, 64; KRAJEWSKI MARKUS, Regelungsgegenstände eines menschenrechtlichen Sorgfaltspflichtengesetzes aus völkerrechtlicher Perspektive, Zeitschrift für Vergleichende Rechtswissenschaft (ZVglRWiss) 2023, 55 ff., 62.

317 Cf. DE SCHUTTER, International Human Rights Law, 188 ff.; JOSEPH/KYRIAKAKIS, LJIL 2023, 342; MONNHEIMER, Due Diligence Obligations in IHRL, 285.

318 KRAJEWSKI, ZVglRWiss 2023, 62.

319 See, e.g., Human Rights Committee, General Comment No. 31 (2004), para. 10; European Court of Human Rights (ECtHR), *Al-Skeini et al. v. UK*, Grand Chamber Judgment of 7 July 2011 (Application no. 55721/07), para. 131 ff.; ECtHR Grand Chamber Judgment, *Hirsi Jamaa et al. v. Italy* (Application no. 27765/09), para. 70 ff.; METHVEN O'BRIEN, BHRJ 2018, 56 ff. and 59 ff.; CASSEL DOUG, State Jurisdiction over Transnational Business Activity Affecting Human Rights, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, 198-222, 213. For an in-depth examination of extraterritorial due diligence obligations of states, see MONNHEIMER, Due Diligence Obligations in IHRL, 258 ff.

over the situation at hand. There are notably no judgments by regional human rights courts or UN bodies that settle this issue.[320] Applied to the context of business and human rights, this means that the question whether home states are obliged to protect rights-holders in host states from human rights abuses resulting from transnational business activities is currently not settled.[321]

Against this backdrop, scholars have turned to general principles of public international law to explore answers to this question.[322] In customary international law, a prohibition of cross-border interference with another state has emerged in recent decades. This principle, which was first developed in the Trail Smelter case[323], is now recognised as a fundamental principle in international environmental law[324].[325] The Trial Smelter case tackled a dispute regarding transboundary pollution. It namely concerned the emissions of a private lead and zinc smelter that caused damage to the surrounding area, including across the US-Canada border.[326] In the case, the Arbitral Tribunal recognised that the discretionary use of state territory is an essential component of state sovereignty; nevertheless, it held that states are not allowed to use their territory or permit the use of their territory in a way that causes damage to the environment of other states.[327] Under this so-called 'no-harm rule', states are thus obliged to exhaust all reasonable measures to prevent activities

320 KRAJEWSKI, ZVglRWiss 2023, 62.

321 For a position affirming such an extraterritorial duty to protect see, e.g., AUGENSTEIN DANIEL / KINLEY DAVID, When Human Rights 'Responsibilities' Become 'Duties': the Extraterritorial Obligations of States that Bind Corporations, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, Beyond the Corporate Responsibility to Respect?, Cambridge 2013, 271-294; DE SCHUTTER OLIVIER, Towards a New Treaty on Business and Human Rights, Business and Human Rights Journal (BHRJ) 2015, 41 ff. See also, COOMANS who argues that there is 'no explicit extraterritorial obligation to protect laid down by international human rights law' but 'strong arguments for an implicit legal basis for such obligations' (COOMANS FONS, The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights, Human Rights Law Review (HRLR) 2011, 1 ff., 31). For a position clearly negating the existence of such an extraterritorial duty, see METHVEN O'BRIEN, BHRJ 2018, 47 ff.

322 See, e.g., COOMANS, HRLR 2011, 31; MONNHEIMER, Due Diligence Obligations in IHRL, 144 ff.; AUGENSTEIN, NQHR 2022, 52; KRAJEWSKI, ZVglRWiss 2023, 62 ff.

323 Trail Smelter Case (United States, Canada), Arbitral Award of 16 April 1938 and 11 March 1941, Reports of International Arbitration Awards, Vol. III, 1905 ff., 1965.

324 International Court of Justice (ICJ), Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), ICJ Reports 1996, 226 ff., para. 29; ICJ, Gabcíkovo-Nagymaros Project (Hungary v. Slovakia), ICJ Reports 1997, 7 ff., para. 101.

325 MONNHEIMER, Due Diligence Obligations in IHRL, 145; KRAJEWSKI, ZVglRWiss 2023, 62 f.

326 Trail Smelter Case (United States, Canada), Arbitral Award of 16 April 1938 and 11 March 1941, 1920 ff.

327 Ibid., 1965.

on their territory, or any area under their jurisdiction, from causing significant harm to the environment of other states.[328]

While the no-harm rule has initially been developed in the context of international environmental law, this does not preclude its application to other areas of public international law. In fact, its application is notably gaining importance in international trade law, for instance.[329] Business and human rights scholars argue that the no-harm rule could be applied in the area of international human rights law as well. They namely contend that the state's duty to protect human rights could be applicable to situations in which non-state actors, that are within a state's jurisdictional reach, abuse the human rights of individuals abroad.[330] This is because states under international human rights law are obliged to take reasonable measures to ensure that their actions or omissions do not contribute to human rights abuses. This due diligence obligation may, for instance, require states to monitor the conduct of private actors and the threat to human rights posed by this conduct.[331] In light of the foregoing, it is argued that due diligence obligations under international human rights law coupled with the prohibition of transboundary harm under customary international law may at least lead to an extraterritorial duty to protect from human rights abuses in certain situations; these are namely cases in which human rights abuses committed by private actors are foreseeable and the materialisation of harm is avoidable with the adoption of reasonable state measures.[332] However, this does not address the question of threshold, as the no-harm principle relates to 'significant' harm.

The 'Maastricht Principles on Extraterritorial State Obligations' formulated in 2011 by a group of international experts from academia, human rights practice, and international organisations provide more insights in this regard. These Principles, albeit not legally binding, offer considerable guidance on how an extraterritorial state duty to protect could be construed.[333] According to Principle 3, all states have obligations to respect, protect and fulfil human

328 ICJ, Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ Reports 2010, 14 ff., para. 101. See further, MONNHEIMER, Due Diligence Obligations in IHRL, 146 f.

329 BÄUMLER JELENA, Rise and Shine: The No-Harm Principle's Increasing Relevance for the Global Community, in: Ziccardi Capaldo (ed.), The Global Community Yearbook of International Law and Jurisprudence, Oxford 2017, 149-174; CURZI, General Principles for BHR, 179.

330 MONNHEIMER, Due Diligence Obligations in IHRL, 274 ff.; KRAJEWSKI, ZVglRWiss 2023, 63.

331 KRAJEWSKI, ZVglRWiss 2023, 63.

332 Ibid. See further, MONNHEIMER, Due Diligence Obligations in IHRL, 285 ff.

333 DE SCHUTTER OLIVIER / EIDE ASBØJRN / KHALFAN ASHFAN et al., Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Human Rights Quarterly (HRQ) 2012, 1084 ff.

rights, including civil, cultural, economic, political, and social rights, both within their territories and extraterritorially. Therefore, the Maastricht Principles generally recognise an extraterritorial duty to protect across different sets of human rights.[334] However, they focus on economic, social and cultural rights.[335] Principle 8 states that extraterritorial obligations are 'obligations relating to the acts and omissions of a State, [...], that have *effects* on the enjoyment of human rights outside of that State's territory [...]'.[336] Consequently, the Principles do not limit the extraterritorial duty to protect to particularly severe human rights abuses. Nonetheless, they require the foreseeability of the 'effects': Principle 9 holds that a state has a duty to protect human rights, *inter alia,* in 'situations over which acts or omissions of the State bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory' and in 'situations in which the State [...] is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially'. The Maastricht Principles become more concrete in Principle 25. Pursuant to Principle 25, states are required to adopt and enforce measures to extraterritorially protect social, economic, and cultural rights through legal and other means in situations in which a 'corporation has or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned'.[337] Such considerations have also increasingly been endorsed in statements, Concluding Observations[338]

334 Cf. Commentary to Principle 3, para. 2.

335 Cf. Preamble of the Maastricht Principles.

336 Principle 8 a) (emphasis added).

337 Principle 25 c).

338 Concluding Observations are issued by UN treaty monitoring bodies on the basis of periodic reports regarding the implementation of Covenant rights that State Parties are required to submit under the UN treaties. Upon review of a state report, the treaty body in question publishes Concluding Observations in which specific concerns can be voiced and recommendations made (KÄLIN/KÜNZLI, International Human Rights Protection, 208). For examples of Concluding Observations that tackle the issue of the extraterritorial protection of human rights from corporate misconduct, see Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations on the Fifteenth to Seventeenth Periodic Report of Australia, UN Doc. CERD/C/AUS/CO/15-17 (13 September 2010), para. 13; CERD, Concluding Observations on the Eighteenth to Twentieth Periodic Reports of the United Kingdom and Northern Ireland, UN Doc. CERD/C/GBR/CO/18-20 (14 September 2011), para. 29; Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on the Fourth Periodic Report of France, UN Doc. E/C.12/FRA/CO/4 (13 July 2016), para. 13; CESCR, Concluding Observations on the Sixth Periodic Report of Germany, UN Doc. E/C.12/DEU/CO/6 (27 November 2018), para. 8 and 10; CESCR, Concluding Observations on the Fourth Periodic Report of Switzerland, UN Doc. E/C.12/CHE/CO/4 (18 November 2019), para. 11.

and General Comments and Recommendations[339] by UN bodies monitoring the implementation of a range of different human rights treaties.[340]

In 2011, the UN Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR by State Parties, namely released a statement on human rights and corporate activities.[341] In this statement, the Committee calls upon State Parties to take measures to prevent corporate abuses of Covenant rights, including abroad.[342] The CESCR notably references its General Comment No. 15 (2002) where it recommends State Parties to take steps 'to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries'[343].[344] The CESCR also cites its General Comment No. 19 (2008) where it urges State Parties to protect the right to social security extraterritorially and prevent non-state actors from abusing this right abroad[345].[346]

In its General Comment No. 24 (2017), the CESCR provides more clarifications on the extraterritorial state duty to protect human rights with respect to corporate activities.[347] It notes that State Parties are required to take measures to prevent and remedy corporate abuses of Covenant rights outside their territory if they 'can exercise control'.[348] The Committee notes that State

339 General Comments and Recommendations offer interpretations of Covenant provisions by the responsible UN treaty monitoring bodies and provide explanations on specific thematic issues. Albeit non-binding, General Comments are important sources of clarification regarding the obligations of State Parties that arise from Covenant provisions (KÄLIN/KÜNZLI, International Human Rights Protection, 214). For examples of General Comments and Recommendations that tackle the issue of the extraterritorial protection of human rights from corporate misconduct besides the ones elaborated on in the main text, see Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 28 (2010), 'The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women', UN Doc. CEDAW/C/GC/28 (16 December 2010), para. 36; Human Rights Committee, General Comment No. 36 (2019), para. 22.

340 KRAJEWSKI, ZVglRWiss 2023, 64. See further, CURZI, General Principles for BHR, 181 ff.

341 Committee on Economic, Social and Cultural Rights (CESCR), 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights', UN Doc. E/C.12/2011/1 (12 July 2011).

342 Ibid., para. 5.

343 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: 'The Right to Water (Arts. 11 and 12 of the Covenant)', UN Doc. E/C.12/2002/11 (20 January 2003), para. 33.

344 CESCR Statement (2011), para. 5.

345 Committee on Social, Economic and Cultural Rights (CESCR), General Comment No. 19: 'The Right to Social Security (Art. 9)', UN Doc. E/C.12/GC/19 (4 February 2008), para. 54.

346 CESCR Statement (2011), para. 5.

347 CESCR, General Comment No. 24 (2017), para. 30 ff.

348 Ibid., para. 30.

Parties may, in accordance with the UN Charter and international law, exercise their extraterritorial duty to protect in situations where the corporations in question are domiciled in their territory and/or jurisdiction. This encompasses 'corporations incorporated under their national laws' and corporations with 'their statutory seat, central administration or principal place of business on their national territory'.[349] Furthermore, the Committee calls on State parties to implement measures requiring companies to ensure to the best of their abilities that corporate entities which they can 'influence' (e.g. subsidiaries and business partners including suppliers, franchisees and subcontractors) respect Covenant rights both domestically and abroad. Such measures may include the imposition of mandatory reporting laws obliging companies to disclose information on how they ensure respect for human rights throughout their supply chains, and provide access to remediation for abuses of Covenant rights.[350] In its Concluding Observations, the CESCR also increasingly urges State Parties to establish a clear regulatory framework for companies, based in their territory and/or jurisdiction, but operating abroad, to ensure that corporate activities do not result in the abuse of economic, social and cultural rights.[351]

Other treaty monitoring bodies, such as the Committee on the Rights of the Child (CRC), which is responsible for monitoring the UN Convention on the Rights of the Child, make similar observations. In its General Comment No. 16 (2013)[352], the Committee clarifies that it is the primary duty of host States to respect, protect and fulfil children's rights. Consequently, host states have to implement all necessary and appropriate measures to ensure that corporations operating on their territory do not infringe children's rights and are not involved in abuses of children's rights in foreign jurisdictions.[353] At the same time, the Committee asserts that home states have an obligation to adopt measures ensuring that transnational business activities do not abuse children's rights abroad if there is 'a reasonable link between the State and the conduct concerned'. The CRC considers there to be a reasonable link in situations where

349 CESCR, General Comment No. 24 (2017), para. 31. In this context, the CESCR also refers to its previous General Comment No. 14 (2000), para. 39, General Comment No. 15 (2003), paras. 31-33 and the Maastricht Principles.

350 CESCR, General Comment No. 24 (2017), para. 33.

351 See, e.g., CESCR, Concluding Observations on France (2016), para. 13; CESCR, Concluding Observations on Germany (2018), para. 8 and 10; CESCR, Concluding Observations on Switzerland (2019), para. 11.

352 UN Committee on the Rights of the Child (CRC), General Comment No. 16: 'State Obligations Regarding the Impact of the Business Sector on Children's Rights', UN Doc. CRC/C/GC/16 (17 April 2013).

353 CRC, General Comment No. 16 (2013), para. 42.

a corporation 'has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities' in the home state.[354]

Based on the above, national laws imposing corporate human rights obligations on companies with operations abroad, such as the French Duty of Vigilance Act 2017, can be understood as an expression of a growing consensus on the existence of an extraterritorial state duty to protect human rights that draws on the no-harm rule.[355] However, based on the above it cannot be assumed that all states are obliged to regulate transnational business activities and enact a particular type of law under all circumstances.[356] This is because while states are required to take all reasonable steps to meet their duty to protect human rights, they enjoy a wide margin of appreciation when choosing the means through which to fulfil this duty.[357] Thus, if a state succeeds in persuading companies to comply with their human rights obligations to a sufficient extent by means other than legal measures, e.g. by incentivising human rights compliance through its public procurement practices, the enactment of a law is not mandatory. Similarly, if a state is able to prevent extraterritorial business-related human rights abuses through the adoption and enforcement of reporting laws, more rigorous legal measures may not be necessary. However, if a state knows or ought to know that companies based on its territory or within its jurisdiction are systematically contributing to human rights abuses abroad, it may be necessary to adopt more rigorous and comprehensive laws that impose human rights obligations on companies.[358]

1.3 The Development of a Binding UN Treaty on Business and Human Rights as the Way Forward?

In June 2014, the UN Human Rights Council adopted a resolution to elaborate an international binding treaty to regulate corporate conduct with respect to human rights (BHR treaty). The resolution was controversial, with 20 states voting in favour, 14 against, and 13 abstaining.[359] The voting pattern uncovered

354 CRC, General Comment No. 16 (2013), para. 43.

355 Cf. CURZI, General Principles for BHR, 187; KRAJEWSKI, ZVglRWiss 2023, 65. See also, KRAJEWSKI, NJHR 2023, 277.

356 Cf. METHVEN O'BRIEN, BHRJ 2018, 69; KRAJEWSKI, ZVglRWiss 2023, 65.

357 Cf. DE SCHUTTER, International Human Rights Law 2019, 481; KRAJEWSKI, ZVglRWiss 2023, 65.

358 KRAJEWSKI, ZVglRWiss 2023, 65.

359 Human Rights Council, Resolution 26/9 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights', UN Doc. A/HRC/26/9 (14 July 2014) (hereinafter: HRC, Resolution 26/9 BHR Treaty).

a North-South divide, with states in the Global North opposed and states in the Global South largely in favour of a BHR treaty.[360] Following the vote, the UN Human Rights Council established an open-ended intergovernmental working group (OEIGWG) with the mandate to discuss the content, scope, nature and form of this future binding treaty and propose a draft as a basis for negotiations.[361]

The Chair of the OEIGWG followed-up with the mandate in 2017 and published first elements of the draft on the legally binding treaty on 'transnational corporations and other business enterprises with respect to human rights'. One year later, the OEIGWG presented the 'Zero Draft' and a draft of the Optional Protocol thereto. In the same year in October 2018, stakeholders were consulted to provide inputs on the content of the Zero Draft. The Zero Draft was revised and subsequently published in July 2019. Ever since, the draft has been revised and updated multiple times.[362]

a) Added Value of a Treaty

There are four points that are particularly put forward with regards to the added value of a treaty. First, it is argued that a BHR treaty would finally codify the extraterritorial state duty to protect human rights and require state parties to regulate the transnational conduct of their corporate nationals.[363] Second, the development of a BHR treaty would ensure the participation of states and peoples in the Global South in norm development and interpretation. The inclusion of these voices is important from a critical decolonial perspective, as in the absence of a BHR treaty, unilateral home state laws are

360 Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, the Philippines, the Russian Federation, South Africa, Venezuela, and Vietnam notably voted in favour. Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Korea, Romania, Macedonia, the UK, and the US that voted against (HRC, Resolution 26/9 BHR Treaty). See also, BILCHITZ DAVID, The Necessity for a Business and Human Rights Treaty, Business and Human Rights Journal (BHRJ) 2016, 203 ff., 204; SIMONS PENELOPE, The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises, Moving Forward Strategically, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours, Cambridge 2017, 48–78, 49 f.

361 HRC, Resolution 26/9 BHR Treaty, para. 1 ff.

362 Office of the High Commissioner for Human Rights (OHCHR), 'Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights', Overview.

363 SKOGLY SIGRUN, Regulatory Obligations in a Complex World, States' Extraterritorial Obligations Related to Business and Human Rights, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours, Cambridge 2017, 318–345, 343; AUGENSTEIN, NQHR 2022, 54. See further, Section III 1.2 of this Chapter.

typically drafted without consulting states and rights-holders in the Global South, even though they are ostensibly adopted for their benefit. This creates interpretative hegemony of the Global North and entrenches colonial power dynamics.[364] Third, a BHR treaty has the potential to promote policy coherence, particularly in terms of the relationship between human rights law and international trade and investment law.[365] As demonstrated in Section II 2.1 of this Chapter, trade and investment agreements may undermine a state's ability to fulfil its obligations under international human rights law. The treaty could notably establish an obligation requiring state parties to ensure existing and new trade and investment agreements are interpreted and implemented in a way that does not conflict with their human rights obligations and thereby facilitate policy coherence.[366] Fourth, a BHR treaty could help victims of human rights abuses overcome obstacles related to pursuing remedy in home state courts. This particularly includes establishing adjudicatory jurisdiction for the home state court to hear claims against the parent or lead company. As illustrated with the Bhopal case study, home state courts often dismiss such claims based on the *forum non conveniens* doctrine. A BHR treaty could discourage or restrict the possibility of dismissals based on this doctrine and promote the application of clear and harmonised standards regarding jurisdiction.[367] Furthermore, a treaty could facilitate international cooperation and mutual assistance and thus reduce technical difficulties when courts adjudicate transnational claims.[368] This could entail cooperating with foreign courts in the collection of evidence (e.g. recording witness statements

364 OMARI LICHUMA CAROLINE, (Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law) (ZaöRV) 2021, 497 ff., 518 and 520; BOSE DEBADATTA, Decentring Narratives around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law, Business and Human Rights Journal (BHRJ) 2023, 18 ff., 40 f. See further, Section III 2.1 b of this Chapter.

365 BILCHITZ, BHRJ 2016, 214 ff.; DEVA SURYA, Treaty Tantrums: Past, Present and Future of a Business and Human Rights Treaty, Netherlands Quarterly of Human Rights (NQHR) 2022, 211 ff., 219. For a detailed analysis of the role a BHR treaty could play with regard to international investment law reforms in particular, see, e.g., LICHUMA CAROLINE, International Investment Law Reforms and the Draft Business and Human Rights Treaty: The More Things Change, the More They Remain the Same?, Journal of World Investment & Trade (JWIT) 2023, 718 ff.

366 Art. 14.5 of the 10th Session BHR Treaty Draft.

367 STEPHENS BETH, Making Remedies Work: Envisioning a Treaty-Based System of Effective Remedies, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours, Cambridge 2017, 408–438, 429 f.

368 BILCHITZ, BHRJ 2016, 219; STEPHENS, in: Deva/Bilchitz (eds.), Building a Treaty, 427.

and conducting site inspections), the execution of searches and seizures, and the enforcement of judgements.[369]

However, the biggest hurdle to the adoption of a BHR treaty is finding a political consensus broad enough to cover powerful home states to challenge the *status quo* for victims of human rights abuses, all while establishing robust obligations that have the potential to improve corporate human rights performance.[370] So far, the North-South divide already present at the initial vote has continued into the treaty development process, and strong divisions remain regarding the form, scope, and substance of a BHR treaty.[371] Some of the most contentious issues will be outlined in the Section below.

b) The Difficulty of Achieving a Broad Consensus: Most Contentious Issues

At the most fundamental level and in view of the strong opposition towards the mandate of the OEIGWG by many states, particularly in the Global North, some scholars have questioned the feasibility of a conventional BHR treaty and explored alternatives, including the idea of a framework convention.[372] A framework convention would commit state parties to an overall objective and broad principles, which would subsequently be complemented by more specific duties, through additional or optional protocols, based on a thorough examination of state practice over a period of time.[373] Proponents of the framework convention model argue that its primary advantage is its potential to swiftly secure broad consensus amongst states. They contend that its general principles could draw on the widely supported UNGPs. More contentious or industry-specific issues could then be gradually addressed in future protocols, without stalling the entire negotiation process, or reducing the number

369 DE SCHUTTER OLIVIER, Towards a New Treaty on Business and Human Rights, Business and Human Rights Journal (BHRJ) 2015, 41 ff., 64 f.; BILCHITZ, BHRJ 2016, 219; STEPHENS, in: Deva/Bilchitz (eds.), Building a Treaty, 427.

370 In this context, Ruggie, the 'father' of the UNGPs, suggested that the treaty process was likely to result in one out of two outcomes: either no treaty will be adopted at all, or a treaty will be adopted that will yield only few, if any, ratifications from powerful home states, and therefore not benefit victims of human rights abuses at all (RUGGIE JOHN GERARD, 'Get Real, or We'll Get Nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business & Human Rights Treaty' (23 July 2025), 1).

371 BILCHITZ, BHRJ 2016, 224; DEVA, NQHR 2022, 216 ff.

372 See, e.g., CASSELL DOUGLASS / RAMASASTRY ANITA, White Paper: Options For a Treaty on Business and Human Rights, Notre Dame Journal of International & Comparative Law (NDJICL) 2016, 1 ff., 24 f.; SIMONS, in: Deva/Bilchitz (eds.), Building a Treaty, 73 ff.; METHVEN O'BRIEN CLAIRE, Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention, American Journal of International Law (AJIL) 2020, 186 ff.

373 CASSELL/RAMASASTRY, NDJICL 2016, 24.

of state parties to an eventual treaty to (very) few states.[374] Furthermore, it is argued that an initial agreement on the framework approach may facilitate further negotiations on more challenging issues.[375] The main drawback of such a framework approach is that it is unlikely to achieve what proponents of a BHR treaty principally seek: legally enforceable corporate accountability and access to effective remedy for victims of corporate human rights abuses.[376] In addition, opponents of a framework approach may doubt whether, after the initial adoption of a framework convention, any future protocols or adjustments with more substantive commitments would actually follow.[377] DEVA aptly points out that instead of focusing on the label or model of the treaty, attention should be focalised on its substance. He argues that a balance should be struck between 'an empty shell framework convention' and 'an overly prescriptive treaty' that seeks to address too many complex issues all at once.[378]

Another baseline question relates to the relationship of the BHR treaty with the UNGPs, namely whether the BHR treaty should align with the latter and what such alignment should look like.[379] The answer to this question has clear ramifications for the treaty design, i.e. its scope in terms of covered companies, covered human rights abuses, and the type of expected business conduct. Under a treaty model that is aligned with the UNGPs, all companies, irrespective of their size, sector, operational context, ownership, and structure, would be held accountable for responsible business conduct.[380] From the perspective of victims of human rights abuses it matters indeed little whether the perpetrator was a MNE or a small company incorporated solely in one jurisdiction. However, many states seek to limit the scope of the proposed treaty to MNEs,[381] purportedly to prevent overburdening small and

374 CASSELL/RAMASASTRY, NDJICL 2016, 25; SIMONS, in: Deva/Bilchitz (eds.), Building a Treaty, 73 and 75.

375 CASSELL/RAMASASTRY, NDJICL 2016, 25; SIMONS, in: Deva/Bilchitz (eds.), Building a Treaty, 73.

376 CASSELL/RAMASASTRY, NDJICL 2016, 25; VAN HO TARA, 'Oops! They Did It Again: The USA's Counter-Diplomacy in Promoting the Framework Convention', Völkerrechtsblog (22 June 2022).

377 CASSELL/RAMASASTRY, NDJICL 2016, 25.

378 DEVA, NQHR 2022, 220.

379 BERNAZ NADIA, Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, Human Rights Review (HRR) 2021, 45 ff.; DEVA, NQHR 2022, 217 f.

380 UNGP 14; BERNAZ, HRR 2021, 50. For a detailed analysis of the corporate responsibility to respect human rights under the UNGPs, see Chapter 2 I 3.1.

381 BILCHITZ, BHRJ 2016, 220 f.; DEVA, NQHR 2022, 216 f.

medium-sized companies.[382] While this objection is understandable, the human rights obligations placed on small local companies do not necessarily have to be the same as on MNEs. The treaty could notably contain provisions that take into account the resource constraints of small and medium-sized companies and require state parties to calibrate obligations accordingly.[383] Furthermore, business sector and operating context may be more indicative of the risk of involvement in human rights abuses than company size. As such, rather than solely basing the imposition of human rights obligations on company size, the exposure to human rights risks may be a more adequate factor to determine the personal scope of the treaty.[384] The current draft treaty covers all business activities, including business activities of a 'transnational character'.[385] It requires state parties to regulate 'the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises' conducting 'activities of transnational character.'[386]

With respect to human rights abuses, a BHR treaty that is aligned with the UNGPs would focus on abuses of the rights enshrined in the UDHR, the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[387], and the ILO Core Labour Standards, regardless of the severity of the abuse.[388] However, Ruggie himself argued that the BHR treaty should be centred around 'gross human rights abuses', such as genocide, slavery and forced labour.[389] The argument for such a narrow treaty scope is based on a 'gradualist approach', again rooted in what is deemed politically palatable rather than impactful from the perspective of rights-holders. This is because the notion of 'gross' human rights abuses is primarily intended to focus upon a very narrow sub-group of flagrant abuses of human rights that are usually considered to constitute international crimes.[390] A significant portion of the

382 DEVA, NQHR 2022, 216 f. For a discussion of the personal scope of mandatory due diligence legislation in selected jurisdictions, see Chapters 3-5.

383 Cf. DEVA, NQHR 2022, 217.

384 See Chapter 2.

385 Art. 3.1 of the 10th Session BHR Treaty Draft.

386 Art. 6.1 of the 10th Session BHR Treaty Draft.

387 International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3 (adopted on 16 December 1966).

388 Cf. UNGP 12. For an in-depth analysis of the human rights abuses covered by the UNGPs, see further, Chapter 2 I 3.1 b.

389 Ruggie John Gerard, 'Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights', (23 January 2015) (hereinafter: Ruggie, Life in the Global Public Domain), 5.

390 BILCHITZ, BHRJ 2016, 226.

scope of such a restricted treaty could thus be addressed by amending the Rome Statute of the International Criminal Court to permit prosecutions against legal persons for international crimes. A debate on the possible extension of the International Criminal Courts's jurisdiction to include corporations has been ongoing since the inception of the Rome Statute and has so far evidently not been resolved in favour of allowing such prosecutions.[391] Thus, it is questionable whether a BHR treaty with the scope proposed by Ruggie would indeed be politically feasible.[392] In any case, a treaty with such a narrow scope would 'mostly serve a symbolic purpose for its ambit will exclude most of the human rights abuses' perpetuated by corporations, as DEVA cautions.[393] It would notably exclude the majority of abuses of economic, social, and cultural rights, which make out a significant portion of the abuses rights-holders in the Global South face. In other words, such a narrow treaty scope would do very little to close the existing governance gap.[394] In contrast to Ruggie's proposed highly limited treaty scope, various scholars and civil society organisations have instead called for a wide scope and the inclusion of all rights enshrined in the nine core human rights treaties[395] as well as references to environment and climate change-related protections and international humanitarian law.[396] The current draft follows a pragmatic approach

391 Cf. Preparatory Committee on the Establishment of an International Criminal Court, Report Addendum, UN Doc. A/CONF.183/2/ Add.1 (14 April 1998), 49 fn. 3; CLAPHAM ANDREW, The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court, in: Kamminga/Zia-Zarifi (eds.), Liability of Multinational Corporations under International Law, The Hague 2000, 139-195; CHIOMENTI CRISTINA, Corporations and the International Criminal Court, in: De Schutter (ed.), Transnational Corporations and Human Rights, Oxford/Portland 2006, 287-312.

392 BILCHITZ, BHRJ 2016, 226.

393 DEVA SURYA, 'Corporate Human Rights Abuses and International Law: Brief Comments' (28 January 2025). See also, BILCHITZ, BHRJ 2016, 226.

394 BILCHITZ, BHRJ 2016, 226; DEVA, NQHR 2022, 217.

395 These include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the CRC, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), and the Convention on the Rights of Persons with Disabilities (CRPD), see overview at OHCHR, 'The Core International Human Rights Instruments and Their Monitoring Bodies'.

396 DEVA SURYA, Scope of the Proposed Business and Human Rights Treaty, Navigating through Normativity, Law and Politics, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours, Cambridge 2017, 154-182, 176 f.; BERNAZ, HRR 2021, 58 f.; DE LEEUW LYDIA, 'Progress and Challenges: Recap of 2023

by covering all 'internationally recognized human rights and fundamental freedoms' that are binding upon the state parties of the BHR treaty.[397]

In terms of expected business conduct, a BHR treaty designed in line with the UNGPs would require states to ensure that businesses respect human rights, which is an expectation to 'do no harm'.[398] First, this means that, in line with other international human rights treaties, human rights obligations would only indirectly arise for corporations under a BHR treaty, i.e. through the adoption of relevant legislation by state parties. Second, this indicates that state parties would solely have to ensure that companies are not involved in human rights abuses, which is an obligation to do no harm. However, particularly in the beginning of the treaty process, certain civil society organisations and scholars have argued in favour of directly placing human rights obligations onto corporations.[399] In addition, some scholars propose that businesses, albeit not to the same degree as states, should also have positive obligations towards the realisation of human rights under a BHR treaty.[400] The current draft appears to follow a traditional state-centric approach that does not go beyond the requirements of the UNGPs: Under the current draft, state parties would be obliged to 'adopt appropriate legislative, regulatory, and other measures to ensure respect by business enterprises for internationally recognized human rights and fundamental freedoms'.[401]

The adoption of the Corporate Sustainability Due Diligence Directive in the European Union (EU)[402] would have provided the momentum to establish a broad consensus for a reasonably comprehensive BHR treaty oriented at the UNGPs that adequately captures perspectives from the Global South, contains substantive provisions able to challenge the *status quo* of corporate impunity, and promote policy coherence. However, due to recent shifts in the geopolitical climate linked to changes in the US presidency as well as the EU Commission's proposal to amend the Corporate Sustainability Due Diligence Directive, it will likely remain challenging to persuade more states in the Global North

UN Binding Treaty Negotiations on Business and Human Rights' (28 November 2023), Centre for Research on Multinational Corporations (SOMO).

397 Art. 3.3 of the 10th Session BHR Treaty Draft.

398 UNGP 11. For an in-depth analysis of the corporate responsibility to respect human rights under the UNGPs, see further, Chapter 2 I 3.1.

399 BILCHITZ, BHRJ 2016, 208 f.; BERNAZ NADIA / PIETROPAOLI IRENE, Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime under the United Nations Convention on the Law of the Sea, Business and Human Rights Journal (BHRJ) 2020, 200 ff.

400 BILCHITZ, BHRJ 2016, 211 f.; BERNAZ, HRR 2021, 55 and 58.

401 Art. 6.2 (b) of the 10th Session BHR Treaty Draft.

402 See Chapter 5 II.

to support a BHR treaty to foster a global level playing field for businesses to operate in.

2. Key Challenges from A National Law Perspective in the Absence of a BHR Treaty

2.1 Extraterritorial State Jurisdiction

a) The Lawfulness of Home State Regulation under International Law

State jurisdiction in international law refers to 'the authority of the state, based in and limited by international law, to regulate the conduct of persons, both natural and legal, by means of its domestic law'.[403] The jurisdiction of a state is closely linked to sovereignty: it encompasses a state's 'right to regulate its own public order'[404] and is 'limited by the equal rights and sovereignty of other states'.[405] There are three kinds of jurisdiction that can be distinguished: prescriptive, executive, and adjudicatory.[406] Prescriptive jurisdiction refers to the authority of a state to enact or prescribe laws.[407] Executive jurisdiction refers to the authority of a state to enforce these laws.[408] And adjudicatory jurisdiction refers to the competence of a state's courts (and other bodies which apply and interpret the law) 'to settle legal disputes'.[409] Adjudicatory jurisdiction is sometimes considered to be part of a state's prescriptive and executive jurisdiction.[410]

Jurisdiction is first and foremost territorial.[411] Territorial jurisdiction 'is exercised over conduct, property, or persons (including corporations) located

403 MILANOVIC MARKO, From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties, Human Rights Law Review (HRLR) 2008, 411 ff., 420 with further references.

404 Ibid., with further references.

405 Ibid., 422.

406 Ibid., 420; METHVEN O'BRIEN CLAIRE, The Home State Duty to Regulate the Human Rights Impacts of TNCs Abroad: A Rebuttal, Business and Human Rights Journal (BHRJ) 2018, 47 ff., 52; CASSEL DOUG, State Jurisdiction over Transnational Business Activity affecting Human Rights, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, 198-222, 201.

407 MILANOVIC, HRLR 2008, 420; CASSEL, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 201.

408 MILANOVIC, HRLR 2008, 420; CASSEL, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 201.

409 MILANOVIC, HRLR 2008, 420 and 434. See also, CASSEL, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 201.

410 MILANOVIC, HRLR 2008, 420.

411 Ibid., 420 f.; METHVEN O'BRIEN, BHRJ 2018, 52.

within a state's territory'. Jurisdiction is still considered to be territorial if a state exercises its jurisdiction 'over conduct that occurs or begins in its territory but has effects elsewhere' (subjective territoriality principle) and if it exercises jurisdiction 'over conduct that begins elsewhere but is completed within the state's territory' (objective territoriality principle).[412]

The exercise of jurisdiction beyond a state's own territory, i.e. extraterritorial, is the exception to the rule and requires either another state's consent (in the case of executive jurisdiction) or a 'connecting factor' (in the case of prescriptive jurisdiction).[413] There are multiple such 'connecting factors' that are recognised in international law. These include nationality, whereby a state is permitted to regulate the conduct of its nationals (both natural and legal persons) (active personality principle) or protect them (passive personality principle) even when they are outside of its territory; by damage whereby a state may regulate conduct by foreign nationals outside its territory to protect its fundamental interests (protective principle); or by damage to the international community as a whole whereby a state may regulate crimes of universal concern such as genocide, crimes against humanity, war crimes, and piracy (universality principle).[414]

National laws regulating transnational business activities with respect to human rights, such as the French Duty of Vigilance Act 2017 and the German Supply Chain Due Diligence Act 2021, can be viewed as an expression of the active personality principle. Such laws namely place an obligation on the parent or controlling company based in the home state to take measures to ensure that its subsidiaries and suppliers abroad respect human rights as well. These laws are based on a recognised jurisdictional link (nationality of legal persons) and normally compatible with the principle of non-intervention under international law.[415] The principle of non-intervention arises from state sovereignty and prohibits unlawful interference with another state's internal affairs *(domaine réservé)*.[416] Home state laws regulating transnational corporate conduct with respect to human rights that are based on the active personality

412 CASSEL, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 202.

413 MILANOVIC, HRLR 2008, 420 f.; METHVEN O'BRIEN, BHRJ 2018, 52.

414 MILANOVIC, HRLR 2008, 421; METHVEN O'BRIEN, BHRJ 2018, 52; CASSEL, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 202 ff.

415 See, e.g., DE JONGE ALICE, Transnational Corporations and International Law: Accountability in the Global Business Environment, Cheltenham 2011, 91; CASSEL, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 222; CURZI, General Principles for BHR, 187; KRAJEWSKI, ZVglRWiss 2023, 61.

416 CURZI, General Principles for BHR, 186; KRAJEWSKI, ZVglRWiss 2023, 60.

principle normally do not violate the principle of non-interference for three main reasons. First, the *de facto* impact on the political and economic system of such laws on other states is likely to be rather low in most cases. This is because such laws impose obligations on the conduct of companies over which the home state has regulatory control.[417] At most, such laws may have indirect consequences for the economic and political system in another country. In this respect, such home state laws do not lead to an interference with the sovereignty of another state. However, it is conceivable that the fulfilment of corporate human rights obligations under such laws may require withdrawal from a particular country or region under certain circumstances.[418] Depending on the importance of the relevant economic sector for the foreign state, it cannot be ruled out that this withdrawal may also result in significant political and economic consequences. Nevertheless, even in this case, it is an indirect consequence of the home state laws, which could also be prevented by the host state concerned if it were to ensure compliance with its own human rights obligations.[419] Second, it is generally accepted that the protection of universally recognised human rights is not part of the *domaine réservé*.[420] Rather, by ratifying international human rights treaties, states accept corresponding obligations that restrict their sovereignty. Furthermore, the protection of human rights is a legitimate concern for all states and the international community as a whole.[421] If a host state is unable or unwilling to regulate corporate conduct vis-à-vis human rights, it is thus justified for home states to take appropriate steps to close this governance gap.[422] Consequently, home state laws that contribute to the protection of human rights in another state could only be considered to violate the principle of non-intervention if they are accompanied by considerable political or economic pressure or military

417 DEVA SURYA, Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'? Melbourne Journal of International Law (MJIL) 2004, 537 ff., 548; SKOGLY, in: Deva/Bilchitz (eds.), Building a Treaty, 328; KRAJEWSKI, ZVglRWiss 2023, 60.

418 KRAJEWSKI, ZVglRWiss 2023, 60.

419 Ibid.

420 MONNHEIMER, Due Diligence Obligations in IHRL, 260; KRAJEWSKI, ZVglRWiss 2023, 60 f.

421 SKOGLY, in: Deva/Bilchitz (eds.), Building a Treaty, 328; CURZI, General Principles for BHR, 186; KRAJEWSKI, ZVglRWiss 2023, 61.

422 CHAMBERS RACHEL, An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct: Jurisdictional Dilemma Raised/Created by the Use of the Extraterritorial Techniques, Utrecht Law Review (ULR) 2018, 22 ff., 35; SKOGLY, in: Deva/Bilchitz (eds.), Building a Treaty, 328; CURZI, General Principles for BHR, 186.

force.[423] Third, the exercise of extraterritorial state jurisdiction is regularly accepted in numerous areas that address global issues, such as bribery and corruption.[424] The argument of unlawful intervention advanced by some home states against the adoption of home state laws, which are based on the active personality principle and seek to regulate transnational corporate conduct with respect to human rights,[425] is thus rather contradictory.[426]

For these reasons, home state laws that regulate transnational corporate conduct with regard to human rights based on the active personality principle are not only generally compatible with international law,[427] but even increasingly recommended by UN treaty monitoring bodies, as previously demonstrated.[428] However, this conclusion does not address the concern that such laws may perpetuate a form of neo-colonialism, given the imperialist history of many home states and the associated risk of reproducing old patterns of hegemony and saviour narratives.[429]

b) The Objection of Neo-Colonialism as a Legitimate Concern

The concern of neo-colonialism is a legitimate one. This is not only true because of the colonial legacies of many home states in the Global North that continue to affect host states in the Global South, but also due to the reluctance of numerous home states to support a multilateral binding BHR treaty, thereby assuming control over the interpretation of corporate human rights obligations.[430] Looking at extraterritorial home state laws through the critical

423 KRAJEWSKI, ZVglRWiss 2023, 61.

424 Well known examples of such legislation include the US Foreign Corrupt Practices Act and the UK Bribery Act (CASSEL, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 201 and 205; MOYO KHULEKANI, Corruption, Human Rights and Extraterritorial Obligations, in: Gibney / Erdem Türkelli / Krajewski et al. (eds.), The Routledge Handbook on Extraterritorial Human Rights Obligations, Oxon 2022, 312–324, 315 f.).

425 See, e.g. Switzerland in the Federal Dispatch on the popular constitutional initiative 'Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt', BBl 2017 6335 (hereinafter: Federal Dispatch RBI), 6366 f.

426 Cf. SKOGLY, in: Deva/Bilchitz (eds.), Building a Treaty, 328.

427 SKOGLY, in: Deva/Bilchitz (eds.), Building a Treaty, 328; CURZI, General Principles for BHR, 186; KRAJEWSKI, ZVglRWiss 2023, 61.

428 See Section III 1.2 of this Chapter.

429 Cf. NWAPI CHILENYE, Litigating Extraterritorial Corporate Crimes in Canadian Courts, doctoral thesis, University of British Columbia, Vancouver 2012, 53; CHAMBERS, ULR 2018, 27; LICHUMA, ZaöRV 2021, 518 f. and 522 f.; BOSE, BHRJ 2023, 33 ff.

430 LICHUMA, ZaöRV 2021, 515 and 518 f.; LICHUMA CAROLINE, 'Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South', Völkerrechtsblog (16 January 2023) (hereinafter: LICHUMA, Centering Europe and Othering the Rest, Völkerrechtsblog); Bose, BHRJ 2023, 41.

lens of Third World Approaches to International Law (TWAIL)[431] can help unpack this concern and provide important insights to improve such laws from the perspective of rights-holders in the Global South.[432]

The central argument of all TWAIL scholarship is that the formal end of colonialism did not lead to the end of colonial relations. TWAIL scholarship thus concentrates on uncovering how colonial relations persist, in varying and intricate forms, in a supposedly decolonised world.[433] TWAIL scholars assert that there is a long history of utilising international law to promote business endeavours in countries in the Global South in a manner that foreign powers profit from at the expense of local communities and peoples.[434] This history can be extended to the analysis of unilateral home state laws as, despite not being international as such, they heavily draw upon international law rules and principles, and have transnational effects.[435] TWAIL scholars argue that issues of material distribution and power asymmetries influence the way in which international legal concepts, categories, norms, and doctrines are developed, interpreted, and applied.[436]

The concern of neo-colonialism can be looked at from two perspectives. First, it could be argued that the reluctance of home states in the Global North to regulate the conduct of their corporate nationals abroad may further entrench neo-colonialism.[437] As previously demonstrated, such home state laws

431 The term 'Third World' is generally used to refer to countries that became independent sovereign states after decolonisation, but its meaning varies depending on the particular phenomenon being studied (ANGHIE ANTONY, Rethinking International Law: A TWAIL Retrospective, European Journal of International Law (EJIL) 2023, 7 ff., 63). TWAIL scholars have embraced the term 'Third World'. MUTUA, for instance, explains that the term 'describes a set of geographic, oppositional, and political realities that distinguish it from the West. It is a historical phenomenon that has a dialectic relationship with Europe in particular and the West in general. The Third World is more truly a stream of similar historical experiences across virtually all non-European societies that have given rise to a particular voice, a form of intellectual and political consciousness.' He adds that the term 'correctly captures the oppositional dialectic between the European and non-European, and identifies the plunder of the latter by the former' (MUTUA MAKAU, What is TWAIL?, Proceedings of the Annual Meeting of the American Society of International Law (ASIL) 2000, 31 ff., 35).

432 Cf. LICHUMA, ZaöRV 2021, 512 ff.

433 ANGHIE, EJIL 2023, 9 and 34 ff.

434 Cf. SIMONS PENELOPE, International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights, Journal of Human Rights and the Environment (JHRE) 2012, 5 ff., 19; LICHUMA, ZaöRV 2021, 512.

435 LICHUMA, ZaöRV 2021, 512.

436 ESLAVA LUIS / PAHUJA SUNDHYA, Between Resistance and Reform: TWAIL and the Universality of International Law, Trade Law and Development (Trade L. & Dev.) 2011, 103 ff., 105; LICHUMA, ZaöRV 2021, 512 f.

437 BOSE, BHRJ 2023, 30.

are necessary to close governance gaps that emerge from host states being unable or unwilling to regulate corporate conduct with regard to human rights and provide access to effective remedy to victims of corporate human rights abuses.[438] According to LAFONT, the notion that all states possess complete control over the implementation of human rights within their territory is incorrect.[439] She posits that this assumption leads to a 'veil of ignorance' for states in the Global North, who refuse to acknowledge or address human rights abuses perpetrated by their corporate nationals abroad. This veil of ignorance results in a 'veil of sovereignty', which asserts that host states are solely responsible for the protection of human rights within their territory, despite the constant erosion of their ability to do so by foreign powers.[440] From this perspective, insistence on state sovereignty as absolute autonomy serves a purely ideological purpose and is a perfect pretext for home states to protect their economic interests, i.e. shielding their corporate nationals from perceived competitive disadvantages, while hiding behind the guise of 'respect for state sovereignty'.[441] According to BOSE, the assertion that unilateral home state laws are neo-colonial may therefore be refuted as a neo-colonial argument in itself, as it facilitates the domination of the Global South by the Global North through a *laissez-faire* approach regarding transnational corporate conduct.[442]

From the other perspective, the enactment and implementation of unilateral home state laws by the Global North could be regarded as neo-colonialist.[443] Two reasons are particularly brought forward in this respect. First, it is argued that exclusively relying on the benevolence of home states in the Global North to improve corporate accountability for human rights abuses simultaneously empowers and disempowers rights-holders in the Global South and reinforces hierarchies between the Global North and South.[444] This is because in the process preceding the adoption of such laws, perspectives

438 LICHUMA, ZaöRV 2021, 520; BOSE, BHRJ 2023, 31 f. See also, PALOMBO DALIA, Transnational Business and Human Rights Litigation: An Imperialist Project?, Human Rights Law Review (HRLR) 2022, 6 ff., 12.

439 LAFONT CRISTINA, Sovereignty and the International Protection of Human Rights, Journal of Political Philosophy (JPP) 2016, 427 ff., 437.

440 LAFONT, JPP 2016, 437.

441 Ibid., 433. Similarly, NWAPI, Litigating Extraterritorial Corporate Crimes, 56; CHAMBERS, ULR 2018, 28.

442 BOSE, BHRJ 2023, 31.

443 Cf. LICHUMA, ZaöRV 2021, 519; LICHUMA, Centering Europe and Othering the Rest, Völkerrechtsblog; BOSE, BHRJ 2023, 33.

444 LICHUMA, ZaöRV 2021, 513.

from the Global South are normally not systematically and sufficiently taken into account. In other words, unilateral home state laws 'are made in the Global North and by the Global North ostensibly for the benefit of the Global South, but [...] with very little input from the Global South'. According to LICHUMA, this lack of consultation privileges voices of the Global North in the business and human rights discourse, thereby generating interpretative hegemony and entrenching colonial power dynamics.[445] At the same time, LICHUMA acknowledges the challenge that the systematic consultation of host states in the lawmaking process of home states would pose, given the conflicting interests between home and host states on the one hand and host states and potentially affected rights-holders therein on the other.[446] Second, it is argued that unilateral home state laws risk to perpetuate an underlying 'saviour narrative'[447].[448] According to this narrative, rights-holders in the Global South rely on being 'saved by the champions of international human rights law'[449], i.e. home states in the Global North enacting and implementing laws that regulate the transnational conduct of their corporate nationals with regard to human rights.[450] The Global North state, taking on the role of the 'saviour' in this constellation, is regarded as the 'good angel who protects and vindicates' rights-holders and 'civilises' the 'savage' host state in the Global South.[451] This narrative clearly carries colonial undertones.[452]

These opposing perspectives on unilateral home state laws creates a dilemma for home states: unilateral home state laws are necessary to close governance gaps, but the way in which they are adopted, implemented, and enforced may disenfranchise rights-holders in the Global South, reproduce old patterns of hegemony, and entrench saviour narratives. However, this dilemma can at least partly be resolved: Firstly, by implementing and enforcing unilateral home state laws in a way that amplifies the voices of the very people they aim to protect. SECK writes in this regard that the legitimacy of a unilateral home state law will thus depend on the extent to which it reflects

445 LICHUMA, Centering Europe and Othering the Rest, Völkerrechtsblog.

446 LICHUMA, ZaöRV 2021, 521.

447 For an in-depth exploration of this narrative, see MUTUA MAKAU, Savages, Victims, and Saviors: The Metaphor of Human Rights, Harvard International Law Journal (HILJ) 2001, 201 ff., 233 ff.

448 LICHUMA, ZaöRV 2021, 522 f.; BOSE, BHRJ 2023, 36 ff.

449 ANGHIE, EJIL 2023, 79.

450 LICHUMA, ZaöRV 2021, 523; BOSE, BHRJ 2023, 37; LICHUMA, Centering Europe and Othering the Rest, Völkerrechtsblog.

451 Cf. MUTUA, HILJ 2001, 204; LICHUMA, ZaöRV 2021, 522 f.; BOSE, BHRJ 2023, 37.

452 Cf. MUTUA, HILJ 2001, 204 f.; LICHUMA, ZaöRV 2021, 523; BOSE, BHRJ 2023, 38.

the perspectives of host state local communities.[453] In terms of the enforcement of such laws, Global South perspectives could be considered by courts inviting human rights experts and civil society organisations to submit *amicus curiae* briefs or statements.[454] Secondly, by highlighting the duty of the home state to prevent its own corporate nationals from involvement in human rights abuses abroad,[455] and by recognising the historic role states in the Global North have played in contributing to the very structures that continue to facilitate corporate human rights abuses in the Global South,[456] instead of perpetuating a saviour narrative[457]. Thirdly, by engaging in the negotiation of a binding UN BHR treaty in good faith. This acknowledges that only the systematic involvement of the Global South, i.e. host states, rights-holders, and human rights experts, in decisions that affect the reality on the ground will combat the disenfranchisement of its peoples.[458] It also underscores the fact that the protection of human rights is indeed a concern of the international community as a whole, and as such requires joint efforts and international cooperation to be addressed.[459]

Overall, the unilateral laws of powerful home states in the Global North have the potential to serve as a catalyst for the adoption of a multilateral BHR treaty[460] and lead to improvements of the human rights situation in host states in the Global South[461]. Therefore, the key is to find an acceptable role for home states that is appropriately balanced against the needs and concerns of host states in the Global South and its peoples.[462]

2.2 Enforcement Issues: The Separation of Entities Principle

There are several reasons why victims of human rights abuses may be more inclined to pursue litigation against the parent or lead company based in the home state, instead of the company directly causing the harm. First, directing

453 SECK SARA L., Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?, Osgoode Hall Law Journal (OHLJ) 2008, 565 ff., 568 and 601.

454 Cf. RYNGAERT CEDRIC, Jurisdiction in International Law, Oxford 2015, 194; LICHUMA, ZaöRV 2021, 520.

455 Cf. SKOGLY, in: Deva/Bilchitz (eds.), Building a Treaty, 328. On the extraterritorial state duty to protect human rights, see Section III 1.2 of this Chapter.

456 E.g. through the way in which the international investment and international trade law regime has been constructed, see Section II 2.1 of this Chapter.

457 Cf. LICHUMA, ZaöRV 2021, 522.

458 Cf. LICHUMA, ZaöRV 2021, 520 f.; BOSE, BHRJ 2023, 42.

459 Cf. Section III 1.2 of this Chapter.

460 SECK, OHLJ 2008, 576.

461 LICHUMA, ZaöRV 2021, 521.

462 Ibid.

claims towards the parent or lead company exposes 'the heart' of the company to its involvement in the human rights abuses. This will likely improve media coverage and, as a result, potentially negatively affect the company's reputation. Second, litigating against the parent or lead company increases the likelihood that victims have a solvent debtor when the entity that directly inflicted the harm may not be able to pay, particularly in the case of large-scale human rights abuses.[463] Third, litigating in host state courts may give rise to more legal uncertainty, for example, due to notoriously long delays in proceedings. Home state courts may offer a more reliable alternative in terms of legal infrastructure and provide better chances at obtaining financial aid to fund litigation.[464] In any case, human rights-related litigation is complex, costly, and time-consuming.[465] It also subjects claimants to uncertain legal outcomes and confronts them with powerful opponents with much more resources.[466]

At the same time, as demonstrated in the discussed Bhopal case for instance, rights-holders face numerous obstacles to access justice before home state courts as well. These particularly include establishing adjudicatory jurisdiction for the home state court to hear claim against the parent or lead company, and establishing liability as a result of the separation principle.[467]

a) Company Law as a Shield for Preventing Corporate Accountability for Human Rights Abuses

One of the key components of corporations provided by company law is the separation principle.[468] This feature is recognised in most jurisdictions[469] and allows the corporate entity to be considered a legal entity that is distinct from

463 VAN DAM CEES, Tort Law and Human Rights: Brothers in Arms, On the Role of Tort Law in the Area of Business and Human Rights, Journal of European Tort Law (JETL) 2011, 221 ff., 228.

464 Ibid.; STEPHENS BETH, Making Remedies Work: Envisioning a Treaty-Based System of Effective Remedies, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours, Cambridge 2017, 408-438, 426 f.

465 Cf. VAN DAM, JETL 2011, 228; CESCR General Comment No. 24 (2017), para. 43.

466 Cf. VAN DAM, JETL 2011, 228.

467 CESCR General Comment No. 24 (2017), para. 42 f.; STEPHENS in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours, Cambridge 2017, 428 ff.; MARES RADU, Liability within Corporate Groups: Parent Company's Accountability for Subsidiary Human Rights Abuses, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, 446-470, 449; CHOUDHURY BARNALI, Corporate Law's Threat to Human Rights: Why Human Rights Due Diligence Might Not Be Enough, Business and Human Rights Journal (BHRJ) 2023, 180 ff., 181 f.

468 CHOUDHURY, BHRJ 2023, 185.

469 Human Rights Council, 'Human Rights and Corporate Law: Trends and Observations from a Crossnational Study Conducted by the Special Representative, Addendum 2 to

its shareholders and also from those who manage it.[470] From the separation of entities principle follows that legal persons are generally only liable for their own actions or omissions and not for those of legally independent third parties. Therefore, parent companies are normally neither liable for their subsidiaries nor for their direct or indirect suppliers. Most jurisdictions have established elaborate rules for liability limitations and only allow exceptions[471] from the principle of legal separation, i.e. the piercing of the corporate veil, under very specific circumstances.[472] The rationale behind the principle of legal separation of entities is to promote 'economic activity and efficiency by localizing liability with the direct wrongdoer, the subsidiary, supplier or other business partner'.[473] While the principle is said to enhance 'efficiency in legitimate ways', it is also criticised for being unfair and 'accidently or even deliberately' placing a burden on society by externalising costs, i.e. risks and harms.[474] This burden comes into play when neither the subsidiary can be held accountable for involvement in human rights abuses, e.g. because of the host state's deficient judicial system, nor the parent company, due to a failure to establish adjudicatory jurisdiction of the home state court or a failure to prove the necessary requirements to pierce the corporate veil.[475] This is well illustrated in the previously discussed Bhopal case, where the parent company based in the US was able to shield itself from liability, as the lawsuit was dismissed on procedural grounds, i.e. the *forum non conveniens* doctrine.[476]

the Report', UN Doc. A/HRC/17/31/Add.2 (23 May 2011), para. 31 and 49; Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse, Report of the United Nations High Commissioner for Human Rights', UN Doc. A/HRC/32/19 (10 May 2016), para. 21.

470 CHOUDHURY, BHRJ 2023, 185.

471 For an overview of exceptions, see, e.g., SPIESSHOFER, Responsible Enterprise, 394 ff. On group liability, see further, MUCHLINSKI PETER, Multinational Enterprises and the Law, Third Edition, Oxford 2021, 300 ff.

472 BACKER, U. of Pac. L. Rev. 2012, 166; MARES RADU, Legalizing Human Rights Due Diligence and the Separation of Entities Principle, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours, Cambridge 2017, 266-296, 271.

473 MARES, in: Deva/Bilchitz (eds.), Building a Treaty, 267. See also, SPIESSHOFER, Responsible Enterprise, 393.

474 MARES, in: Deva/Bilchitz (eds.), Building a Treaty, 270 f.; SPIESSHOFER, Responsible Enterprise, 393. For more details on the advantages of the separation principle and limited liability, see, MARES, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 467 ff. with further references.

475 MUCHLINSKI, BEQ 2012, 152; MARES, in: Deva/Bilchitz (eds.), Building a Treaty, 270 f.; SPIESSHOFER, Responsible Enterprise, 393.

476 See Section II 2.2 a of this Chapter.

Similarly, in contractual relationships, when lead companies outsource production or services to tiers of suppliers in host states, lead companies are regularly able to shield themselves from liability as a result of the separation principle, even though they may exercise considerable influence over the conduct of their suppliers.[477] Companies in the fast fashion industry, in particular, follow and benefit from this model of outsourcing: Lead firms outsource production in supply chains to states in which labour laws offer little protection from abuses or are seldomly enforced.[478] The purchasing practices of the lead firm, such as aggressive bargaining with suppliers for low prices, short lead production times, and sudden order cancellations, affect how suppliers treat their workers and the work environment they create. For instance, low prices and last-minute cancellations may leave suppliers unable to pay their workers a decent wage and invest in safe and healthy working conditions in their factories.[479] Poor purchasing practices thus exploit pre-existing poor labour standards in the host state and exacerbate precarious working conditions and ill-treatment of workers, all while maximising profit for the lead firm by reducing costs and shielding it from liability.[480]

The lawsuit against KiK Textilien und Non-Food GmbH (KiK) in Germany exemplifies this issue well.[481]

b) The Case of KiK in Pakistan as an Illustrative Example

On 11 September 2012, a garment factory in Pakistan caught fire, leaving over 250 workers dead and dozens injured, some critically.[482] According to one of the NGOs accompanying the case, i.e. the European Center for Constitutional and Human Rights (ECCHR), the high number of victims was attributable to

477 MARES, in: Deva/Bilchitz (eds.), Building a Treaty, 270.

478 CHOUDHURY, BHRJ 2023, 182.

479 ANNER MARK / BAIR JENNIFER / BLASI JEREMY, Toward Joint Liability In Global Supply Chains: Addressing The Root Causes Of Labor Violations In International Subcontracting Networks, Comparative Labor Law & Policy Journal (CLL & PJ), 1 ff., 8 ff; Human Rights Watch, '"Paying for a Bus Ticket and Expecting to Fly", How Apparel Brand Purchasing Practices Drive Labor Abuses', Report (April 2019) (hereinafter: Human Rights Watch, Purchasing Practices and Labor Abuses), 2 ff.; Better Buying Institute, 'Purchasing Practices and Factory-Level Noncompliances: How the Available Research Can Inform Supply Chain Due Diligence', Better Buying Special Report (January 2023) (hereinafter: Better Buying Institute, Purchasing Practices and Factory-Level Noncompliances), 3 ff.

480 CHOUDHURY, BHRJ 2023, 182.

481 Cf. European Center for Constitutional and Human Rights (ECCHR), 'Case Report: Pakistan – Cheap Clothes, Perilous Conditions' (January 2021) (hereinafter: ECCHR, KiK Case Report), 2.

482 Clean Clothes Campaign, 'Justice for the Ali Enterprise Victims'.

inadequate health and safety measures, such as an insufficient number of fire alarms and extinguishers, the presence of numerous barred windows, and locked emergency exits. This prevented workers from escaping the factory, leading to them being suffocated or burned alive.[483] Furthermore, some workers were allegedly ordered to save garments first and kept from escaping the building.[484] The factory belonged to Ali Enterprises, which was one of the suppliers of KiK Textilien und Non-Food GmbH (KiK), a textile discount retailer with its statutory seat in Germany.[485]

In August 2012, just three weeks prior to the fire, Ali Enterprises had received a SA8000 certification. This certification is meant to be issued to companies that uphold certain health and safety standards, following a social audit. In the case of Ali Enterprises, the certification was issued by the Italian auditing company RINA, which did not perform the social audit itself, but subcontracted the inspection to a Pakistani company. However, the latter reportedly never visited the factory either.[486]

On 13 March 2015, a civil lawsuit was brought against KiK before the District Court of Dortmund *(Landgericht Dortmund)* in Germany by four Pakistani citizens – one survivor and three relatives of victims who died as a result of the fire. This lawsuit marked the first tort-based business and human rights lawsuit in Germany in which the human rights abuses occurred at a supplier abroad.[487] The jurisdiction of the German court was based on art. 4(1) and 63(1) of EU Regulation 1215/2012 (Brussels I Recast Regulation)[488], which is directly applicable in Germany and provides German courts with adjudicative juris-

483 European Center for Constitutional and Human Rights (ECCHR), 'KiK: Paying the Price for Clothing Produced in South Asia' (hereinafter: ECCHR, KiK in Pakistan Overview). See also, MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 59.

484 WALSH DECAN, 'Anger Rolls Across Pakistani City in Aftermath of Factory Fire' (13 September 2012), New York Times article.

485 ECCHR, KiK in Pakistan Overview.

486 Clean Clothes Campaign, 'Complaint Filed Against Italian Auditor for Ignoring Fatal Flaws in Garment Factory'; European Center for Constitutional and Human Rights (ECCHR), 'Case Report: RINA Certifies Safety before Factory Fire in Pakistan' (hereinafter: ECCHR, RINA Case Report), 1. A complaint was brought against RINA before the Italian National Contact Point regarding its alleged role in the factory fire, see Chapter 2 II 2.1 a.

487 WESCHE PHILIPP / SAAGE-MAASS MIRIAM, Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v KiK, Human Rights Law Review (HRLR) 2016, 370 ff., 372; MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 62.

488 Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 20.12.2012, L 351/1.

diction over all companies with a statutory seat, central administration or principal place of business in Germany.[489] Pursuant to art. 4(1) of EU Regulation 864/2007 (Rome II Regulation)[490], the law applicable to the dispute is the law of the country where the damage occurred *(lex loci damni),* which in this case was Pakistani tort law.[491] Pakistani law is largely based on principles of English Common Law, and Pakistani courts often refer to English case-law as a source of authority, especially in the area of tort law.[492]

The claimants each sought compensation for the amount of EUR 30,000 for the damages they had suffered as a result of the fire.[493] This included the loss of income of the main breadwinner as well as the pain and suffering for the loss of life. In addition, the claimants sought an apology from KiK and a pledge to ensure safety at its outsourced clothing production facilities.[494] The claimants asserted that KiK owed them a direct duty of care to guarantee a healthy and safe working environment. The claimants argued that KiK 'regularly intervened in the factory's operations, including by directing and monitoring safety management',[495] and that KiK assumed responsibility for the health and safety of the employees of Ali Enterprises.[496] The claimants explained that KiK had a distinct code of conduct that was incorporated into its supply chain contracts, requiring suppliers entering into business relationships with KiK to adhere to certain standards that ensured safe working conditions. KiK tracked compliance with such standards, notably through third-party audits, and was able to impose sanctions, such as cancelling orders or ending business engagements, in the event of non-compliance. The claimants emphasised that KiK accounted for 75% of the factory's output and was thus its

489 WESCHE/SAAGE-MAASS, HRLR 2016, 373; MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 62.

490 Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 31.7.2007, L 199/40.

491 WESCHE/SAAGE-MAASS, HRLR 2016, 374; MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 62.

492 LAU MARTIN, Introduction to the Pakistani Legal System, with Special Reference to the Law of Contract, Yearbook of Islamic and Middle Eastern Law (YB Islamic & Middle Eastern Law) 1994, 3 ff., 10; LEADER SHELDON / WRIGHT JANE / YILMAZ ANIL, 'Legal Opinion on English Common Law Principles on Tort – Jabir and others v. KiK Textilien und Non-Food GmBH' (7 December 2015) (hereinafter: LEADER/WRIGHT/YILMAZ, Legal Opinion KiK), para. 1. See also, WESCHE/SAAGE-MAASS, HRLR 2016, 373.

493 ECCHR, KiK in Pakistan Overview; MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 62.

494 Business & Human Rights Resource Centre, 'KiK Lawsuit (re Pakistan)'; Marx/Bright/Wouters, Access to Legal Remedies, 62.

495 WESCHE/SAAGE-MAASS, HRLR 2016, 373.

496 LEADER/WRIGHT/YILMAZ, Legal Opinion KiK, para. 4 f.

primary client. Furthermore, they argued that, according to KiK's own statements, employees of its corporate social responsibility, purchasing and quality assurance departments frequently conducted on-site visits of the Pakistani factory, asserting that the business relationship between KiK and the Pakistani factory was sufficiently close.[497] Consequently, the claimants contended that KiK was accountable for ensuring compliance with health and standards at the factory and argued that KiK breached its duty of care by failing to take measures to prevent the harm suffered by the workers of Ali Enterprises.[498]

At the request of ECCHR, the Forensic Architecture at Goldsmiths at the University of London, developed a computer simulation of the fire at Ali Enterprises, which was submitted to the District Court in Dortmund in January 2018. The simulation revealed that inadequate fire safety measures, such as a lack of stairs, emergency exits, fire extinguishers, and fire alarms, contributed to the deaths and injuries of hundreds of factory workers. The simulation showed that minor improvements to the safety measures in place, specifically accessible stairways and clearly marked escape routes, could have significantly changed the course of the tragic incident and prevented numerous deaths.[499]

KiK on the other hand maintained that it could not be held accountable for the occurrence due to the absence of a sufficiently close relationship between KiK and its supplier.[500] Furthermore, the defendant argued that it was unaware of the safety deficiencies in the factory, as the compliance with the safety standards was verified by an independent third-party auditor, i.e. the company RINA. In addition, the defendant contended that the codes of conduct between KiK and its suppliers were merely voluntary and not enforceable.[501] The defendant also asserted that the fire was the consequence of a malicious act of arson rather than the result of inadequate fire safety measures.[502] Lastly, KiK held that the claims were time-barred under Pakistani law.[503]

497 WESCHE/SAAGE-MAASS, HRLR 2016, 373; MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 63.

498 District Court of Dortmund, 'Landgericht Dortmund gewährt pakistanischen Klägern Prozesskostenhilfe für ein Klageverfahren gegen "KiK" auf Zahlung von Schmerzensgeld und holt in der Hauptsache schriftliches Rechtsgutachten zum pakistanischen Recht ein', Press Release (30 August 2016) (hereinafter: District Court of Dortmund, Press Release (August 2016)), 2 f.; Marx/Bright/Wouters, Access to Legal Remedies, 63.

499 ECCHR, KiK in Pakistan Overview; MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 63.

500 MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 63.

501 District Court of Dortmund, Press Release (August 2016). See also, MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 63.

502 MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 63.

503 Landgericht Dortmund, Urteil vom 10.1.2019, 7 O 95/15, para. 19. See also, MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 63.

On the question of whether the statute of limitations had passed, the claimants asserted that KiK had initially agreed to waive potential statutory limitations.[504] Moreover, the claimants affirmed that in the course of their negotiations to seek an out-of-court settlement, the defendant had at least implicitly agreed to the application of German limitation law. The claimants argued that this is particularly supported by the fact that the German lawyers of both parties, who had no training in Pakistani law, communicated in German using the formulations customary under German law in relation to the waiver in question.[505]

The District Court of Dortmund opted to procure a written legal opinion from a Professor in the UK, with the objective of ascertaining whether and under which conditions the defendant's liability could be established, and whether the statute of limitations had passed according to Pakistani law.[506] According to the written legal opinion, the claims for compensation were time-barred under Pakistani law and any waiver would be inadmissible. Furthermore, unlike in many other legal systems, mere negotiations about the claim would have no effect on the limitation period.[507] As a result, the District Court dismissed the lawsuit on procedural grounds in January 2019 on the basis that the claims were time-barred under Pakistani law and did not examine the question of liability any further.[508]

The KiK case is emblematic for litigated business and human rights cases in at least three regards: First, it demonstrates the ability of lead companies to outsource production to hosts states with labour laws offering little protection from human rights abuses or being rarely enforced. By outsourcing production to host states, lead companies are able to benefit from precarious and hazardous working conditions, maximise profits, and shield themselves from liability thanks to the separation principle. Second, the case exposes the pitfalls of delegating the assessment of human rights risks at suppliers to auditing firms without investigating the approaches and methods of these firms and critically examining the audit results. Third, it illustrates one of the procedural

504 ECCHR, KiK in Pakistan Overview; MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 63.

505 Landgericht Dortmund, Urteil vom 10.01.2019, 7 O 95/15, para. 13. See also, MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 63.

506 District Court of Dortmund, Press Release (August 2016). See also, MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 64.

507 Landgericht Dortmund, Urteil vom 10.01.2019, 7 O 95/15, para. 33. See also, MARX/BRIGHT/WOUTERS, Access to Legal Remedies, 64.

508 Landgericht Dortmund, Urteil vom 10.01.2019, 7 O 95/15, para. 25 and 34 ff. See also, ECCHR, KiK Case Report, 1.

barriers claimants seeking justice in home state courts may face, namely the applicability of the law of the host state, which may be less favourable and negatively impact the outcome of the lawsuit.

3. Concluding Remarks

From the perspective of public international law, there are three main challenges to regulate transnational corporate conduct with respect to human rights. First, corporations are not considered to be subjects of international law by the vast majority of legal scholars. This means that *de lege lata,* no direct obligations arise for corporations under international human rights law. Human rights obligations may, nevertheless, apply indirectly, i.e. whenever states enact relevant legislation.[509] Second, drawing on the no-harm rule under customary international law, it is possible to deduct a duty for states to ensure that their corporate nationals are not involved in human rights abuses abroad. However, this does not mean that all states are under all circumstances obliged to regulate transnational business activities by enacting (a particular type of) legislation.[510] Third, the adoption of a binding BHR treaty would be necessary to codify the duty of states to extraterritorially protect human rights from corporate misconduct, ensure the equal participation of states in the Global South in the definition and interpretation of treaty obligations, and enhance policy coherence. However, achieving a broad consensus regarding the model and main features of a binding BHR treaty is difficult, as there appears to be a divide between the expectations of states in the Global North and in the Global South.[511]

From a national law perspective, there are two main challenges regarding the regulation of transnational corporate conduct in the absence of a binding BHR treaty. The first one relates to the lawfulness and legitimacy of extraterritorial home state laws. Home state laws regulating transnational corporate conduct with respect to human rights that are based on the active personality principle normally do not violate the principle of non-interference under international law.[512] Nevertheless, in the absence of a binding multilateral BHR treaty, such laws may raise legitimacy concerns from a critical decolonial perspective, as they are typically adopted without sufficient consultation of host states and rights-holders in the Global South, entrench interpretative

509 See Section III 1.1 a of this Chapter.

510 See Section III 1.2 of this Chapter.

511 See Section III 1.3 of this Chapter.

512 See Section III 2.1 a of this Chapter.

hegemony in the business and human rights discourse, and may perpetuate saviour narratives.[513] The second challenges relates to the effectiveness of such laws in terms of deterring companies from involvement in human rights abuses and providing rights-holders with access to remedy. This is because companies are regularly able to shield themselves from liability as a result of the separation principle under company law when they outsource the production of their goods and services to subsidiaries or suppliers abroad.[514] While the separation of entities principle cannot simply be considered 'a legal technicality' or 'a lasting pro-business bias' and should therefore not be completely abolished,[515] some scholars argue that company law reform may be necessary to overcome this structural barrier to access to remedy.[516] At present and in the near future, however, states overhauling company law for the benefit of corporate human rights accountability, including by abandoning the separation of entities principle as a cornerstone, is an unlikely scenario, especially across jurisdictions.[517] More promising would be an approach whereby exceptions to the separation principle are continued to be carefully carved out[518] and human rights concerns are legally required to be integrated in corporate governance[519], for instance, by mandating directors of companies to take into account the consequences of their decisions on human rights[520].

IV. Summary

As demonstrated, the focus of the business and human rights movement has traditionally been on the regulation of MNEs. However, with the endorsement of the UNGPs in 2011, the conduct of all business enterprises, irrespective of

513 See Section III 2.1 b of this Chapter.

514 See Section III 2.2 of this Chapter.

515 MARES, in: Deva/Bilchitz (eds.), Building a Treaty, 272.

516 CHOUDHURY, BHRJ 2023, 190 f. and 196. For a discussion of different positions on this matter, see MARES, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 462 ff. See also, CESCR General Comment No. 24 (2017), para. 44.

517 Similarly, MARES, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 469.

518 Cf. MARES, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 469.

519 Cf. CHOUDHURY, BHRJ 2023, 191 ff. and 195 f.

520 This was notably initially proposed by the EU Commission when drafting art. 25 of the Corporate Sustainability Due Diligence Directive, see European Commission, 'Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937', COM/2022/71 final (23 February 2022) (hereinafter: EC, CSDDD Proposal), 66.

their size, sector, operational context, ownership, and structure, has started to be scrutinised as well. Since its inception, the business and human rights movement has been concerned with finding ways to regulate transnational corporate conduct with respect to human rights and provide access to remedy for victims of corporate human rights abuses. A variety of instruments have been explored to this effect. Currently, there is a clear trend towards the adoption of extraterritorial home state laws in Europe. This development presents a real chance for improving corporate accountability for human rights abuses and an opportunity to persuade more states to adopt a binding BHR treaty. The added value of the latter would especially include the equal participation of states in the Global South in the definition and interpretation of treaty obligations as well as the facilitation of policy coherence.

Part II:
International Human Rights Due Diligence Standards

Chapter 2: The UNGPs and OECD Guidelines as Authoritative Reference Points for Responsible Business Conduct

The focus this Chapter is to examine the international framework for responsible business conduct and demonstrate the development, application, and refinement of HRDD standards therein. To do so, the UNGPs' concept of HRDD and its main critique will be analysed in depth in Section I. Section II then centres on the analysis of the adoption of the UNGPs' HRDD concept in the Organisation for Economic Co-operation and Development (OECD) and illustrate its operationalisation and refinement through the analysis of cases brought before National Contact Points (NCPs), i.e. the OECD's non-judicial enforcement mechanism. The latter analysis will also include the role of voluntary initiatives that seek to address human rights challenges related to transnational business activities in effective HRDD. The examination of these HRDD standards is essential, because they form the benchmarks against which the mandatory HRDD legislation in Chapters 3 to 5 will be assessed.

I. The 'Protect, Respect and Remedy Framework' and its Operationalisation in the UNGPs

1. Context

As demonstrated in the previous Chapter, Harvard Professor John Ruggie was appointed as UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) in 2005 due to the failure of the UN Draft Norms.[521] Professor Ruggie presented his report 'Protect, Respect and Remedy: A Framework for Business and Human

521 UN Commission on Human Rights, Resolution 2005/69, 'Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. E/CN.4/RES/2005/69 (20 April 2005), para. 1.

Rights' (UN Framework) to the UN Human Rights Council in 2008. His framework consists of three pillars: the state duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy for victims of human rights abuses.[522] To operationalise the UN Framework, Professor Ruggie developed the UNGPs.[523] The UNGPs are a set of soft law norms for states and companies that offer guidance on how to prevent, address and remedy human rights abuses in business operations. The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011,[524] which was hailed 'a game changer' by many.[525]

The SRSG rejected a 'legalistic approach' to the elaboration of the UN Framework and UNGPs as a result of the failed attempt of the UN Draft Norms to govern corporate conduct by defining binding corporate human rights obligations.[526] Instead, he opted for an approach of 'principled pragmatism' and polycentric governance. The SRSG described 'principled pragmatism' as

> 'an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people'.[527]

The SRSG expressed that he sought to promote practical measures that 'provide the best mix of effectiveness and feasibility'.[528] He rejected the 'voluntary/

522 UN Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie', UN Doc. A/HRC/8/5 (7 April 2008) (hereinafter: SRSG UN Framework Report (2008)).

523 UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. A/HRC/17/31 (21 March 2011) (hereinafter: SRSG UNGPs Report (2011)).

524 UN Human Rights Council, Resolution 17/4, 'Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. A/HRC/RES/17/4 (6 July 2011) (hereinafter: UN Human Rights Council, Resolution 17/4 (2011)), para. 6 (a).

525 See, e.g., JERBI SCOTT, 'UN Adopts Guiding Principles on Business and Human Rights – What Comes Next?' (17 June 2011), Institute of Human Rights and Business.

526 BIJLMAKERS, CSR, 48. For more information on the UN Draft Norms, see Chapter 1 III 1.1 b.

527 Commission on Human Rights, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. E/CN.4/2006/97 (22 February 2006) (hereinafter: SRSG Interim Report (2006)), para. 81.

528 RUGGIE JOHN GERARD, 'Business and Human Rights: Achievements and Prospects, Global Policy Innovations' (28 October 2008), Carnegie Council for Ethics in International Affairs.

mandatory dichotomy'.[529] Rather, he prioritised a 'smart mix' of public and private governance measures to promptly tackle human rights abuses over advocating for the direct imposition of human rights obligations onto corporations through the negotiation of a binding treaty.[530] The SRSG considered there to be three governance systems: the state-based traditional system of public law and governance at the international and domestic level, civil governance systems which involve different stakeholders such as rights-holders affected by corporate human rights abuses and companies that seek to promote responsible conduct, and corporate self-regulatory systems.[531] The SRSG sought to

> 'formulate an authoritative basis whereby the three forms of governance systems become better aligned in relation to business and human rights, compensate for one another's shortcomings and begin to play mutually reinforcing roles, out of which cumulative change can evolve over time'.[532]

The SRSG described the elaboration of the UN Framework and the UNGPs as a widely participatory process that included consultations with a variety of stakeholder groups such as governments, civil society organisations, and corporations in all phases of the mandate. His goal was to attain a 'thick stakeholder consensus' instead of a 'thin state consent'.[533]

Despite their soft law nature, the UNGPs developed into *the* authoritative, global reference point in the field of business and human rights and have been incorporated in international, regional, and national instruments that seek to promote responsible business conduct.[534] These instruments range from voluntary initiatives[535], to soft[536] and hard law[537] a selection of which will be discussed in Section II and subsequent Chapters.

2. The State Duty to Protect

In the UN Framework Report, the SRSG firstly notes that despite the lack of consensus regarding the existence of a state duty to protect rights-holders

529 RUGGIE, Life in the Global Public Domain, 2.

530 RUGGIE JOHN GERARD, Just Business: Multinational Corporations and Human Rights, New York 2013, 57.

531 RUGGIE, Life in the Global Public Domain, 2.

532 Ibid.

533 Ibid., 1.

534 WGBHR, UNGPs: Taking Stock of the First Decade (2021), 5 ff.

535 See Section II of this Chapter.

536 See Section II of this Chapter.

537 See Chapters 3-5.

from corporate human rights abuses abroad, there is no prohibition to do so, provided that a recognised jurisdictional basis exists.[538] While it is true that there is debate on the existence of a extraterritorial state duty to protect human rights, including through enacting relevant legislation, various UN treaty monitoring bodies have affirmed such a duty and have been urging states to regulate their corporate nationals with regard to respecting human rights throughout their operations, as demonstrated in Chapter 1 III 1.2. Without insisting on specific legislative or policy actions, the SRSG then underlines that states should foster a corporate culture that is respectful of human rights as a matter of an urgent policy priority.[539] In particular, he notes that states could endorse and reinforce market pressures on corporations to respect human rights.[540] These findings are reflected in UNGPs 1–5.

According to UNGP 1, states should protect against human rights abuses within their territory and/or jurisdiction by non-state actors, including business enterprises. UNGP 2 describes the duty of states to proclaim that business enterprises domiciled in their territory and/or jurisdiction are expected to respect human rights throughout their operations including abroad. The Commentary to UNGP 2 then reiterates what the SRSG already noted in its Framework Report: whereas the Commentary does not affirm a general duty to regulate corporate conduct abroad, it acknowledges that UN treaty monitoring bodies have been urging states to protect human rights extraterritorially, including from corporate misconduct. The Commentary encourages states to regulate their corporate nationals abroad and recognises that there are various approaches to do so, ranging from requiring parent companies to report on activities of the corporate group to extraterritorial criminal liability for corporate misconduct.[541] UNGP 3 calls upon states to consider implementing corporate respect for human rights in laws and policies in a multitude of ways: Firstly, states should enforce laws aimed at establishing corporate respect for human rights, periodically assess their effectiveness, and address identified gaps where appropriate.[542] Secondly, states should ensure that other laws and policies regulating the creation and conduct of business enterprises enable corporate respect for human rights.[543] Thirdly, states should provide guidance to business enterprises on how to establish respect for human rights

538 SRSG UN Framework Report (2008), para. 19. On the lawfulness of extraterritorial home state laws, see Chapter 1 III 2.1 a.

539 SRSG UN Framework Report (2008), para. 27.

540 Ibid., para. 30.

541 Commentary to UNGP 2.

542 UNGP 3(a).

543 UNGP 3(b).

in their operations.[544] Lastly, UNGP 3 formulates the duty of states to encourage, and where appropriate require, business enterprises to report on how they address their human rights impacts.[545]

Pursuant to UNGP 5 states should take additional measures to protect against corporate human rights abuses, where business enterprises are owned or controlled by the state, or receive substantial support and services from state agencies such as export credit agencies and official investment insurance or guarantee agencies. UNGP 5 further reminds states to exercise adequate supervision when contracting business enterprises for the delivery of services that may impact the enjoyment of human rights, as states cannot evade their human rights obligations though privatisation.[546] Besides, states should promote respect for human rights when conducting commercial transactions with business enterprises, for instance, through their procurement practices.[547]

In the UN Framework Report, the SRSG further highlights the aggravated risks of corporate involvement in human rights abuses in conflict zones. He calls on states to sensitise corporations operating in conflict zones to the inherent context-specific human rights challenges and ensure appropriate corporate conduct.[548] This issue is elaborated on in UNGP 7. UNGP 7 calls on states to help ensure that business enterprises operating in conflict affected areas are not involved with human rights abuses. This includes four measures: Firstly, states should engage at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights risks related to their activities and business relationships.[549] Secondly, states should provide business enterprises with adequate assistance to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence.[550] Thirdly, states should deny business enterprises, that are involved in gross human rights abuses and refuse to cooperate in remediation, access to public support and services.[551] Lastly, states should ensure that their current policies, legislation, regulations and enforcement measures are effective in tackling the risk of corporate involvement in gross human rights abuses.[552]

544 UNGP 3(c).
545 UNGP 3(d).
546 UNGP 5 and Commentary.
547 UNGP 6 and Commentary.
548 SRSG UN Framework Report (2008), para. 47-49.
549 UNGP 7(a).
550 UNGP 7(b).
551 UNGP 7(c).
552 UNGP 7(d).

The SRSG proceeds to discuss policy incoherencies with regard to the implementation of human rights by states in the UN Framework Report. He defines 'vertical' incoherencies as states committing to human rights but disregarding their implementation and 'horizontal' incoherencies as policies implemented by different state departments such as trade, development, and foreign affairs within the same state that conflict with the state's human rights obligations.[553] The SRSG demands the alignment of all economy-related state instruments with the protection of human rights and exemplifies this policy alignment with bilateral investment treaties for host countries and export credits and guarantees for home countries.[554] As highlighted in the previous Chapter, enhancing policy coherence, particularly with regard to international human rights law and international investment and trade agreements, can be a critical means to address governance gaps in host states. This is because investment and trade agreements may undermine a state's ability to meet its human rights obligations under international human rights law, including protecting rights-holders from corporate misconduct.[555] The SRSG concludes that states, corporations, the institutions encouraging investments, and those developing arbitration procedures should aim at creating mechanisms that balance investor interests and the human rights obligations of host states appropriately.[556] The UNGPs address the issue of policy coherence in UNGP 8-10.

UNGP 8 establishes that states should ensure that governmental departments, agencies and other state-based institutions that create business practices are mindful of and comply with the state's human rights obligations when fulfilling their respective mandates. States may do so by providing their departments, agencies etc. with relevant information, training, and support.[557] UNGP 9 calls upon states to maintain appropriate domestic policy and regulatory space to meet their human rights obligations when pursuing business-related policy objectives with other states or business enterprises such as international investment and trade agreements.[558] UNGP 9 thereby highlights the importance of identifying and resolving potential conflicts between obligations under international human rights law on the one hand and international investment and trade agreements on the other hand before signing the latter.

553 SRSG UN Framework Report (2008), para. 33.

554 Ibid., para. 33-42. For more on the role of international investment law and international trade law in human rights challenges, see Chapter 1 II 2.1.

555 See Chapter 1 II 2.1.

556 SRSG UN Framework Report (2008), para. 38.

557 UNGP 8 and Commentary.

558 UNGP 9 and Commentary. For more on the role of international investment law and international trade law in human rights challenges, see Chapter 1 II 2.1.

UNGP 9 thus aligns with the recommendations made by UN treaty monitoring bodies and business and human rights scholarship, which propose means to identify and resolve such conflicts, including by conducting human rights impact assessments and inserting human rights clauses in international investment agreements to ensure that human rights considerations are taken into account in investor-state arbitration.[559]

UNGP 10 elaborates on the state duty to protect in the context of membership in multilateral institutions when dealing with business-related issues. It notes that states should seek to ensure that those institutions neither restrain the ability of their member states to meet their duty to protect nor hinder business enterprises from respecting human rights.[560] In addition, states should encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help states meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising.[561] Lastly, states should draw on the UNGPs to promote shared understanding and advance international cooperation in the management of business and human rights challenges.[562]

3. The Corporate Responsibility to Respect Human Rights

3.1 The Corporate Responsibility to Respect in General

In the UN Framework Report, the SRSG defines the responsibility to respect as a responsibility 'to do no harm', meaning to 'not to infringe on the rights of others'. As corporations can impact 'virtually all internationally recognized human rights', the SRSG calls on corporations to respect all such rights.[563] He notes that in previous discussions on the role of corporations in respecting human rights, such as in the UN Draft Norms, the main focus was placed on the identification of a limited number of rights for which corporate responsibility was assumed. However, he argues that the inclusion or exclusion of certain rights may spark controversy as illustrated by the UN Draft Norms. In addition, he criticises that the UN Draft Norms would have applied the same range of human rights duties onto corporations as onto states. The only difference,

559 See further, Chapter 1 II 2.1.

560 UNGP 10(a).

561 UNGP 10(b).

562 UNGP 10(c).

563 SRSG UN Framework Report (2008), para. 24. However, in the UNGPs, the SRSG only refers to certain human rights instruments explicitly, as will be demonstrated in Section 3.1 b of this Chapter.

he observes, would have been the vague distinction between 'primary' and 'secondary' obligations and the introduction of the concept of 'corporate sphere of influence'. He concludes that this was the wrong approach. Instead of introducing a limited list of human rights linked to ambiguous and extensive corporate duties, the focus should rather be the definition of precise responsibilities for corporations with respect to all human rights.[564] The SRSG points out that corporations can indeed be considered 'organs of society' with responsibilities. However, he underlines that they are specialised economic organs and not democratic public interest institutions. As such, their responsibilities should not equate to the duties of states.[565] The SRSG proceeds to clarify that while states determine the scope of legal compliance, the scope of the corporate responsibility to respect human rights is defined by social expectations. These social expectations can be considered elements of a corporation's so called 'social license to operate'. Consequently, the failure of corporations to respect human rights may subject them to 'the courts of public opinion', i.e. the judgment of employees, consumers, civil society organisations, investors and the like.[566] These reflections inform UNGP 11–16. The use of the word 'responsibility' instead of 'obligation' or 'duty' was hence a deliberate choice by the SRSG to indicate that the responsibility to respect human rights under the UNGPs is indeed a social norm, not a legal one. The distinction between the responsibility to respect as a social norm and legal norms is reiterated in the Commentary to UNGP 11, which differentiates between the responsibility to respect human rights as a 'global standard of expected conduct for all business enterprises' and issues of 'compliance with national laws and regulations protecting human rights'. With this distinction, the SRSG underscores that the UNGPs do not challenge the traditional view under international human rights law according to which states are the primary duty bearers and as such directly bound by human rights obligations.[567]

In addition to the UNGPs, the United Nations Office of the High Commissioner for Human Rights (OHCHR) elaborated a comprehensive 'Interpretive Guide' together with the SRSG to further elaborate on the corporate responsibility to respect human rights, as it is the most complex pillar of the UN Frame-

564 SRSG UN Framework Report (2008), para. 51. For a discussion of the UN Draft Norms, see Chapter 1 III 1.1 b.

565 Ibid., para. 53.

566 Ibid., para. 54.

567 The SRSG's position on this matter was criticised in the literature, see, e.g., BILCHITZ, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, 107 ff. For more on the state centricity of international human rights law, see further Chapter 1 III 1.1 a.

work.[568] The Interpretive Guide does not alter or add to the expectations set forth in the UNGPs. Its objective is to promote a comprehensive understanding of the background, meaning, and intent of the UNGPs. The Guide was elaborated by means of numerous consultations during the SRSG's mandate and is reflective of the SRSG's reports.[569]

a) Personal Scope

Pursuant to UNGP 14, the responsibility to respect human rights applies to 'all business enterprises', irrespective of their size, sector, operational context, ownership, and structure. Neither the UNGPs nor the OHCHR Interpretative Guide define this essential term. This omission is rightfully criticised in the literature.[570] SPIESSHOFER, for instance, notes that the UNGPs' notion of a business enterprise is vague and would likely conceptualise a corporate group as one single unit which would run counter to the separation of entities principle enshrined in company law across jurisdictions.[571] BACKER observes that the absence of definitions for key terms, such as 'business enterprise', is perhaps connected to the fact that the SRSG received considerable criticism for definitions included in the draft[572] of the UNGPs, which he published for public consultation in November 2010.[573] Thus, the use of vague language and lack of definitions for key terminology may have been a deliberate choice by the SRSG to reach consensus (faster).[574] The Draft Principles defined the term

568 Office of the High Commissioner for Human Rights (OHCHR), 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide', UN Doc. HR/PUB/12/02 (2012) (hereinafter: OHCHR Interpretive Guide).

569 OHCHR Interpretative Guide, 3.

570 BACKER LARRY CATA, From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance, Pacific McGeorge Global Business & Development Law Journal (U. of Pac. L. Rev.) 2012, 69 ff., 103; SPIESSHOFER, Responsible Enterprise, 73.

571 SPIESSHOFER, Responsible Enterprise, 396 and 400. For more on the separation of entities principle, see Chapter 1 III 2.2.

572 Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 'Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy Framework"', UN Doc. DRAFT (Nov. 2010) (hereinafter: Draft Principles).

573 BACKER LARRY CATA, From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations Protect, Respect and Remedy and the Construction of Inter-Systemic Global Governance, Pacific McGeorge Global Business & Development Law Journal (U. of Pac. L. Rev.) 2012, 69 ff., 103

574 Ibid.; DEVA, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, 79 f. and 89 ff.

'business enterprise' very broadly as 'all companies, both transnational and others, regardless of sector or country of domicile or operation, of any size, ownership form or structure'.[575] Since the definition section was removed in the final version of the UNGPs, the UNGPs possibly allow for an even wider range of interpretations, whereby, for instance, non-profit organisations, such as Amnesty International, could be considered business enterprises, as long as they act like businesses, have employees, own property, and engage in transactions.[576]

In any case, while all business enterprises have a responsibility to respect human rights, the scale and complexity of the measures to fulfil this responsibility may differ depending on the size, sector, operational context, ownership, and structure of the business enterprise as well as the severity of its potential adverse human rights impacts pursuant to UNGP 14. UNGP 14 thereby enshrines two fundamental concepts: the concept that measures have to be appropriate in view of a business enterprise's concrete circumstances and the concept that measures have to be risk-based. The Commentary to UNGP 14 illustrates these concepts by using the example of company size. It notes that small and medium-sized business enterprises may have less capacity and elaborate management structures than larger business enterprises. Consequently, their policies and processes will be different from the ones implemented by larger business enterprises, i.e. appropriate to their size. Nevertheless, even small and medium-sized business enterprises can potentially cause or contribute to severe human rights impacts. These potential impacts call for the implementation of appropriate prevention measures based on the concrete level of risk. This means that under the UNGPs, the more severe the potential impact, the more efforts would be expected to prevent it, even from a small business enterprise. The Commentary to UNGP 14 adds that the severity of an impact is assessed based on its scale, scope and irremediability.[577] While these two concepts help guide business enterprises in their implementation of the corporate responsibility to respect human rights, they cannot absolve states from defining which companies and potentially other legal persons have an obligation to respect human rights when transposing the UNGPs to hard law. Otherwise, issues regarding the enforcement of such hard laws will arise due to the principle of legality. This principle is enshrined in international human rights law and across European constitutions and requires that the legal provisions on the basis of which restrictions on the enjoyment of human

575 Draft Principles, 27.

576 BACKER, U. of Pac. L. Rev. 2012, 103 and 106.

577 Commentary to UNGP 14.

rights and fundamental freedoms are imposed – in this case the rights of companies and other legal persons[578] – are sufficiently precise.[579]

b) Covered Human Rights

In terms of covered human rights, the responsibility to respect human rights encompasses all 'internationally recognized human rights' according to UNGP 12. These include at least the rights enshrined in the International Bill of Human Rights and the fundamental rights set out in the ILO's Declaration on Fundamental Principles and Rights at Work, also referred to as the ILO Core Labour Standards.[580] The International Bill of Human Rights consists of the UDHR and the main instruments through which it has been codified, namely the ICCPR and the ICESCR.[581] The ILO Core Labour Standards include rights related to freedom of association and collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation, and a safe and healthy working environment.[582] Under the UNGPs, these instruments provide the 'benchmarks' against which human rights impacts are assessed. The Commentary clarifies that the corporate responsibility to respect human rights needs to be distinguished from legal liability for human rights abuses and enforcement issues, which are mainly determined by national law.[583]

The list of human rights treaties provided in UNGP 12 is not exhaustive.[584] The Commentary to UNGP 12 recognises that business enterprises may have to take 'additional standards' into account, depending on their operative context. The Commentary illustrates the need to respect additional standards referring to the situation of vulnerable individuals and groups and conflict situations. The Interpretative Guide elaborates that vulnerable individuals, groups and communities are people at particular risk of discrimination and other adverse human rights impacts. The Interpretative Guide adds that disadvantaged and marginalised people or people denied full participation in economic, social,

578 As enshrined in art. 16 of the Charter of Fundamental Rights of the European Union, for instance.

579 DE SCHUTTER, International Human Rights Law, 344 and 439 ff.

580 UNGP 12.

581 Commentary to UNGP 12.

582 ILO Declaration on Fundamental Principles and Rights at Work (2022), para. 2.

583 Commentary to UNGP 12.

584 This is already indicated in the wording of UNGP 12: '[…] understood, *at a minimum,* as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work' (emphasis added).

cultural, and political life such as minorities, indigenous peoples and persons with disabilities are at heightened risk of vulnerability.[585]

In the literature, opinions on the UNGPs' scope in terms of covered human rights diverge considerably. On one side of the spectrum, scholars argue that the scope is too wide and likely to create legal uncertainty.[586] BACKER, for instance, rightfully draws attention to the incoherence between the binding human rights obligations of states and the corporate responsibility to respect human rights.[587] He points out that while UNGP 12 stipulates a responsibility for all business enterprises to respect 'all internationally recognized human rights' without reservations, states are only bound by the human rights that are enshrined in the treaties they have ratified or are part of customary international law. The UNGPs do not elaborate on the reason(s) for this discrepancy.[588] Furthermore, human rights have to be interpreted, concretised, and – in the context of the responsibility to respect human rights – 'translated' to expectations regarding corporate conduct.[589] This may especially be true for social, economic and cultural rights (ESC-rights)[590], which have historically been viewed as vaguer than civil and political rights, non-self-executing[591], and non-justiciable[592].[593] This is connected to the fact that many ESC-rights 'require active steps for their realisation and, therefore, fulfilment is fundamentally a matter of social and government policy' and dependent on sufficient resources.[594] As such, ESC-rights are often regarded as aspirational goals, not

585 OHCHR Interpretative Guide, 11.

586 See, e.g., SPIESSHOFER, Responsible Enterprise, 74 and 76.

587 BACKER, U. of Pac. L. Rev. 2012, 153 f. See also, SPIESSHOFER, Responsible Enterprise, 74 and 92.

588 BACKER, U. of Pac. L. Rev. 2012, 153; SPIESSHOFER, Responsible Enterprise, 74.

589 SPIESSHOFER, Responsible Enterprise , 74.

590 At the UN level, ESC-rights are most prominently guaranteed in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

591 Self-executing refers to the suitability of a human rights to be directly applied by a court 'without further elaboration' (Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9, UN Doc. E/C.12/1998/24 (3 December 1998), para. 10).

592 Justiciability refers to the suitability of a human right to be adjudicated by a court (CESCR, General Comment No. 9 (1998), para. 10).

593 NOLAN/TAYLOR, J Bus Ethics 2009, 435 f.; DE SCHUTTER, International Human Rights Law, 821 f.; KÄLIN/KÜNZLI, International Human Rights Protection, 89. On the evolution of human rights and the place of ESC-rights in the human rights system, see also, EIDE ASBJØRN, Economic, Social and Cultural Rights as Human Rights, in: Eide/Krause/Rosas (eds.), Economic, Social and Cultural Rights, A Textbook, Second Revised Edition, Dordrecht/Boston/London 2001, 9-28, 9 ff.

594 NOLAN/TAYLOR, J Bus Ethics 2009, 435. See also, DE SCHUTTER, International Human Rights Law, 821 f.

directly applicable, but instead subject to progressive realisation.[595] In the context of corporate activities, involvement in the infringement of ESC-rights may therefore be considered a question of degree rather than an absolute moral wrong.[596] Nevertheless, the inclusion of ESC-rights in the UNGPs was an important step, since they seek to address social issues related to 'the impoverishment and economic exploitation of important parts of the population'.[597] ESC-rights notably seek to guarantee subsidence (e.g. the right to food according to art. 11 ICESCR and the right to health according to art. 12 7 (b) ICESCR), decent work (e.g. the right to just and favourable conditions of work according to art. 7 ICESCR) and social security (art. 9 ICESCR). As such, they are especially relevant for rights-holders in countries in the Global South who are disproportionately affected by business-related human rights abuses.[598] In addition, ESC-rights 'are foundational for the exercise of civil and political rights', as it is difficult to exercise one's freedom of expression, for instance, without having one's basic needs met first.[599] While it is true that certain ESC-rights may be vaguer than civil and political rights, the CESCR held that they cannot be regarded as *a priori* non-self-executing and non-justiciable.[600] It observed that a strict differentiation between civil and political rights on the one hand and economic, social and cultural rights on the other hand in this regard would exclude the later from being invoked before courts. The Committee considered such an inflexible classification of human rights to be arbitrary

595 EIDE, in: Eide/Krause/Rosas (eds.), Economic, Social and Cultural Rights, 22; DE SCHUTTER, International Human Rights Law, 821 f.

596 FASTERLING/DEMUIJNCK contend that 'some human rights imply perfect duties'. They define perfect duties as duties that denote a clear obligation and determine the individuals to whom this duty is owed. The scholars note that perfect duties are typically negative duties, meaning duties to refrain from doing something, e.g. not to harm people. In terms of human rights, a perfect moral duty also implies that trade-offs are only permitted between different human rights abuses. Trade-offs between human rights abuses and other considerations such as economic interests are not compatible with a perfect moral duty. To exemplify a perfect moral duty in terms of human rights, the scholars use the prohibition of torture. In contrast to perfect moral duties, imperfect duties are not well-defined obligations. They offer significant leeway to choose between different avenues. Imperfect duties are normally positive duties, meaning they require action, e.g. to alleviate poverty (FASTERLING BJÖRN / DEMUIJNCK GEERT, Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights, Journal of Business Ethics (J Bus Ethics) 2013, 799 ff., 802 ff.).

597 KÄLIN/KÜNZLI, International Human Rights Protection, 32.

598 DEVA, in: Deva/Bilchitz (eds.), Building a Treaty, 176. See also, NOLAN/TAYLOR, J Bus Ethics 2009, 434.

599 ČERNIČ JERNEJ LETNAR, Corporate Accountability under Socio-Economic Rights, Abingdon / New York 2019, 87. This arises from the idea that human rights are indivisible, interdependent and interrelated, see Vienna Declaration (1993), para. 5.

600 CESCR, General Comment No. 9 (1998), paras. 10 and 11.

and incompatible with the principle of indivisibility and interdependence of the two sets of human rights. The CESCR moreover argued that such a rigid classification of human rights would put the protection of 'the rights of the most vulnerable and disadvantaged groups in society' at risk.[601] All human rights require interpretation, especially when it comes to the delineation of expected conduct for business enterprises, as human rights treaties have been conceptualised with states as duty-bearers in mind.[602] The OHCHR recognised this issue when noting that human rights treaties provide 'reference points' for responsible business conduct but do not formulate behavioural standards for corporations *per se*.[603]

Irrespective of the subset of human rights, particular challenges to interpret human rights provisions may arise for corporations where the scope of a specific, 'internationally recognized' right varies from one human rights instrument to another. For instance, the scope in a regional human rights instrument may be different from the one in a UN instrument.[604] The UNGPs do not address this situation. However, corporations are not authorised institutions to interpret human rights provisions. Rather, they are 'bound by national law (and its concretization) of human rights'.[605] Circumstances in which host states have 'deliberately rejected' certain human rights standards that fall within the scope of the corporate responsibility to respect may be even more difficult to navigate for corporations.[606] The UNGPs do not provide substantive guidance for such a scenario.[607] The Commentary to UNGP 11 merely holds that the responsibility to respect is 'a global standard of expected conduct' for all business enterprises, irrespective of the location of their operations. As such, it applies independently of a state's ability or willingness to meet its human rights obligations according to the UNGPs.[608] UNGP 23 (a) calls on business

601 CESCR, General Comment No. 9 (1998), para. 10.

602 DEVA, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, 88; SPIESSHOFER, Responsible Enterprise, 74.

603 OHCHR Interpretative Guide, 11; SPIESSHOFER, Responsible Enterprise, 75.

604 SPIESSHOFER, Responsible Enterprise, 74 and 92.

605 Ibid., 90.

606 BACKER, U. of Pac. L. Rev. 2012, 154 ff.; SPIESSHOFER, Responsible Enterprise, 74 f. and 92. The OHCHR Interpretative Guide refers to this situation as a 'dilemma' to which 'there is no blueprint for how to respond'. However, the Guide at least urges enterprises to thoroughly examine whether and how they can proceed to operate with integrity whenever conflicting national laws would expose them to the risk of involvement in gross human rights abuses such as international crimes (OHCHR Interpretative Guide, 78 f.).

607 BACKER, U. of Pac. L. Rev. 2012, 138. See also, SPIESSHOFER, Responsible Enterprise, 92.

608 Commentary to UNGP 11.

enterprises to respect domestic laws and UNGP 23 (b) simply states that business enterprises should 'seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements'. BACKER rightly argues that this puts corporations in the position to 'either lobby for local change, negotiate tolerance or consider discontinuing operations.'[609] Whether to remain in challenging contexts or discontinue operations or relationships is a complex question that the UNGPs should have addressed more concretely.[610] Instead, business and human rights scholarship and practice have developed recommendations for corporations on how to navigate conflicting human rights expectations and decide on whether to remain or exit highly challenging contexts.[611]

On the other side of the spectrum, some scholars find the approach of the UNGPs to simply enumerate certain human rights treaties, particularly in view of existing state obligations under international human rights law, to be problematic.[612] MUCHLINSKI underlines that such an approach fails to factor in 'the progressive development of international human rights law through new instruments'.[613] While this is true in theory, in practice treaty-making in the field of international human rights has notoriously been stagnating for decades.[614] More problematic is the fact that the Commentary to UNGP 12 refers to treaties centred on the human rights of historically marginalised groups such as women, indigenous peoples, and persons with disabilities as mere 'additional standards' that 'business enterprises may need to consider' depending on circumstances. SIMONS rightfully highlights that such a hierarchisation is not compatible with and 'undermines the widely accepted doctrine

609 BACKER, U. of Pac. L. Rev. 2012, 154.

610 On the issue of disengagement, see further Section I 3.2 g of this Chapter.

611 See, in particular, SMIT LISE / GRIFFITH ARIANNE / MCCORQUODALE ROBERT, 'When National Law Conflicts with International Human Rights Standards: Recommendations for Business', British Institute for International and Comparative Law (BIICL), Report (2017) (hereinafter: SMIT/GRIFFITH/MCCORQUODALE, BIICL Report on Conflicts with IHR); Office of the High Commissioner for Human Rights (OHCHR), 'Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting' (April 2023) (hereinafter: OHCHR, BHR in Challenging Contexts: Considerations for Remaining and Exiting).

612 MUCHLINSKI, BEQ 2012, 148; BERNAZ NADIA, Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty, Human Rights Review (HRR) 2021, 45 ff., 50 and 52; DEVA SURYA, The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface, Business and Human Rights Journal (BHRJ) 2021, 336 ff., 340.

613 MUCHLINSKI, BEQ 2012, 148.

614 Cf. PAUWELYN/WESSEL/WOUTERS, EJIL 2014, 733 ff.; MOTZFELDT KRAVIK, LJIL 2021, 935 ff.

of the indivisibility and interrelatedness of all human rights articulated in the Vienna Declaration and Programme of Action 1993'.[615]

To be more internally coherent and provide necessary specification regarding the rights of marginalised groups, the UNGPs should have gone beyond the International Bill of Rights and at least required business enterprises to respect the human rights enshrined in all nine[616] core human rights treaties[617] under the condition that their home state has ratified them or that they form part of customary international law. In any case, significant guidance on the interpretation of corporate human rights obligations, how to balance countervailing human rights interests, how to tackle potentially unidentical scopes of human rights instruments etc. will have to be provided by states wanting to transpose the UNGPs' corporate responsibility to respect to hard law.

c) Do No Harm

According to UNGP 11, business enterprises 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'. Thus, while the UNGPs refer to human rights *violations* in connection with the state duty to protect, they employ the terms 'adverse human rights impacts' and 'human rights abuses' with regard to corporate misconduct. This differentiation is likely made to highlight the fact that in contrast to states, corporations do not have direct legal obligations under international human rights law.[618] The Interpretative Guide defines the term 'adverse human rights impact' as an action that 'removes or reduces the ability of an individual to enjoy his or her human rights'.[619] However, 'impact' is not a term commonly used in international human rights law. It has a wider scope than 'violation'. Under international human rights law, not every

615 SIMONS, in: Deva/Bilchitz (eds.), Building a Treaty, 60. Agreeing, BERNAZ, HRR 2021, 50. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN Doc. A/CONF.157/23.

616 These include the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the ICCPR, the ICESCR, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the CRC, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), and the Convention on the Rights of Persons with Disabilities (CRPD), see overview at OHCHR, 'The Core International Human Rights Instruments and Their Monitoring Bodies'.

617 With respect to a binding treaty, see, DEVA, in: Deva/Bilchitz (eds.), Building a Treaty, 176 f.

618 DEVA, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, 97.

619 OHCHR Interpretive Guide, 5.

infringement of a right automatically constitutes a violation.[620] Human rights treaties recognise legitimate limitations.[621] However, these treaties were conceptualised with states as duty-bearers in mind. The duties applicable to states are not easily transposable to corporations.[622] As a result, some scholars rightfully argue that the term 'impact' lacks contours.[623] SPIESSHOFER namely criticises that the UNGPs do not define a minimal threshold for a right to be considered adversely impacted.[624] DEVA questions whether the use of the word 'impact' instead of 'violation' appropriately captures the 'ethos' of human rights and sufficiently considers the perspective of victims as rights-holders and their suffering altogether.[625] Other scholars welcome the use of the term 'impact' and view it as transformative precisely because it is vaster than 'violation'.[626] In light of legal certainty considerations and the prevention of enforcement issues, states would be well advised to clearly define the actions that would constitute human rights abuses when transposing the UNGPs' corporate responsibility to respect to hard law.

Depending on the type of involvement in human rights abuses, the UNGPs place varying degrees of responsibility onto business enterprises. While business enterprises should 'avoid causing or contributing to adverse human rights impacts through their own activities',[627] they are called on to 'seek to prevent or mitigate adverse human rights impacts' which are directly linked to their business relationships[628]. Only in the former scenario are business enterprises required to remediate adverse impacts that have occurred.[629] The Commentary to UNGP 13 defines the term 'business relationships' as all ties with business partners, entities in the corporate value chain, and any other non-state

620 The exception of this rule are absolute rights such as the right to be free from torture or cruel, inhuman or degrading treatment or punishment according to Art. 7 ICCPR. See also, DE SCHUTTER, International Human Rights Law, 307 ff. and KÄLIN/KÜNZLI, International Human Rights Protection, 90 ff.

621 DE SCHUTTER, International Human Rights Law, 344 ff.

622 DEVA, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, 88. See also, DE SCHUTTER, International Human Rights Law, 368.

623 DEVA, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, 98; SPIESSHOFER, Responsible Enterprise, 76.

624 SPIESSHOFER, Responsible Enterprise, 76.

625 DEVA, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, 97 f.

626 BIRCHALL DAVID, Any Act, Any Harm, To Anyone: The Transformative Potential of 'Human Rights Impacts' Under the UN Guiding Principles on Business and Human Rights, University of Oxford Human Rights Hub Journal (OHRHJ) 2019, 120 ff.

627 UNGP 13(a).

628 UNGP 13(b).

629 UNGP 22.

or state actor directly linked to the business enterprise's business operations, products or services.[630] The Interpretative Guide provides more information on the terminology 'value chain'. It notes that corporate value chains are comprised of entities which are tied together by direct or indirect business relationships. Value chains cover 'all activities that convert input into output by adding value.' Entities in value chains either supply products or services that contribute to a business enterprise's own products or services, or receive products or services from said business enterprise.[631] This means that the UNGPs extend the responsibility of a parent company to respect human rights beyond its own activities to those of independent third parties, such as subsidiaries and direct and indirect suppliers. However, critics consider this extension of the responsibility to respect beyond the parent company's own activities to potentially be problematic.[632] This is because the transposition of the UNGPs' conception of responsibility to respect to hard law may conflict with the principle of legal separation of entities and limited liability under company law, as most jurisdictions only allow the piercing of the corporate veil under very specific circumstances.[633] Yet, the Interpretative Guide still recognises that '[i]f human rights abuses occur, it will be the national law in the relevant jurisdiction that determines where liability rests'.[634] Consequently, states can continue to limit the piercing of the corporate veil to the circumstances described in their national laws when transposing the UNGPs' corporate responsibility to respect to hard law and grant victims of human rights abuses access to remedy through civil liability in accordance with these limitations.

In any case, several scholars aptly point out that the UNGPs do not clearly delineate the difference between causing, contributing, and being directly linked to human rights abuses.[635] As seen, defining these categories of involvement is important, since they determine whether a business enterprise is

630 Commentary to UNGP 13.

631 OHCHR Interpretative Guide, 8.

632 BACKER, U. of Pac. L. Rev. 2012, 166; MARES, in: Deva/Bilchitz (eds.), Building a Treaty, 267 and 272; SPIESSHOFER, Responsible Enterprise, 89 and 393 ff. On the issue of liability in global value and supply chains, see, MUCHLINSKI, Multinational Enterprises, 317 ff. and 533 ff.

633 BACKER, U. of Pac. L. Rev. 2012, 166; MARES, in: Deva/Bilchitz (eds.), Building a Treaty, 267; SPIESSHOFER, Responsible Enterprise, 89 and 393 ff. For a critical analysis of the implications of the separation of entities principle in business and human rights cases, see further Chapter 1 III 2.2.

634 OHCHR Interpretative Guide, 22.

635 FASTERLING/DEMUIJNCK, J Bus Ethics 2013, 809; VAN HO TARA, Defining the Relationships: 'Cause, Contribute, and Directly Linked to' in the UN Guiding Principles on Business and Human Rights, Human Rights Quarterly (HRQ) 2021, 625 ff.

responsible to provide remediation under the UNGPs.[636] According to UNGP 22, business enterprises only have a responsibility to remedy when they have 'caused' or 'contributed to' harm. In contrast, whenever a business enterprise is 'directly linked to' harm by a business relationship, it should use its leverage over the concerned entity to affect change or consider terminating the relationship.[637] The OHCHR Interpretative Guide provides a few examples for each mode of involvement but does not define the terms either.[638] For instance, a business enterprise causes an adverse human rights impact when it subjects factory workers to dangerous working conditions without providing them with safety equipment. According to the OHCHR Interpretative Guide, being the 'sole or main source of pollution in a community's drinking water supply' would also qualify as 'causing'.[639] Providing a government, which tracks and prosecutes political dissidents, with data about internet service users, would be considered 'contributing' according to the OHCHR Interpretative Guide.[640] Another example the OHCHR Interpretative Guide gives for 'contributing' is the situation where an enterprise requires its female employees to work late night shifts in an unsafe neighbourhood and some of its female employees get attacked on their way home after work.[641] As per the OHCHR, an example for 'being directly linked to' a harm would be giving a financial loan to another corporation for business activities which, contrary to agreed standards, leads to the eviction of communities.[642] The OHCHR Interpretative Guide also considers a corporation to be 'directly linked to' human rights abuses when one of the corporation's suppliers subcontracts work to child labourers in spite of contractual obligations not to do so.[643] These examples only provide limited guidance to differentiate between the modes of involvement.[644] The need for clarification especially relates to the category of 'being directly linked to' human rights abuses and particularly regards the financial sector.[645] Questions relating to the 'extent and nature' of the responsibilities of financial

636 VAN HO, HRQ 2021, 627.

637 Commentary to UNGP 19(b).

638 OHCHR Interpretative Guide, 16 and 17.

639 Ibid., 17.

640 Ibid.

641 Ibid., 41.

642 Ibid., 17.

643 Ibid., 17 and 49.

644 VAN HO, HRQ 2021, 657.

645 Ibid., 639 ff. See also, UN Working Group on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises (WGBHR), 'Letter to Roel Nieuwenkamp re: Request for Guidance on Specific Aspects the Guiding Principles and

institutions are markedly complex and require further elaboration.[646] The general lack of authoritative guidance regarding the modes of involvement has given business enterprises significant discretion to interpret them how they please and determine whether or not to remediate human rights abuses.[647] This exposes victims of human rights abuses to significant uncertainty regarding their prospects of remediation.[648] For the sake of legal certainty, transforming the UNGPs into hard law would therefore necessitate that the modes of involvement are precisely defined and that binding guidance is issued. This is important for both corporations and rights-holders seeking redress, as the different modes of involvement will determine whether civil liability can successfully be pursued in courts.

Overall, the UNGPs subdivide the responsibility to respect human rights into three aspects: First, business enterprises should publicly express their commitment to fulfil their responsibility to respect human rights in the form of a policy statement.[649] This policy statement should be approved by the top tier management level of the business enterprise and proclaim the enterprise's human rights expectations vis-à-vis its staff, business partners and other entities directly linked to its operations, products or services.[650] It should be the result of consultation with internal and/or external human rights experts.[651] In order to raise awareness for the business enterprise's responsibility to respect human rights, the policy commitment should be published and disseminated internally and externally to staff, business partners and other relevant parties.[652] The policy statement should be implemented in all corporate policies and procedures of the business enterprise.[653] Second, the corporate

their Meaning in the Context of Financial Transactions and Institutions' (3 December 2013), 2.

646 MUCHLINSKI, Multinational Enterprises, 576. The OHCHR had the opportunity to clarify the modes on involvement a few years after the publication of the Interpretative Guide. The OHCHR was asked to elaborate more on the application of the UNGPs in the banking sector by a civil society organisation in 2017, see, Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Response to Request from BankTrack for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector' (12 June 2017). In 2024, the UN Environment Programme – Finance Initiative (UNEPFI) launched its 'Human Rights Toolkit for Financial Institutions' aiming to provide step-by step guidance to financial institutions to align their practices with the UNGPs.

647 FASTERLING/DEMUIJNCK, J Bus Ethics 2013, 809.

648 Ibid.; VAN HO, HRQ 2021, 625 ff.

649 UNGP 15(a).

650 UNGP 16(a) and (c).

651 UNGP 16(b); OHCHR Interpretative Guide, 28 f.

652 UNGP 16(d).

653 UNGP 16(e).

responsibility to respect entails the exercise of human rights due diligence.[654] This element will be explained in detail in the following section. Third, the responsibility to respect human rights requires business enterprises to provide for or cooperate in the remediation of adverse impacts they have caused or contributed to.[655] Company-level mechanisms may be an effective way to remediate impacts and will be further discussed in Section I. 4. of this Chapter.

3.2 Corporate Human Rights Due Diligence (HRDD) in Particular

In the UN Framework Report, the SRSG states that in order for corporations 'to discharge their responsibility to respect', they have to undertake human rights due diligence. He describes due diligence as 'the steps a company must take to become aware of, prevent and address adverse human rights impacts'. He observes that similar 'processes' are often already embedded in corporate systems due to state legislation legally obliging corporations to install information and monitoring mechanisms with the purpose of assessing financial and related risks.[656] UNGP 17–21 operationalise the concept of corporate human rights due diligence (HRDD).

a) An Iterative Process

In the language of the UNGPs, HRDD refers to a process by which businesses are required to identify, prevent, mitigate, and account for how they address adverse human rights impacts.[657] To do so, businesses have a responsibility to investigate and take appropriate measures, monitor their responses to identified issues, communicate the measures they have adopted, enable inclusive decision-making by involving potentially affected rights-holders and encourage stakeholder participation overall, and seek relevant human rights expertise.[658]

Pursuant to UNGP 17(a), the scope of HRDD should encompass human rights impacts that a business enterprise causes or contributes to through its own activities as well as impacts that are directly linked to its operations, products or services by its business relationships. According to UNGP 17(b), appropriate due diligence will depend on a business enterprise's circumstances such as its size, ownership, structure, and operational context as well as the severity of potential human rights impacts. Consequently, measures may vary in

654 UNGP 15(b).
655 UNGP 15(c) and 22.
656 SRSG UN Framework Report (2008), para. 56.
657 UNGP 15(b) and 17.
658 UNGP 17–24.

scale and complexity depending on the variables.[659] For instance, in corporate groups, the conceptualisation of due diligence may differ from businesses with a simple corporate structure: In corporate groups, the parent company may namely have a responsibility to oversee the activities conducted by its subsidiaries abroad as part of its due diligence process.[660] The UNGPs recognise the need for business enterprises with particularly high numbers of entities in their value chains to prioritise areas of heightened risk of adverse human rights impacts. This is because conducting human rights due diligence across all entities may not be feasible.[661] Where prioritisation is inevitable, business enterprises should focus on preventing and mitigating the most salient and severe impacts in accordance with the UNGPs.[662] Saliency refers to human rights that are most at risk of being adversely impacted.[663] Severity refers to the scale, scope, and remediability of an impact,[664] and is not considered in absolute terms, but relative to other identified human rights impacts[665]. Furthermore, business enterprises operating in conflict-ridden regions or in sectors where human rights abuses are regularly reported may have to create a more elaborate and comprehensive due diligence process and apply a more rigorous approach to its implementation.[666] As previously seen, the UNGPs thereby enshrine two fundamental notions that should guide the implementation of HRDD: the notion that measures have to be appropriate in view of a business enterprise's concrete circumstances and the notion that measures have to be risk-based. In any case, human rights due diligence should be an iterative process according to UNGP 17(c). The reasoning behind this requirement is the fact that business operations and operating contexts are likely to evolve over time, warranting the adaptation of the due diligence process to changed circumstances.[667]

Several scholars point out that the UNGPs' concept of due diligence is ambiguous and leaves significant discretion to corporations to interpret it as a formalistic 'box-ticking exercise' without consideration for the effective

659 UNGP 14 and 17(b).

660 OHCHR Interpretative Guide, 22.

661 Commentary to UNGP 17. The OHCHR Interpretative Guide refers to human rights at heightened risk of being abused as 'salient' human rights (OHCHR Interpretative Guide, 8).

662 Commentary to UNGP 17 and 24.

663 OHCHR Interpretative Guide, 8.

664 Commentary to UNGP 14.

665 UNGP 24 and Commentary thereto. See also, OHCHR Interpretative Guide, 84.

666 Commentary to UNGP 23.

667 UNGP 17(c).

prevention of human rights abuses.[668] Rather than viewing HRDD as a means to achieve an end, i.e. respect for human rights in practice, adopting a HRDD process risks to be viewed as the end in itself.[669] This risk is connected to the fact that the UNGPs describe HRDD as a risk management process. A process-based understanding of the UNGPs' HRDD concept that is not firmly tied to the achievement of the result, i.e. respect for human rights in practice, is more prone to 'cosmetic compliance'. Cosmetic compliance would be compliance that unduly focuses on the implementation of the HRDD steps required under the UNGPs without actual concern for the avoidance of involvement in human rights abuses.[670] This has ramifications for the transposition of the UNGPs to hard law: a formalistic approach to HRDD would regard the implementation of the HRDD steps required under the law as sufficient to absolve companies from being sanctioned and/or held liable, whereas a substantive understanding of HRDD would view due diligence as a defence. A conceptualisation of HRDD as a defence would imply that competent oversight authorities and/or courts assess whether a company has taken appropriate and effective measures to prevent the occurrence of the harm in question.[671] To ensure alignment with the spirit of the UNGPs, i.e. the prevention of human rights abuses, it is imperative that states conceptualise HRDD as a defence when transposing the corporate responsibility to respect to hard law.

b) Risk Identification and Assessment

The prerequisite of effectively implementing due diligence is to gauge human rights risks. UNGP 18 therefore states that business enterprises should inves-

668 MUCHLINSKI, BEQ 2012, 156; FASTERLING/DEMUIJNCK, J Bus Ethics 2013, 805 f.; BONNITCHA JONATHAN / MCCORQUODALE ROBERT, The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights, The European Journal of International Law (EIJIL) 2017, 899 ff., 910; LANDAU INGRID, Human Rights Due Diligence and the Risk of Cosmetic Compliance, Melbourne Journal of International Law (MJIL) 2019, 221 ff., 234 ff.; QUIJANO GABRIELA / LOPEZ CARLOS, Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?, Business and Human Rights Journal (BHRJ) 2021, 241 ff., 244 and 246 ff.

669 MARES, in Law, Business and Human Rights 2014, 43; LANDAU, MJIL 2019, 238 and 240 f. See also, QUIJANO/LOPEZ, BHRJ 2021, 248 f.

670 MUCHLINSKI, BEQ 2012, 156; FASTERLING/DEMUIJNCK, J Bus Ethics 2013, 808; MARES RADU, 'Respect' Human Rights: Concept and Convergence, in: Bird/Cahoy/Prenkert (eds.), Law, Business and Human Rights, Bridging the Gap, Cheltenham/Northampton 2014, 3-47, 43; BONNITCHA/MCCORQUODALE, EIJIL 2017, 910; LANDAU, MJIL 2019, 223 and 234 ff.; NOLAN JUSTINE, Chasing the Next Shiny Thing: Can Human Rights Due Diligence Effectively Address Labour Exploitation in Global Fashion Supply Chains?, International Journal for Crime, Justice and Social Democracy (IJCJ & SD) (2) 2022, 1 ff., 9.

671 Cf. SMIT LISE / BRIGHT CLAIRE / NEELY STUART, Muddying the Waters: The Concept of a 'Safe Harbour' in Understanding Human Rights Due Diligence, Business and Human Rights Journal (BHRJ) 2023, 1 ff., 10.

tigate human rights risks and actual impacts they may cause or contribute to through their own activities or that they are involved in as a result of their business relationships. The objective of human rights impact assessments should be to provide an evidence-based analysis of potential or actual adverse human rights impacts, taking into account the business enterprise's specific circumstances (e.g. its size and operating context).[672] To do so, business enterprises should draw on the knowledge of internal and/or independent human rights experts and meaningfully engage with potentially affected rights-holders and other stakeholders.[673] The OHCHR defines stakeholders as individuals which may 'affect or be affected' by business activities.[674] To meaningfully engage with stakeholders, business enterprises should consult them directly, taking into consideration potential barriers to effective communication such as language. In instances where direct consultation is unfeasible, business enterprises should search for reasonable alternatives, including seeking advice from independent human rights experts and civil society organisations.[675] Meaningful stakeholder engagement is not only crucial for business enterprises to gain valuable insights into the concerns of (potentially) affected rights-holders and other stakeholders, but can also help demonstrate the business enterprise's commitment to respecting human rights.[676]

In the assessment of these impacts, special attention is to be paid to gender-specific risks, and the rights-holders and communities at heightened risk of vulnerability and marginalisation.[677] As human rights situations may change considerably over time, human rights impact assessments should be conducted regularly, namely before a new business activity or relationship, prior to significant decisions or changes in operations such as market entry and product launches, and as a reaction to or in expectation of contextual changes such as rising social tensions.[678]

c) Appropriate Measures to Adress Risks and Adverse Impacts

The findings of human rights impact assessments should be effectively integrated back into due diligence and management processes and appropriate action taken to prevent and mitigate adverse human rights impacts pursuant

672 Commentary to UNGP 18; OHCHR Interpretative Guide, 39-41.

673 UNGP 18(a) and (b).

674 OHCHR Interpretative Guide, 8.

675 Commentary to UNGP 18; OHCHR Interpretative Guide, 43-45.

676 Cf. OHCHR Interpretative Guide, 44.1

677 Commentary to UNGP 18.

678 Commentary to UNGP 18.

to UNGP 19. Effective integration consists of two steps. The first step includes the assignment of responsibility to the competent level and function within the business enterprise to address identified impacts. The second step is enabling effective responses to identified impacts through internal decision-making, budget allocation, and oversight processes.[679] The appropriateness of measures that may be taken depends on two factors. The first factor is the extent of involvement in the adverse impact, meaning whether the business enterprise caused or contributed to the impact through its own activities or is involved in it as a result of its business relationships. The second factor is the extent of leverage the business enterprise has in addressing the identified impact.[680]

The UNGPs recognise that where an adverse human rights impact is directly linked to a business enterprise's operations, products or services by its business relationship with another entity, the situation is more complex than where the business enterprise caused or contributed to the impact. For these situations, the UNGPs introduce the concept of 'leverage'. In the context of the UNGPs, leverage can be defined as the ability of a business enterprise to effect change in the wrongful conduct of another entity in its value chain it is tied to by a business relationship.[681] The Commentary to UNGP 19 states that business enterprises should exercise their leverage to prevent or mitigate adverse human rights impacts. Where business enterprises lack leverage, they should aim to increase it (e.g. by offering incentives such as future business opportunities to improve the entity's human rights performance). Where the business enterprise is unable to increase its leverage, it should consider terminating the relationship, assessing the potential adverse human rights impacts of doing so.[682] Besides leverage, other factors that determine appropriate action are 'how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself' would subsequently lead to adverse human rights impacts.[683] A relationship is considered crucial if it supplies the business enterprise with an essential product or service that cannot be reasonably substituted. In cases where no appropriate alternatives exist, the severity of adverse human rights impacts must be taken into account. The more severe an impact, the swifter the business enterprise

679 UNGP 19(a).

680 UNGP 19(b).

681 Commentary to UNGP 19; OHCHR Interpretative Guide, 7.

682 Commentary to UNGP 19; OHCHR Interpretative Guide, 49 f.

683 Commentary to UNGP 19. For examples of how to determine leverage and appropriate action for identified impacts the business enterprise is solely involved in, see: OHCHR Interpretative Guide, 49 f.

is expected to notice change in the conduct of the entity concerned before it decides whether or not to terminate the relationship. No matter the decision, the business enterprise should be able to prove its continuous efforts to mitigate the impact as long as it persists and the business relationship has not been terminated.[684] The UNGPs thereby conceptualise the termination of business relationships as a measure of last resort.

d) Monitoring

According to UNGP 20, business enterprises should evaluate the effectiveness of their response to identified impacts to verify the appropriateness of measures taken. This evaluation should draw on relevant qualitative and quantitative indicators and should consider feedback from internal and external sources, especially affected individuals and communities.[685]

e) Reporting

The last step of human rights due diligence pertains to transparency. UNGP 21 specifies that business enterprises should 'communicate externally' how they address potential and actual human rights impacts. External communication is particularly important where human rights concerns are brought to the business enterprise's attention by or on behalf of affected stakeholders. This requirement to communicate adopted measures is rooted in the idea that transparency enables affected stakeholders and the general public to evaluate the effectiveness of adopted due diligence measures, to hold business enterprises to account for lack of implementation, and to track improvements.[686] UNGP 21 stresses that reporting should be especially formal where operations or operating contexts present risks of severe human rights impacts. In any case, external communication should fulfil three requirements: First, it should be in a form and frequency that is reflective of an enterprise's human rights impacts and accessible. Second, it should be informative enough to facilitate the evaluation of a business enterprise's response to identified impacts. Although this clarification is useful, it is insufficient in elucidating the expected content of reports that would ensure their quality and comparability for users. The Interpretative Guide does not provide more clarity in this regard and holds that reporting 'should be accurate and honest', and hence not (mis)used as a tool for 'self-promotion'.[687] Third, it should not endanger

684 Commentary to UNGP 19.

685 UNGP 20 and Commentary.

686 Commentary to UNGP 21; OHCHR Interpretative Guide, 57 f.

687 OHCHR Interpretative Guide, 61.

affected stakeholders or staff or spark legitimate concerns regarding commercial confidentiality.[688]

f) HRDD and Remediation

Finally, the UNGPs recognise that even with a strong commitment to human rights and an excellent human rights due diligence process in place, a business enterprise may cause or contribute to adverse human rights impacts it has not foreseen or could not prevent. In such situations, business enterprises should provide for or cooperate in the remediation of impacts.[689]

BONNITCHA/MCCORQUODALE argue that the UNGPs use language invoking two distinct concepts of human rights due diligence. On the one hand, the UNGPs use the concept of due diligence to describe a process to manage human rights risks. On the other hand, the UNGPs' description of HRDD also invokes the notion of due diligence as a standard of conduct to meet the responsibility to respect human rights.[690] They argue that this creates uncertainty about the role of HRDD – or lack thereof – in the responsibility of businesses to respect human rights and remedy human rights abuses.[691]

The scholars first point out that UNGP 11-13 namely establish 'the meaning and scope of the corporate responsibility to respect human rights [...]' without referring to due diligence at all. They note that UNGP 11 simply defines the responsibility to respect human rights as a responsibility 'to avoid infringing on the human rights of others and to address human rights impacts with which they are involved.'[692] The relationship between HRDD, if there is any, with the responsibility to respect is not clarified. The fact that HRDD is not mentioned could be interpreted to mean that a business enterprise would breach its responsibility to respect human rights as soon as it infringes on human

688 UNGP 21.

689 UNGP 22. The Commentary to UNGP 22 namely states that '[e]ven with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent'.

690 BONNITCHA/MCCORQUODALE, EJIL 2017, 908 f. Similarly, the International Law Association notes in its first report on due diligence in international law that the UNGPs appear to combine two different concepts of due diligence from two fields: the due diligence concept understood as a risk management process in business contexts and the concept of due diligence under international human rights law (International Law Association (ILA), Study Group on Due Diligence in International Law, First Report (7 March 2014), 20 f.). See also, FASCIGLIONE MARCO, The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the Legal Systems of EU Countries, Human Rights & International Legal Discourse (HR & ILD) 2016, 94 ff., 104.

691 BONNITCHA/MCCORQUODALE, EJIL 2017, 901.

692 Ibid., 909.

rights. From such a perspective, the responsibility to respect is an obligation of result. Thus, a business enterprise would have to provide remediation whenever it infringes on human rights, even if it had undertaken HRDD to avoid doing so.[693] Transposed to hard law, this would imply that states foresee a strict liability regime for human rights abuses. From the perspectives of victims of human rights abuses, a strict liability regime would be advantageous because victims would not need to prove a fault element in the business enterprise's conduct.[694]

UNGPs 17–22, titled 'human rights due diligence', then explain a set of processes for business enterprises to identify and prevent adverse human rights impacts and track the effectiveness of their responses to such impacts. UNGP 17 and UNGP 15 explicitly use the word 'process' to refer to human rights due diligence.[695] BONNITCHA/MCCORQUODALE note that these described processes are consistent with a business understanding of due diligence as a risk management process.[696] In business contexts, due diligence is typically associated with a process undertaken by corporations to identify and manage commercial risks. A frequently used example is the process carried out by parties to mergers and acquisitions.[697] In this context, the aim of due diligence is to uncover all relevant facts to help the potential purchaser make an informed decision on whether to proceed with the transaction.[698]

However, in his last report to the Human Rights Council, which contains the UNGPs, the SRSG explains that the responsibility to respect human rights requires business enterprises to 'act with due diligence to avoid infringing on the rights of others'.[699] According to BONNITCHA/MCCORQUODALE, this passage frames due diligence as a standard of conduct that business enterprises must meet to comply with their responsibility to respect human rights.[700] Due diligence as a standard of conduct is a legal concept used to determine liability that originated from Roman law.[701] Under Roman law, a person could be held liable for harm they unintentionally caused. The determining factor was

693 BONNITCHA/MCCORQUODALE, EIJIL 2017, 911.

694 For more on the concept of strict liability across European jurisdictions, see VAN DAM CEES, European Tort Law, Second Edition, Oxford 2013, 297 ff.

695 BONNITCHA/MCCORQUODALE, EIJIL 2017, 909.

696 Ibid., 908 f.; Moreover, the Commentary to UNGP 17 explains that 'human rights due diligence can be included within broader enterprise risk management systems'.

697 BONNITCHA/MCCORQUODALE, EIJIL 2017, 901.

698 Ibid.

699 SRSG UNGPs Report (2011), para. 6.

700 BONNITCHA/MCCORQUODALE, EIJIL 2017, 909.

701 ZIMMERMANN REINHARD, The Law of Obligations: Roman Foundations of the Civilian Tradition, Oxford 1996, 1009.

whether that person has met the standard of conduct expected of a diligent or reasonable person *(bonus pater familias)* under the specific circumstances of the case. The person would be held liable if they did not act with sufficient care, i.e. the care a reasonable person would have exercised.[702] This rule has been transposed to the modern tort laws of many countries and is said to have influenced the concept of due diligence in international law.[703] In light of a legal understanding of due diligence, a business enterprise would breach its responsibility to respect under the UNGPs if it did not undertake reasonable steps to avoid involvement in human rights abuses. As a result of its lack of sufficient care, the business enterprise would have to provide remedy.[704] Transposed to hard law, this understanding of the relationship between HRDD and the corporate responsibility to respect would imply that states foresee a fault-based liability regime for human rights abuses. In the absence of a reversal of the burden of proof, this would typically imply that victims of human rights abuses would have to proof a fault element committed by the business enterprise in question and a causal link between this fault and the damage they have suffered as a result.[705]

BONNITCHA/MCCORQUODALE contend that confusion about the meaning of due diligence in turn creates confusion about the relationship – if there is any – between HRDD and the responsibility to respect and the responsibility to provide remediation.[706] The scholars seek to settle this perceived confusion by finding that UNGP13 differentiates between adverse human rights impacts caused or contributed to by a business enterprise's own conduct on the one hand and adverse human rights impacts directly linked to a business enterprise's business relationships on the other. They note that while business enterprises should 'avoid' causing or contributing to adverse human rights impacts through their own activities, the standard for third party impacts is lowered to 'seek to prevent'.[707] The UNGPs only explicitly call on business enterprises to remedy human rights abuses in the former scenario.[708] The scholars conclude that while business enterprises have a strict responsibility

702 ZIMMERMANN, The Law of Obligations, 1008. See also, VAN DAM CEES, JETL 2011, 237.

703 VAN DAM CEES, JETL 2011, 237; HESSBRUEGGE JAN, The Historical Development of the Doctrines of Attribution and Due Diligence in International Law, New York University Journal of International Law and Politics (JILP) 2004, 265 ff.

704 BONNITCHA/MCCORQUODALE, EIJIL 2017, 911.

705 For more on the element of fault and causation in European tort law, see VAN DAM, European Tort Law, 297 ff. and 307 ff.

706 Ibid., 911.

707 VAN DAM, European Tort Law, 912.

708 UNGP 13 (a): '[...] and address such impacts when they occur'.

regarding their own conduct (obligation of result), they have to meet a standard of conduct to discharge their responsibility to respect with regard to third party impacts (obligation of effort).[709]

The SRSG dismissed the criticism raised by BONNITCHA/MCCORQUODALE.[710] He highlights that HRDD is distinctive from due diligence understood as a legal concept.[711] Furthermore, he clarifies that HRDD is the means through which business enterprises should prevent and mitigate human rights abuses.[712] In addition, he underlines that conducting HRDD does not absolve a business enterprise from its responsibility to remediate or contribute to remediation.[713] He concludes that BONNITCHA/MCCORQUODALE's interpretation of the UNGPs does not capture the 'scope of the responsibility to respect human rights, particularly with regard to remedy'.[714]

Notwithstanding the SRSG's clarifications, the UNGPs' HRDD concept has been interpreted in a variety of ways.[715] The emergence of different interpretations is understandable, as the term 'due diligence' has distinct meanings in different disciplines and the UNGPs do not define their 'version' of due diligence. Moreover, the misconceptions surrounding HRDD are not dispelled by the OHCHR Interpretative Guide. On the contrary, the Interpretative Guide reiterates the meaning of due diligence in law and then defines HRDD as 'an ongoing management process that a reasonable and prudent enterprise needs

709 BONNITCHA/MCCORQUODALE, EIJIL 2017, 914. This conclusion is similar to the one FASTERLING and DEMUIJNCK come to when they argue that 'human rights due diligence is neither necessary nor sufficient to meet perfect moral duties' (FASTERLING/DEMUIJNCK, J Bus Ethics 2013, 805). In other words, having a due diligence process in place does not discharge companies from remedying (certain) human rights abuses.

710 RUGGIE JOHN GERARD / SHERMAN JOHN F., III, The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights, A Reply to Jonathan Bonnitcha and Robert McCorquodale, The European Journal of International Law (EIJIL) 2017, 921 ff.

711 RUGGIE/SHERMAN, EIJIL 2017, 923 and 925.

712 Ibid., 928. BONNITCHA/MCCORQUODALE agree with these statements in their rejoinder: BONNITCHA JONATHAN / MCCORQUODALE ROBERT, The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights, A Rejoinder to John Gerard Ruggie and John F. Sherman, III, The European Journal of International Law (EIJIL) 2017, 929 ff., 932 f.

713 RUGGIE/SHERMAN, EIJIL 2017, 928.

714 Ibid.

715 LANDAU, MJIL 2019, 238; QUIJANO/LOPEZ, BHRJ 2021, 246 ff.; HOLLY GABRIELLE / METHVEN O'BRIEN CLAIRE, 'Human Rights Due Diligence Laws: Key Considerations', Briefing, the Danish Institute for Human Rights (October 2021) (hereinafter: HOLLY/METHVEN O'BRIEN, HRDD Laws: Key Considerations), 10 f. The legislative approaches mandating HRDD at the (supra-)national level and the different conceptions of HRDD reflected therein will be analysed in the third part of this thesis, in Chapters 3-5. For an assessment of corporate HRDD practices, see, e.g., the Corporate Human Rights Benchmark reports of the World Benchmarking Alliance.

to undertake'.[716] This reinforces the notion that HRDD is the result of merging two contrasting due diligence concepts together, i.e. due diligence as a risk management process on the one hand and due diligence as a standard of conduct to discharge the responsibility to respect human rights on the other. These varying interpretations have ramifications for rights-holders when states transpose the UNGPs to hard law: different understandings of HRDD affect how liability is conceptualised in hard law, namely whether liability is strict or fault-based, and which elements victims of human rights abuses will have to prove to obtain redress.[717] Consequently, the way in which the relationship between HRDD and the responsibility to respect is conceptualised in hard law influences the prospects for victims of human rights abuses to successfully hold companies liable for the damages suffered in court.

g) Limits of HRDD and Responsible Disengagement

A number of scholars point out that the UNGPs only provide limited guidance for corporations on how to tackle operational contexts in which gross human rights abuses are systemic, especially outside of conflict-affected areas.[718] However, such guidance would be important as undertaking HRDD may be ineffective to achieve respect for human rights in particular circumstances.[719]

The Commentary to UNGP 19 offers some insight into situations where disengagement from an operation or relationship may be the sole option for corporations to avoid involvement in human rights abuses. It holds that where a corporation has no leverage to prevent or mitigate human rights abuses, and is not able to increase its leverage, it 'should consider ending the relationship'.

716 OHCHR Interpretative Guide, 6.

717 Cf. BONNITCHA/MCCORQUODALE, EIJIL 2017, 919; QUIJANO/LOPEZ, BHRJ 2021, 248.

718 DEVA, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, 87; VAN HO TARA, Business and Human Rights in Transitional Justice: Challenges for Complex Environments, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, 379-401, 379; QUIJANO/LOPEZ, BHRJ 2021, 251 ff.; POLASCHEK ROSA, Responses to the Uyghur Crisis and the Implications for Business and Human Rights Legislation, Business and Human Rights Journal (BHRJ) 2021, 567 ff., 573 f. According to MICHALOWSKI, the UNGPs introduce but do not sufficiently elaborate on the relationship between HRDD and complicity. She notes that the circumstances in which 'the mere presence in a country, or the continuation of business relationships can make [companies] complicit in human rights violations carried out by their business partners' (MICHALOWSKI SABINE, Due Diligence and Complicity: A Relationship in Need of Clarification, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, Beyond the Corporate Responsibility to Respect?, Cambridge 2013, 218-242, 241).

719 QUIJANO/LOPEZ, BHRJ 2021, 251 ff.; DEVA SURYA, The UN Guiding Principles' Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface, Business and Human Rights Journal (BHRJ) 2021, 336 ff., 341; POLASCHEK, BHRJ 2021, 573 f.

The Commentary to UNGP 19 then elaborates that corporations should take into account the potential adverse impacts a withdrawal may create.

The UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (WGBHR) whose mandate is to promote, disseminate, and implement the UNGPs[720], noted in a report in 2020[721] that the UNGPs 'refer to disengagement as an option for addressing adverse human rights impacts' in high risk situations 'but do not directly deal with this situation'.[722] In this report, the WGBHR then elaborates on elements of a responsible exit for corporations in conflict-affected areas.[723] However, further recommendations to corporations on the circumstances under which they should not start their operations, enter into business relationships or cease engagement, are not made. As a result of this lack of guidance, some scholars assert that defining these circumstances is indispensable to prevent the legitimisation of corporate engagement in situations where the risk of involvement in gross human rights abuses is overwhelming.[724]

A current, frequently cited example of such a situation is the ongoing Uyghur crisis in China.[725] The Xinjiang region in in the north-west of China is home to a predominantly Muslim population made of different communities such as the Uyghurs, Kazakhs, and Kyrgyz. Contrary to the majority of the population in China, which is Han Chinese, the communities in the Xinjiang region are ethnically Turkic and speak their own languages.[726]

720 UN Human Rights Council, Resolution 17/4 (2011), para. 6.

721 UN General Assembly, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises – Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action', UN Doc. A/75/212 (21 July 2020) (hereinafter: WGBHR Report on Conflict-Affected Regions (2020)).

722 Ibid., para. 64.

723 Ibid., para. 65.

724 QUIJANO/LOPEZ, BHRJ 2021, 253. See also, DEVA, BHRJ 2021 341 and POLASCHEK, BHRJ 2021 573 f. AGUIRRE/PIETROPAOLI expressed concern that in the absence of binding standards, the question of corporate disengagement may be open to politicisation, as seen in the difference in corporate responses to the Russian invasion of Ukraine as opposed to other contexts, such as the Uyghur crisis in China (AGUIRRE DANIEL / PIETROPAOLI IRENE, Part 2: 'Responsible Exit from Russia: Business and Human Rights in a Global Governance Gap', British Institute of International and Comparative Law (BIICL) Blog (22 March 2022).

725 QUIJANO/LOPEZ, BHRJ 2021, 252; DEVA, BHRJ 2021, 341; POLASCHEK, BHRJ 2021, 567 ff. See also, Human Rights Watch / Mills Legal Clinic Stanford Law School, Report '"Break Their Lineage, Break Their Roots", Chinese Government Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims' (April 2021) (hereinafter: Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021), 52.

726 Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 7. See also: SUDWORTH JOHN, 'The Faces from China's Uyghur Detention Camps', BBC News report (May 2022).

In spring 2017, regulations of 'de-extremification' were implemented in Xinjiang which leave considerable leeway to criminalise 'virtually all Islamic matters' and Muslim religious practices.[727] A surge in mass detentions of Uyghurs began in spring 2017.[728] Since 2017[729], Uyghurs in Xinjiang have allegedly been detained for 'expressions of ethno-religious culture' such as wearing a headscarf or growing a beard and religious acts of worship such as fasting, praying, and attending religious events and ceremonies.[730] Over a million Uyghurs have reportedly been detained in so-called 're-education camps' in Xinjiang.[731] These camps are purportedly run like prisons, with a 'shoot-to-kill policy for those who try to escape'.[732] According to government sources, the purpose of these camps is to 'wash brains and cleanse hearts'.[733] Detainees are allegedly 'subjected to political indoctrination, forced to renounce their religion and culture and, in some instances, reportedly subjected to torture'.[734] There are

727 Newslines Institute for Policy and Strategy, Uyghur Genocide Report 2021, 22. See also, Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021, 27 ff. and OHCHR, Assessment of Human Rights Concerns in Xinjiang 2022, paras. 17 ff. and 84.

728 Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 12; Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021, 23 and 27 ff.

729 Some reports suggests that the 'detention of Turkic Muslims in extra-legal detention centres has been documented since at least 2016' (Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 12).

730 UN Committee on the Elimination of Racial Discrimination (CERD), Concluding Observations on the Combined Fourteenth to Seventeenth Periodic Reports of China (including Hong Kong, China, and Macao, China), UN Doc. CERD/C/CHN/CO/14-17 (19 September 2018), para. 40; Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 14-15; Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021, 27 ff.

731 XIUZHONG XU VICKY / CAVE DANIELLE / LEIBOLD JAMES / MUNRO KELSEY / RUSER NATHAN, 'Uyghurs for Sale: "Re-education", Forced Labour and Surveillance Beyond Xinjiang', Australian Strategic Policy Institute (ASPI), Policy Brief Report No. 26/2020 (hereinafter: ASPI, Uyghurs for Sale 2020), 4. Others report numbers between 'several hundred thousand and one million' (CERD, Concluding Observations on China, UN Doc. CERD/C/CHN/CO/14-17 (19 September 2018), para. 40).

732 Newslines Institute for Policy and Strategy, Uyghur Genocide Report 2021, 24; SUDWORTH, The Faces from China's Uyghur Detention Camps, BBC News Report (May 2022).

733 Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 25.

734 ASPI, Uyghurs for Sale 2020, 4; Newslines Institute for Policy and Strategy, Uyghur Genocide Report 2021, 22 ff.; Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 12 ff., 19 ff. and 25 ff.; Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021, 84 ff. and 96 ff.; OHCHR, Assessment of Human Rights Concerns in Xinjiang 2022, paras. 70 ff.

also multiple accounts of female detainees being raped, sexually humiliated, and abused.[735]

Some detainees who have 'graduated' these camps are allegedly sent to different factories in Xinjiang and across China where they are forced to work.[736] Forced labourers are also reportedly sourced from outside of internment camps.[737] In these factories, Uyghurs are purportedly paid minimal wages and exposed to 'poor working conditions' and 'a discriminatory work environment'.[738]. Uyghurs are allegedly segregated, subjected to harsh living conditions and forced to take Mandarin classes and undergo 'patriotic education' lessons after working hours. According to reports, they are also banned from practicing their religion and constantly surveilled by assigned mindors and security staff.[739] Furthermore, evidence suggests that their freedom of movement is restricted, that they have to stay in surveilled dormitories and that they are kept away from their families and children.[740] In addition, workers' families are reportedly being watched to further intimidate workers and ensure their obedience for fear of retaliation.[741]

Factories in which Uyghurs have reportedly been exploited as forced labourers were allegedly part of the supply chains of 'at least 82 well-known global brands in the technology, clothing, and automotive sectors'.[742] In response to reports of forced labour in their supply chains, some corporations

735 See, e.g., INGRAM RUTH, 'Confessions of a Xinjiang Camp Teacher', The Diplomat (17 August 2020); HILL MATTHEW / CAMPANALE DAVID / GUNTER JOEL, '"Their Goal Is to Destroy Everyone": Uighur Camp Detainees Allege Systematic Rape', BBC News article (2 February 2021); Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021, 109 f.; OHCHR, Assessment of Human Rights Concerns in Xinjiang 2022, para. 73.

736 ASPI, Uyghurs for Sale, 2020, 3; Newslines Institute for Policy and Strategy, Uyghur Genocide Report 2021, 25 f.; Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 34 ff.; Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021, 126 ff.; OHCHR, Assessment of Human Rights Concerns in Xinjiang 2022, paras. 118 ff.

737 ASPI, Uyghurs for Sale 2020, 3; Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 35; OHCHR, Assessment of Human Rights Concerns in Xinjiang 2022, paras. 118 ff.

738 Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021, 126.

739 ASPI, Uyghurs for Sale 2020, 3 and 6; Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 35.

740 ASPI, Uyghurs for Sale 2020, 3 and 6; Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 31 and 34.

741 ASPI, Uyghurs for Sale 2020, 3, 8 ff., 18 ff. and 21 ff.

742 Ibid., 3 and 7; KELLY ANNIE, '"Virtually Entire" Fashion Industry Complicit in Uighur Forced Labour, Say Rights Groups', the Guardian news article (23 July 2020).

issued statements promising to investigate allegations and cut ties with factories in Xinjiang in 2020 and early 2021.[743] Others refused any responsibility to investigate allegations, denied any connection to forced labour and were unwilling to sever business ties with factories in Xinjiang. The pressure from Chinese consumers denying all allegations of systematic human rights violations perpetrated by the Chinese government against Uyghurs presumably played a role in the latter corporate responses.[744]

The allegations raised against the Chinese government range from systematic human rights violations against Uyghurs[745], particularly large-scale arbitrary detention and forced labour[746], to crimes against humanity[747], and even genocide[748]. Art. 2(1) of the ILO Forced Labour Convention, 1930 (No. 29) defines forced or compulsory labour as 'all work or service which is extracted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily'. The ILO cites 11 indicators of forced labour. These include, but are not limited to, abuse of vulnerability, restriction of movement, isolation, intimidation and threats, and abusive working and living conditions.[749] All of the aforementioned indicators have been reported in the context of the Uyghur crisis.[750]

743 STANDAERT MICHAEL AND AGENCIES, 'Nike and H&M Face Backlash in China over Xinjiang Statements', the Guardian news article (25 March 2021).

744 MCGREGOR GRADY, 'How Brands Are Responding to China's Xinjiang Boycotts: Deleting Past Statements or All-Out FlipFlops', Fortune news article (26 March 2021).

745 According to the cited reports, the Chinese government has mainly targeted Uyghurs. However, other Turkic minorities such as Kazakh and Kyrgyz have also been subjugated to the described government practices. For the sake of brevity, the following comments refer to all affected Turkic minorities as 'Uyghurs'.

746 ASPI, Uyghurs for Sale 2020, 4 ff.; Amnesty International, '"Like We Were Enemies in A War", China's Mass Internment, Torture and Persecution of Muslims in Xinjiang', Report (June 2021) (hereinafter: Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021), 126 ff.

747 Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021; Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021), 142 ff.; The Office of the United Nations High Commissioner for Human Rights (OHCHR), Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China (31 August 2022) (hereinafter: OHCHR, Assessment of Human Rights Concerns in Xinjiang 2022), para. 148.

748 Newslines Institute for Policy and Strategy, 'The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention', Policy Report (8 March 2021) (hereinafter: Newslines Institute for Policy and Strategy, Uyghur Genocide Report 2021). The United States State Department and the parliaments of the Netherlands, Canada, and the United Kingdom qualified China's conduct as genocide. See, e.g., BBC news article, 'Uyghurs: MPs State Genocide is Taking Place in China' (23 April 2021).

749 International Labour Organisation (ILO), Special Action Programme to Combat Forced Labour, 'ILO Indicators of Forced Labour' (1 October 2012).

750 ASPI, Uyghurs for Sale 2020, 6.

According to art. 7 of the Rome Statute, crimes against humanity refer to certain, widespread or systemic attacks against a civilian population that are committed with intent. These crimes are enumerated in art. 7 (1) of the Rome Statute and constitute some of the most serious human rights violations.[751] Contrary to war crimes, crimes against humanity can be committed both during peace time as well as armed conflict.[752] Crimes against humanity, with the exception of art. 7(1)(h), do not necessarily entail discriminatory intent or motive, i.e. having to be committed against a specific national, ethnical, racial or religious group.[753] They can be directed at foreign nationals as well as at a perpetrating state's own population.[754] However, the attacks must primarily be targeted at civilians.[755] The crimes against humanity allegedly committed by the Chinese authorities include the imprisonment or other severe deprivation of physical liberty in violation of international law, the persecution of an identifiable ethnic or religious group, torture, and inhumane acts intentionally causing great suffering or serious injury to mental or physical health, namely forced labour and sexual violence.[756]

Art. 8 of the Rome Statute and art. II of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[757] define genocide as any of the listed acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. These acts include killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about a protected group's physical destruction in whole or in part, imposing measures intended to prevent births within the protected group, and forcibly transferring children of the protected group to another group. Genocide is often referred to as 'the crime of crimes'.[758]

751 International Criminal Court, 'Elements of Crimes', Publication, The Hague 2013, 3; KÄLIN/KÜNZLI, International Human Rights Protection, 32.

752 SCHABAS A. WILLIAM, The International Criminal Court: A Commentary on the Rome Statute, Second Edition, Oxford 2016, 168; AMBOS, Commentary on the Rome Statute of the ICC, Art. 7 margin n. 3.

753 SCHABAS, The International Criminal Court, 171 f.

754 Ibid., 154.

755 Ibid., 155; AMBOS, Commentary on the Rome Statute of the ICC, art. 7 margin n. 25 and 29.

756 Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 2.

757 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (9 December 1948).

758 See, e.g., SCHABAS WILLIAM A., Genocide in International Law, The Crime of Crimes, Second Edition, Cambridge 2009; SACHS JFFREY D. / SCHABAS WILLIAM A., 'The Xinjiang Genocide Allegations Are Unjustified', Project Syndicate commentary (20 April 2021) (hereinafter: SACHS/SCHABAS, The Xinjiang Genocide Allegations Are Unjustified, Project Syndicate Commentary).

China's alleged treatment of the Uyghur people has been qualified as genocide in a number of reports.[759] However, this qualification has been contested by some scholars.[760] They especially doubt the existence of sufficient proof of genocidal intent based on the available evidence.[761] This is because with the exception of the intentional forcible transfer of children, all acts of genocide aim at physically or biologically destroying a protected group.[762] The proposal to include the notion of 'cultural genocide' was explicitly rejected by the drafters of the Genocide Convention in 1948.[763] Decades later, the International Court of Justice reiterated that seeking to destroy the historical, cultural, and religious heritage of a protected group was not a punishable act covered by art. II of the Genocide Convention.[764] In this judgment, the International Court of Justice also referenced the judgements of the Trial Chamber[765] and Appeals Chamber[766] of the International Criminal Tribunal for the former Yugoslavia in which the same stance had been taken.[767] With regard to the situation in Xinjiang, China's reported treatment of the Uyghur people is arguably not necessarily aimed at the physical or biological destruction of this group as such. Evidence rather points to the existence of an intent to destroy the cultural and religious identity of Uyghurs, which is,

759 See, e.g., Newslines Institute for Policy and Strategy, Uyghur Genocide Report 2021; United States, Department of State, Bureau of Democracy, Human Rights and Labor, 2020 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet); MACDONALD QC ALISON / MCARTHUR JACKIE / HART NAOMI / ABOAGYE LORRAINE, Essex Court Chambers (London), International Criminal Responsibility for Crimes against Humanity and Genocide against the Uyghur Population in the Xinjiang Uyghur Autonomous Region, legal opinion provided for The Global Legal Action Network, in partnership with the World Uyghur Congress and Uyghur Human Rights Project (26 January 2021).

760 SACHS/SCHABAS, The Xinjiang Genocide Allegations Are Unjustified, Project Syndicate Commentary.

761 Ibid.; Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021, 2.

762 SCHABAS, The International Criminal Court, 137.

763 UN Social Council, 'Continuation of the Consideration of the Draft Convention on Genocide', Report, UN Doc. A/C.6/SR.83 (25 October 1948), 206.

764 International Court of Justice (ICJ), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, 43 ff., para. 344.

765 Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, Krstić (IT-98-33-T), Judgment, 2 August 2001, para. 580.

766 Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, Krstić (IT-98-33-A), Judgment, 19 April 2004, para. 25.

767 ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, Judgment, ICJ Reports 2007, 43 ff., para. 344.

as seen, not considered to amount to a genocidal intent within the meaning of the Convention.[768]

Regardless of the legal qualification of the Chinese authorities' acts under international criminal law, journalists, human rights organisations, and think tanks have extensively documented the systemic gross human rights violations against the Uyghurs.[769] In June 2020, a group of UN human rights experts, including numerous UN Special Rapporteurs and members of the WGBHR, expressed their grave concern regarding allegations of the systemic repression of Uyghurs in Xinjiang in a joint statement and called on the UN Human Rights Council 'to take all appropriate measures to monitor Chinese human rights practices'.[770] In June 2022, the experts reiterated their statement from 2020 and highlighted that they 'have repeatedly raised concerns about widespread violations of the rights of Uyghurs and other Muslim minorities in the Xinjiang Uyghur Autonomous Region (XUAR) [...].' In the joint statement, the experts also underlined 'the urgent need for a complete assessment of the human rights situation in the country, and especially in the Xinjiang Uyghur Autonomous Region [...]'.[771]

On 31 August 2022, the OHCHR finally published an assessment of the human rights situation in Xinjiang. In its assessment, the OHCHR noted that the 'extent of arbitrary and discriminatory detention of members of Uyghur and other predominantly Muslim groups, pursuant to law and policy, in context of restrictions and deprivation more generally of fundamental rights enjoyed individually and collectively, may constitute international crimes, in

768 Cf. SACHS/SCHABAS, The Xinjiang Genocide Allegations Are Unjustified, Project Syndicate Commentary. However, some countries, such as Germany, apply a 'social concept of destruction', whereby a state's intention to destroy the social existence of a group is considered sufficient to assume genocidal intent within the meaning of the Genocide Convention (German Federal Parliament, Research Services, 'Die Uiguren in Xinjiang im Lichte der Völkermordkonvention: Zum Tatbestand des Völkermordes, zu den rechtlichen Implikationen für deutsche Unternehmen und den Reaktionsmöglichkeiten der Staatengemeinschaft', Expert Report WD 2 – 3000 – 027/21 (12 May 2021) (hereinafter: German Federal Parliament, Report on the Situation of Uyghurs in Xinjiang, 72).

769 See, e.g., RAMZY AUSTIN / BUCKLEY CHRIS, '"Absolutely No Mercy": Leaked Files Expose How China Organized Mass Detentions of Muslims', New York Times Article (November 2019); SUDWORTH, The Faces from China's Uyghur Detention Camps, BBC News Report (May 2022); Human Rights Watch / Mills Legal Clinic Stanford Law School, Crimes against Humanity: Uyghur Report 2021; Amnesty International, Mass Internment, Torture and Persecution of Muslims in Xinjiang: Report 2021; ASPI, Uyghurs for Sale 2020.

770 OHCHR Press Release (26 June 2020), 'UN Experts Call for Decisive Measures to Protect Fundamental Freedoms in China'.

771 OHCHR Press Release (10 June 2022), 'China must address grave human rights concerns and enable credible international investigation: UN experts'.

particular crimes against humanity'.[772] The Chinese government denied all accusations in its state response to the assessment.[773] The allegations raised against China regarding their treatment of Uyghurs prompted the European Parliament to adopt a resolution calling on the Commission to propose an import ban on all products produced with forced labour and on products produced by all Chinese companies listed as exploiting forced labour.[774] The EU Commission adopted its proposal on a forced labour ban on 14 September 2022.[775] Following trilogue negotiations, the EU Forced Labour Regulation was formally adopted by the European Council on 19 November 2024[776] and published in the Official Journal of the EU on 12 December 2024[777].

In any case, human rights scholars and experts have aptly expressed that conducting human rights due diligence is unlikely to render operations in or business relationships with entities in Xinjiang compliant with the responsibility to respect human rights. They argue that human rights violations are so 'endemic to the region and directly linked to the deliberate actions of state actors' that avoiding corporate involvement in human rights abuses is hardly possible.[778]

Overall, the UNGPs' HRDD concept is based on an individual corporate risk assessment.[779] The UNGPs namely do not elaborate on the general circumstances in which undertaking HRDD is likely to prove ineffective to prevent involvement in human rights abuses.[780] Not defining these circumstances

772 OHCHR, Assessment of Human Rights Concerns in Xinjiang 2022, para. 148.

773 The People's Republic of China, 'State Response to the OHCHR's Assessment of Human rights Concerns in the Xinjiang Uyghur Autonomous Region', No.GJ/56/2022 (31 August 2022).

774 European Parliament, 'Resolution on the Human Rights Situation in Xinjiang, including the Xinjiang Police Files', 2022/2700(RSP) (9 June 2022).

775 European Commission, 'Proposal for a Regulation on Prohibiting Products Made with Forced Labour on the Union Market', COM(2022) 453 (14 September 2022).

776 Council of the European Union, 'Products Made with Forced Labour: Council Adopts Ban', Press Release (19 November 2024).

777 Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937, OJ 12.12.2024, L series.

778 POLASCHEK, BHRJ 2021, 572; Human Rights Watch, Response to Request for Public Comments on the United States' Uyghur Forced Labor Prevention Act (UFLPA) (9 March 2022), 2. The UFLPA is a new law, entered into effect on 21 June 2022, which creates a rebuttable presumption that goods made in whole or in part in Xinjiang, or produced by entities in China are linked to forced labour, and thus banned from importation into the United States (see the official website of the United States' Custom and Border Protection, Uyghur Forced Labor Prevention Act).

779 POLASCHEK, BHRJ 2021, 573.

780 VAN HO, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 380; QUIJANO/LOPEZ, BHRJ 2021, 253.

gives corporations considerable leeway to decide whether or not to enter certain markets or end operations and/or business relationships. This is even the case for situations where the risk of corporate involvement in gross human rights abuses is overwhelming. Even though the flexibility of the UNGPs' HRDD concept is one of its key advantages, relying on corporations' individual assessments of a particularly risky human rights context may open their decision-making up to politisation. Thus, scholars have rightly pointed out the need to recognise the limits of HRDD, especially in the context of gross, systemic human rights abuses such as the ones occurring in Xinjiang.[781] They call on lawmakers to adopt legislation and/or binding guidance that defines the circumstances in which corporations should consider refraining from entering or disengaging from high-risk contexts because HRDD will likely be ineffective to prevent involvement in human rights abuses.[782] By doing so, the risk of politisation – by corporations as well as states – is not eliminated but at least reduced, as the criteria for engagement and disengagement are determined in advance.

4. Access to Remedy

In the UN Framework Report, the SRSG notes that access to remedy is closely linked to the state duty to protect human rights.[783] He distinguishes between judicial and non-judicial mechanisms to address alleged human rights abuses. He points out that non-judicial mechanisms complement judicial mechanisms in a significant way. Non-judicial mechanisms may namely play an important role in contexts where courts are incapable of providing adequate and effective access to remedy. Even so, non-judicial mechanisms can also be critical in contexts with a well-functioning judiciary, providing a faster, more straightforward and less cost-intensive way to access remedy.[784] These observations are elaborated on in UNGP 25 and 26. The former urges states to ensure access to effective remedy for victims of human rights abuses. This includes the implementation of appropriate judicial, administrative, and legislative measures.[785] The Commentary to UNGP 25 clarifies that access to effective remedy contains

781 QUIJANO/LOPEZ, BHRJ 2021, 253; DEVA, BHRJ 2021, 341; POLASCHEK, BHRJ 2021, 573.

782 QUIJANO/LOPEZ, BHRJ 2021, 254; DEVA, BHRJ 2021, 341. POLASCHEK suggests a 'complementary regulatory approach' according to which states take additional regulatory measures such as sanctions and import bans to accompany mandatory HRDD laws (POLASCHEK, BHRJ 2021, 574 f.).

783 SRSG UN Framework Report (2008), para. 82.

784 Ibid., para. 84.

785 UNGP 25. See further, Office of the High Commissioner for Human Rights (OHCHR), 'Access to Remedy in Cases of Business-Related Human Rights Abuse: An Interpretive

procedural as well as substantive elements. Procedural elements include impartiality, fairness, and independence. Remedies provided by grievance mechanisms may take different forms and range from apologies, restitution, rehabilitation, financial or non-financial compensation to sanctions and guarantees of non-repetition. However, the aim of these remedies is always to counteract potential or make good actual adverse human rights impacts.[786] In the context of the UNGPs, a grievance is defined as 'a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities'. Grievance mechanisms are defined as routinised, state-based or non-state-based, judicial or non-judicial processes by help of which claims of corporate human rights abuses can be made and remedy pursued.[787]

UNGP 26 addresses judicial mechanisms in particular. Pursuant to UNGP 26, states should pay special attention to the effectiveness of domestic judicial mechanisms because they lay at the core of remedy considerations.[788] Measures to strengthen effectiveness of judicial remedy include the reduction of legal, practical, and other relevant barriers that hamper access to remedy for victims of human rights abuses.[789] A legal barrier within the meaning of UNGP 26 may arise from the manner in which legal responsibility is attributed amongst corporate entities in a corporate group, which enables the evasion of corporate accountability. Practical and procedural barriers to legitimate corporate accountability claims may arise where, for instance, the costs of litigation exceed the amount necessary to deter unmeritorious cases, and where there are no or inadequate options that allow for the aggregation of claims or representative legal action.[790]

The SRSG subdivides non-judicial mechanisms into two categories in his Framework Report: state-based mechanisms and company-level mechanisms.[791] With regard to state-based non-judicial mechanisms, the SRSG references the National Contact Points of member and adhering states of the OECD as an example.[792] With respect to company-level mechanisms, the SRSG

Guide', UN Doc. HR/PUB/24/1 (2024) (hereinafter: OHCHR, Guide on Access to Remedy), 28 ff.

786 Commentary to UNGP 25.

787 Ibid.

788 UNGP 26 and Commentary.

789 UNGP 26. See further, OHCHR, Guide on Access to Remedy, 41 ff.

790 Commentary to UNGP 26.

791 SRSG UN Framework Report (2008), paras. 93 ff. and 96 ff., respectively.

792 Ibid., para. 98.

highlights that lack of impartiality may arise as a concern. He rightfully stresses that the mechanism should therefore be designed with the help of potentially affected stakeholders and chaired jointly with representatives of stakeholder groups.[793] Apart from contributing to impartiality, this could also foster trust among stakeholders and the acceptance of outcomes. UNGPs 27-30 elaborate further on both state-based and company-level grievance mechanisms. UNGP 28 notably addresses the need for states to facilitate access to company-level grievance mechanisms, for instance, by raising awareness on their existence and UNGP 29 calls directly on business enterprises and encourages them to establish or cooperate in operational-level grievance mechanisms. Operational-level grievance mechanisms fulfil two crucial purposes in relation to the corporate responsibility to respect human rights. First, they promote the identification of adverse human rights impacts as part of a continuous human rights due diligence process. They enable rights-holders to voice their legitimate concerns on potential or actual adverse human rights impacts of corporate operations. The analysis of trends and patterns in complaints can enable corporations to identify systemic shortcomings in their human rights due diligence process and improve their practices in accordance with their findings. Second, these mechanisms permit identified adverse human rights impacts to be remediated promptly, thereby preventing their aggravation and their escalation into serious disputes.[794] UNGP 30 holds that industry, multi-stakeholder and other collaborative initiatives promoting corporate respect for human rights should implement effective grievance mechanisms.

The SRSG enumerates six minimal requirements for non-judicial grievance mechanisms to be compelling and effective. The first requirement refers to the legitimacy of the mechanism. In order to be legitimate, non-judicial mechanisms must embody clear, transparent and independent governance structures, ensuring the impartial conduct of the grievance process. The second constituent of an effective non-judicial grievance mechanism is its accessibility. The SRSG underlines that information on the existence of grievance mechanisms must be publicly available. Adequate assistance to affected parties who may face language, literacy, financial or other barriers must be provided. The third requirement is predictability. Non-judicial mechanisms must lay out clear and transparent procedures with a time frame for each step of the procedure and clarity on the types of processes and outcomes they can and cannot provide. The requirement of predictability also imposes the monitoring and implementation of outcomes. The fourth constituent of an effective

793 SRSG UN Framework Report (2008), para. 95.

794 Commentary to UNGP 29. See further, OHCHR, Guide on Access to Remedy, 72 ff.

non-judicial grievance mechanism is equity according to the SRSG. Grievance mechanisms must guarantee affected parties reasonable access to information and expertise, ensuring a process on fair and equitable terms. The fifth requirement refers to the compatibility of the mechanism with internationally recognised human rights. This includes ensuring that outcomes are in line with international human rights standards such as equality and non-discrimination. The last constituent of effective non-judicial remedies is transparency. The SRSG highlights that non-judicial mechanisms must provide sufficient transparency of process and outcome such as the receipt of complaints and the key elements of procedural results.[795]

UNGP 31 clarifies these criteria and adds two requirements: one general requirement and one specifically pertaining to company-level grievance mechanisms, as they may be more susceptible to bias. The former is reflected in UNGP 31(g), which emphasises that non-judicial grievance mechanisms should be a continuous source of learning for the improvement of the mechanisms and prevention of future harm. The latter is reflected in UNGP 31(h) which highlights the need for operational-level mechanisms to involve stakeholders in the design and monitoring of the performance of these mechanisms. UNGP 31(h) also underscores the necessity for these mechanisms to be based on dialogue to resolve grievances.[796]

5. Concluding Remarks

While the UNGPs have been hailed by many as a milestone, they have also received backlash, particularly with regard to the legally non-binding nature of the responsibility to respect human rights.[797] On the one hand, the criticism against the conceptualisation of the responsibility to respect is understandable, as corporate commitment to adhere to a responsibility which cannot be legally enforced may be weak. On the other hand, insistence on imposing legal human rights obligations on corporations would have likely failed.[798] The accusation that the UNGPs simply promote voluntarism also disregards the legal nature of soft law and its transformative potential.[799] In international law,

795 SRSG UN Framework Report (2008), para. 92.

796 UNGP 31. See further, OHCHR, Guide on Access to Remedy, 93 ff.

797 MUCHLINSKI, Multinational Enterprises, 584.

798 Ibid.

799 PITTS CHIP, The United Nations 'Protect, Respect, Remedy Framework' and Guiding Principles, in: Baumann-Pauly/Nolan (eds.), Business and Human Rights: From Principles to Practice, Abingdon / New York 2016, 51-63, 59.

soft law and hard law can be considered to exist on a continuum.[800] Albeit non-legally enforceable, soft law establishes norms of expected conduct and non-compliance leads to political repercussions.[801] It can provide authoritative guidance, often precedes the adoption of hard law such as internationals treaties, and can develop into binding customary international law.[802] This is particularly true in the field of international human rights law.[803]

Besides voluntarism, much of the criticism related to the UNGPs' responsibility to respect human rights circles around the employment of vague language that is not rooted in established human rights discourse and seemingly prizes achieving broad consensus over tackling controversial issues.[804] As seen, the UNGPs do not define key terminology used for the responsibility to respect. Moreover, the contours of the responsibility to respect, particularly its material scope, lack clarity, and the UNGPs' concept of HRDD is ambiguous. The UNGPs thereby confer considerable discretion on corporations to interpret their responsibility for themselves. This has ramifications for rights-holders and demonstrates that the UNGPs' corporate responsibility to respect should not be transposed to hard law without refinement and significant guidance.

Despite their perceived shortcomings, the UNGPs have been a driving force in the business and human rights discourse of the past decade. They have undoubtedly developed into *the* globally agreed upon authoritative standard for responsible business conduct and have inspired positive change at the international and national level.[805] The UNGPs are notably referenced by UN treaty monitoring bodies[806] when urging state parties to establish a regulatory framework ensuring that all companies domiciled in their territory or under their jurisdiction exercise HRDD[807], prompted an update of the OECD

800 JOSEPH/KYRIAKAKIS, LJIL 2023, 337. SHELTON DINAH, Soft Law, in: Armstrong (ed.), Routledge Handbook of International Law, London 2009, 68–80, 71.

801 SHELTON, in: Armstrong (ed.), Handbook of International Law, 68.

802 JOSEPH/KYRIAKAKIS, LJIL 2023, 337; SHELTON, in: Armstrong (ed.), Handbook of International Law, 72 f.

803 SHELTON, in: Armstrong (ed.), Handbook of International Law, 73. For instance, the UDHR preceeded the adoption of the ICCPR and ICESCR and the UN Declaration on the Elimination of all Forms of Racial Discrimination (UN Doc. A/RES/18/1904) preceded the adoption of the ICERD (JOSEPH/KYRIAKAKIS, LJIL 2023, 337).

804 NOLAN JUSTINE, The Responsibility to Respect Human Rights: Soft Law or Not Law?, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, Beyond the Corporate Responsibility to Respect?, Cambridge 2013, 138–161, 161.

805 WGBHR, UNGPs: Taking Stock of the First Decade (2021), 5 ff. See also, JOSEPH/KYRIAKAKIS, LJIL 2023, 341.

806 See, e.g., CESCR, General Comment No. 24 (2017), para. 33.

807 See, e.g., CESCR, Concluding Observations on France (2016), para. 13; CESCR, Concluding Observations on Germany (2018), para. 8 and 10; CESCR, Concluding Observations on Switzerland (2019), para. 11.

Guidelines, and are used as benchmarks for responsible business conduct by states in so-called National Action Plans (NAPs)[808]. Since the UNGPs' endorsement in 2011, more than thirty states around the globe, including Switzerland[809], Germany[810], and France[811], have adopted NAPs, in which they commit to implementing the UNGPs and outline measures to do so.[812] In Europe, these developments helped spark a trend towards the adoption of mandatory HRDD legislation.[813]

The OECD Guidelines will be analysed in depth in the Section below. Selected mandatory HRDD legislation in Chapters 3-5.

II. The OECD's HRDD Framework

1. The OECD Guidelines for Multinational Enterprises

As seen in the previous Chapter, the OECD Guidelines for Multinational Enterprises contain non-binding principles and standards for responsible business conduct.[814] After the endorsement of the UNGPs in 2011, the OECD Guidelines were updated to align with the former, introducing a chapter on human rights and arguably developed into the other most authoritative framework of reference for responsible business conduct.[815] The chapter on human rights in the Guidelines stipulates a corporate responsibility to respect human rights[816] and

808 JOSEPH/KYRIAKAKIS, LJIL 2023, 347. The UN Working Group on Business and Human Rights strongly encourages the adoption of NAPs and has published guidance regarding their content, see Working Group on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises (WGBHR), 'Guidance on National Action Plans on Business and Human Rights' (November 2016).

809 Switzerland adopted its first NAP in December 2026 and recently launched a NAP for the period of 2024-2027: Swiss Federal Government, 'UN Guiding Principles on Business and Human Rights: Swiss National Action Plan 2024-27'.

810 Federal Government of Germany, 'National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights, 2016-2020' (hereinafter: German NAP 2016-2020). On the content of the German NAP, see further Chapter 4 II 1.

811 French Government, Ministry of Foreign Affairs and International Development, 'Plan National de mise en œuvre des Principes directeurs des Nations Unies pour les droits de l'Homme et les entreprises' (26 April 2017).

812 For an overview, see UN Working Group on he Issue of Human Rights and Transnational Corporations and Other Business Enterprises (WGBHR), 'National Action Plans on Business and Human Rights'.

813 JOSEPH/KYRIAKAKIS, LJIL 2023, 348.

814 See Chapter 1 II 1. and III 1.1 c.

815 OECD Guidelines 2011, Foreword, 3.

816 OECD Guidelines 2023, Chapter IV: Human Rights, para. 1 (idem for the Guidelines 2011).

carry out HRDD[817], explicitly based on the UN Framework and the UNGPs[818]. However, in contrast to the UNGPs, the Guidelines primarily target multinational enterprises, operating in or from member and adhering states, not all business enterprises.[819] The OECD Guidelines were last updated in 2023.[820]

To promote a common understanding on due diligence and offer practical support to companies in their implementation of the OECD Guidelines, the OECD published the OECD Due Diligence Guidance for Responsible Business Conduct in 2018.[821] Recognising the particularities of different sectors and the complexities of reoccurring issues with regard to responsible business conduct throughout global supply chains, the OECD developed sector- and issue-specific due diligence guidance. The sectors and issues covered include extractives, agriculture, garment and footwear, and finance as well as child labour and conflict minerals.[822]

Similarly to the UNGPs, the OECD Guidelines are soft law and thus not legally binding for companies.[823] However, every OECD member and adhering state is required to establish a National Contact Point (NPC) that hears complaints of alleged breaches of the OECD Guidelines. The role of the NPCs is to offer its good offices for conflict resolution and promote the effective implementation of the OECD Guidelines.[824] NCPs do not make judgments and cannot mandate corporate action, such has stopping projects that cause or contribute to human rights abuses. Nevertheless, they may issue final statements in which they voice criticism and provide recommendations.[825] Today,

817 OECD Guidelines 2023, Chapter IV: Human Rights, para. 5 (idem for the Guidelines 2011).

818 OECD Guidelines 2023, Commentary on Chapter IV: Human Rights, para. 41 (OECD Guidelines 2011, Commentary on Chapter IV: Human Rights, para. 36).

819 OECD Guidelines 2023, Preface, para. 1. Although the Guidelines refer to 'multinational enterprises', they clarify that they do not seek to introduce 'differences of treatment between multinational and domestic enterprises; they reflect good practice for all' (OECD Guidelines 2023, I. Concepts and Principles, para. 5).

820 Organisation for Economic Co-operation and Development (OECD), '2023 Update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct'.

821 Organisation for Economic Co-operation and Development (OECD), Due Diligence Guidance for Responsible Business Conduct (2018) (hereinafter: OECD RBC Guidance), 3.

822 For an overview, see Organisation for Economic Co-operation and Development (OECD), 'Responsible Business Conduct'.

823 Cf. OECD Guidelines 2023, Preface, para. 1 and 5.

824 OECD Guidelines 2023, I. Concepts and Principles, para. 11; Organisation for Economic Co-operation and Development (OECD), 'What are National Contact Points for Responsible Business Conduct?'.

825 OECD Guidelines 2023, Part II: Commentaries on the Implementation Procedures, para. 43 f.

their significant potential as state-based non-judicial remedy mechanisms is widely acknowledged in the business and human rights sphere.[826]

2. Analysis of Cases before OECD National Contact Points with Respect to HRDD

This Section seeks to illustrate the potential and limitations of NCPs as sites for effective remedy and discuss key issues of responsible business conduct that are fleshed out further in the OECD Guidelines 2023 in comparison to the UNGPs. These issues include the role of social audits, certifications and voluntary and multistakeholder initiatives in effective HRDD, HRDD in the financial sector, meaningful stakeholder engagement, downstream HRDD, and responsible disengagement.

2.1 The Role of Social Audits, Certifications, and Voluntary Industry and Multistakeholder Initiatives in Effective HRDD

a) Ali Enterprises Factory Fire Affectees Association v. RINA

On the occasion of the sixth anniversary of the Ali Enterprises factory fire, discussed in the previous Chapter in connection with the lawsuit filed against the company KiK[827], the Ali Enterprises Factory Fire Affectees Association (AEFFAA) together with several civil society organisations filed a complaint with the Italian NCP on 11 September 2018. The complaint was filed against RINA Services, an auditing company based in Italy that provided the Ali Enterprises factory with the SA8000 certification, designed to indicate safe working conditions, just a few weeks before the fire.[828]

The complaints alleged that RINA wrongfully granted the SA 8000 certification to Ali Enterprises following a social audit conducted by a RINA subcontractor in Karachi.[829] The complainants argued that RINA's audit report should have detected child labour, excessive overtime and forced labour, and

826 Cf. SRSG UN Framework Report (2008), para. 98; Human Rights Council, 'Improving Accountability and Access to Remedy or Victims of Business-Related Human Rights Abuse Through State-Based Non-Judicial Mechanisms', Report of the United Nations High Commissioner for Human Rights, UN Doc. A/HRC/38/20 (2018) (14 May 2018), para. 24; BUHMANN KARIN, Confronting Challenges to Substantive Remedy for Victims: Opportunities for OECD National Contact Points under a Due Diligence Regime Involving Civil Liability, BHRJ 2023, 403 ff., 404.

827 Chapter 1 III 2.2 b.

828 ECCHR, RINA Case Report, 1.

829 AEFFAA et al. v. RINA, NCP Complaint (11 September 2018), 9; Italian NCP, Initial Assessment: AEFFAA et al. v. RINA (8 April 2019), para. 24.

deficient fire systems at the factory.[830] They namely contended that the faulty audit report and the issued certification contributed to the fact that fire safety conditions at the Ali Enterprises factory remained poor. They asserted that had RINA not issued the certificate, the factory owners would have been persuaded to take appropriate measures to improve fire safety at the factory to enable them to continue producing for Western companies, which would have likely changed the course of the events; however, by issuing the SA8000 certificate, RINA misled Western companies sourcing from Ali Enterprises, such as the German-based discount retailer KiK, which would have otherwise likely requested corrective measures from the factory management.[831] The complainants concluded that RINA's conduct breached the OECD Guidelines.[832] They sought mediation from the Italian NCP to encourage RINA to disclose its audit reports, assess and improve its methodology for audits, strengthen its internal quality review procedures, and provide financial compensation and an apology to the victims and their families.[833]

On 8 April 2019, the Italian NCP issued an initial assessment accepting the complaint for further examination.[834] The Italian NCP extended its good offices through mediation carried out under the guidance of an external mediator, which was accepted by both parties.[835] Two conciliation meetings were held in June and September 2019, in which the parties worked out a Terms of Settlement.[836] However, RINA refused to sign the Terms and no settlement was therefore concluded.[837]

On 11 December 2020, the Italian NCP published its final statement, in which it made four recommendations. First, it recommended RINA to make a humanitarian gesture in support of the families of the victims, without any prejudice in terms of liability, and convey their sympathy for the tragic event.[838] Second, it noted that RINA should conduct effective and targeted risk-based

830 AEFFAA et al. v. RINA, NCP Complaint (11 September 2018), 11; Italian NCP, Initial Assessment: AEFFAA et al. v. RINA (8 April 2019), para. 27 ff.

831 AEFFAA et al. v. RINA, NCP Complaint (11 September 2018), 14 ff.; Italian NCP, Initial Assessment: AEFFAA et al. v. RINA (8 April 2019), para. 30.

832 AEFFAA et al. v. RINA, NCP Complaint (11 September 2018), 21 f.; Italian NCP, Initial Assessment: AEFFAA et al. v. RINA (8 April 2019), para. 30 ff.

833 AEFFAA et al. v. RINA, NCP Complaint (11 September 2018), 23; Italian NCP, Initial Assessment: AEFFAA et al. v. RINA (8 April 2019), para. 35.

834 Italian NCP, Initial Assessment: AEFFAA et al. v. RINA (8 April 2019), para. 128.

835 Italian NCP, Final Statement: AEFFAA et al. v. RINA (9 December 2020), para. 33.

836 Ibid., para. 34 ff.

837 Ibid., para. 42 f.

838 Ibid., para. 49 b. and c.

due diligence when operating in high-risk sectors and countries.[839] Third, it held that RINA should follow-up with its commitments to improving its certification mechanism, and consider the particularities of the textile sector and high-risk countries.[840] Fourth, the NCP recommended that the parties collaborate to implement the recommendations[841] and invited the them to report on the steps taken to comply with the recommendations one year after the publication of the final statement[842].

On 3 August 2022, the Italian NCP released its follow-up report where it simply noted that the parties' positions on whether RINA had implemented the NCP's recommendations differed considerably.[843] Whereas complainants reported that RINA did not implement any of the recommendations,[844] RINA contended it had adopted and implemented an ameliorated corporate enterprise risk management system and third-party due diligence measures[845]. However, in the report, RINA admitted it had not made a humanitarian gesture to the victims of the Ali Enterprises fire and their families, but instead made a donation to a school in Lahore Pakistan. The company also admitted to not having issued an apology, as it considered that it had not 'materially participated in or caused' the fire.[846]

While it is true that NCP statements are not legally enforceable and therefore cannot grant victims of human rights abuses remediation without the cooperation of the opposing party, the Italian NPC's final statement and follow-up report are still rather disappointing. This is because the issue of inadequate social audits and certifications is a systemic one, particularly in the textile sector.[847] The Italian NCP could have taken the opportunity to clarify

839 Italian NCP, Final Statement: AEFFAA et al. v. RINA (9 December 2020), para. 49 d.

840 Ibid., para. 49 e.

841 Ibid., para. 49 f and g.

842 Ibid., para. 51.

843 Italian NCP, Follow-up Report: AEFFAA et al. v. RINA (3 August 2022), 5.

844 Ibid., 4.

845 Ibid., 2 ff.

846 Ibid., 2.

847 Cf. VAN HO TARA / TERWINDT CAROLIJN, Assessing the Duty of Care for Social Auditors, European Review of Private Law (ERPL) 2019, 379 ff., 383; NOLAN JUSTINE / FRISHLING NANA, Human Rights Due Diligence and the (Over) Reliance on Social Auditing in Supply Chains, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, 108129, 121 ff.; WILKS SASKIA / BLANKENBACH JOHANNES, 'Beyond Social Auditing: Key Considerations for Mandating Effective Due Diligence', Briefing (October 2021), Business & Human Rights Resource Centre (hereinafter: WILKS/BLANKENBACH, Beyond Social Auditing), 2; Human Rights Watch, '"Obsessed with Audit Tools, Missing the Goal": Why Social Audits Can't Fix Labor Rights Abuses in

common shortcomings and general limitations of social audits and certifications, and elaborated on how the credibility of these tools can be evaluated and improved for effective HRDD.

b) ECCHR v. TÜV Rheinland

On 2 May 2016, the German NCP received a complaint lodged by the NGO ECCHR together with other civil society organisations and a number of survivors of the Rana Plaza Factory collapse against TÜV Rheinland AG (TÜV Rheinland) and its Indian subsidiary TÜV Rheinland India Pvt. Ltd (TÜV India).[848] In the complaint, it is argued that TÜV India failed to comply with the OECD Guidelines when carrying out the social audit at Phantom Apparel Ltd (Phantom) in June 2012. The complainants namely alleged that human rights abuses such as child labour, forced labour, gender-based discrimination and abuses related to trade union rights remained uncovered. Furthermore, they claimed that Phantom was one of the textile factories producing in the Rana Plaza factory building when the latter collapsed on 24 April 2013. The collapse resulted in the death of at least 1,138 people and more than 2,000 injured. The complainants contended that TÜV India had failed to point out building safety risks when preparing the social audit.[849] The complainants asserted that they extended responsibility to TÜV Rheinland for three reasons: First, they argued that TÜV Rheinland owned 100% of its subsidiary, TÜV India. Second, they alleged that TÜV Rheinland failed to take the appropriate measures to ensure that its subsidiary would conduct social audits to an adequate standard. Third, they contended that TÜV Rheinland failed to respond to the assertions made in the auditing report, despite their apparent inaccuracy.[850] The complainants concluded that through TÜV Rheinland and TÜV India's failure to submit an audit report detailing the detected safety issues at Phantom, the companies prevented the factory owners and retailers sourcing from Phantom from taking the necessary steps to improve workers' rights and building safety. In this regard, the complainants argued, both TÜV Rheinland and TÜV India had breached their due diligence obligations under the OECD Guidelines and contributed to human rights abuses.[851]

Global Supply Chains', Report (November 2022) (hereinafter: Human Rights Watch, Social Audits and Labour Rights Abuses), 10 ff.; NOLAN, IJCJ & SD 2022, 7.

848 ECCHR et al., v. TÜV Rheinland and TÜV India, NCP Complaint (2 May 2016), 3 and 5.

849 German NCP, Final Statement: ECCHR et al. v. TÜV Rheinland (26 December 2018), para. 10.

850 Ibid., para. 11.

851 Ibid., para 13.

On 26 July 2016, the German NCP concluded its initial assessment and extended an offer of mediation to the parties, finding that some of the issues raised by the complainants merited further examination.[852] However, the efforts to find an agreement between the parties ultimately failed.[853] Despite the failed mediation efforts, the regular reliance of companies on social audits to exercise HRDD prompted the German NCP to provide insights on how to assess and improve the credibility of social audits and certifications.[854] Firstly, the German NCP questioned whether companies purchasing from factories should pay for the social audit of these factories, rather than the factory owners.[855] This could help prevent potential conflicts of interests between the auditing firm and their paying client, which are a reoccurring issue associated with the auditing business, and may incentivise auditing firms to overlook some deficiencies.[856] Secondly, the German NCP pointed out that the qualification of auditors, the time allocated for the completion of the audit, and the consideration of the perspectives of workers and trade unions, may be important factors to take into account when seeking to improve the quality of social audit practices.[857] This is because poor auditing methodologies and practices are well documented and include 'snapshot' and box-ticking-approaches to assessing working conditions, instead of consulting with workers and trade unions over a period of time, and reliance on incomplete or inaccurate information.[858] Lastly, the German NCP noted that auditing firms cannot rectify the deficiencies found in the production sites; this would require the production sites that have been audited and the companies sourcing from these factories to work together constructively and effectively. The German NCP held that the duration of the business relationship may be an important factor to enable such capacity-building in this regard. To monitor the improvement of working conditions on production sites, unannounced follow-up audits could

852 German NCP, Final Statement: ECCHR et al. v. TÜV Rheinland (26 December 2018), para. 21.

853 Ibid., para. 39.

854 Ibid., para. 46 ff.

855 Ibid., para. 49.

856 VAN HO / TERWINDT, ERPL 2019, 381; WILKS/BLANKENBACH, Beyond Social Auditing, 2; Human Rights Watch, Social Audits and Labour Rights Abuses, 5; NOLAN, IJCJ & SD 2022, 7.

857 German NCP, Final Statement: ECCHR et al. v. TÜV Rheinland (26 December 2018), para. 49.

858 NOLAN/FRISHLING, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 121 ff.; Human Rights Watch, Social Audits and Labour Rights Abuses, 12 ff.

be carried out and a company-level grievance mechanism established for workers and trade unions to flag issues.[859]

This and the previous case illustrate the need for companies to critically assess the credibility of an auditing firm's methodology and practices, understand the limitations of social audits, and thus only use social audits as an auxiliary tool for the implementation of effective HRDD.[860]

c) IDI, EC, and LICADHO v. Bonsucro

On 11 March 2019, several NGOs representing more than 700 Cambodian families, who were allegedly forcibly evicted from their homes and dispossessed of their livelihoods to pave the way for a sugar plantation, filed a formal complaint with the United Kingdom (UK)'s NCP against Bonsucro Ltd, formerly called Better Sugar Cane Initiative.[861] Bonsucro is a non-profit company registered in the UK. The organisation promotes itself as a multistakeholder initiative aimed at accelerating the sustainable production and utilisation of sugarcane by establishing and promoting sustainability standards. Bonsucro benefits from membership fees and grants admission to companies wishing to join the multistakeholder initiative that adhere to its code of conduct.[862]

Multistakeholder initiatives are part of voluntary private regulatory initiatives that establish standards to address challenges in global supply chains such as human rights and environmental concerns. Albeit voluntary, such initiatives may include enforcement measures such as exclusion from participation, loss of certification/label, and/or mechanisms for rights-holders to settle grievances. In the case of multistakeholder initiatives, these initiatives are led by a 'multistakeholder body' that brings together representatives from corporations, governments, and NGOs.[863] The complainants essentially argued that Bonsucro breached the OECD Guidelines for two main reasons. First, they alleged that Bonsucro failed to conduct appropriate HRDD when

859 German NCP, Final Statement: ECCHR et al. v. TÜV Rheinland (26 December 2018), para. 49.

860 Cf. Organisation for Economic Co-operation and Development (OECD), 'The Role of Sustainability Initiatives in Mandatory Due Diligence: Background Note on Regulatory Developments Concerning Due Diligence for Responsible Business Conduct' (2022) (hereinafter: OECD, Sustainability Initiatives & HRDD), 11 and 17.

861 IDI, EC, and LICADHO v. Bonsucro, NCP Complaint (11 March 2019), 2.

862 Ibid., 3. See also, CORCIONE ELENA, In the Wake of Bonsucro: Multi-Stakeholder Initiatives and Third-Party Certifiers at the Test Bench of OECD National Contact Points, Business and Human Rights Journal (BHRJ) 2023, 271 ff., 273.

863 BENNETT ELIZABETH A., The Efficacy of Voluntary Standards, Sustainability Certifications and Ethical Labels, in: Marx/Wouters/Van Calster et al. (eds.), Research Handbook on Global Governance, Business and Human Rights, Cheltenham 2022, 177-204, 177 f. See also, OECD, Sustainability Initiatives & HRDD, 4.

accepting and maintaining the membership of Mitr Phol Co. Ltd, a company based in Thailand. This is because of the company's reported involvement in severe human rights abuses in Cambodia that remained unremedied. Second, they alleged that Bonsucro failed to exercise its leverage vis-à-vis Mitr Phol to mitigate human rights abuses and facilitate remediation.[864]

The complainants asserted that the Cambodian government issued a 70-year land concession for sugarcane production to three subsidiaries of Mitr Phol in 2008. The complainants argued that the majority of the areas covered by the land concessions were overlapping with private lands, and no or inadequate compensation was afforded to affected rights-holders. They contended that between 2008 and 2009, Mitr Phol's subsidiaries had engaged in violent displacements of the villagers to clear the areas for plantations, resulting in further human rights abuses such as arbitrary arrests and abuses related to the right to an adequate standard of living.[865] In 2013, these abuses were brought to the attention of the Thai National Human Rights Commission, which found that Mitr Phol severely breached its responsibility to respect human rights under the UNGPs and called on the company to provide remediation. The complainants asserted that Mitr Phol refused to provide any form of compensation to the Cambodian families in spite of the Commission's findings.[866]

After Mitr Phol became a member of Bonsucro in 2010, representatives of the displaced families also submitted a complaint against Mitr Phol to Bonsucro's grievance mechanism. Rather than addressing the issues raised in the complaint, the Thai corporation opted to withdraw its membership from Bonsucro in 2012. In 2015, Bonsucro reinstated Mitr Pohl without informing the complainants and without requiring the company to resume the complaint resolution process.[867] Upon learning that Mitr Phol had been re-admitted to Bonsucro, the complainants requested Bonsucro to reinstate the complaints procedure. Bonsucro declined this request. The complainants submitted a second complaint in February 2016 in relation to the persisting human rights abuses and breaches of Bonsucro's code of conduct, this time referencing the National Human Rights Commission's findings.[868] Bonsucro's board dismissed

864 IDI, EC, and LICADHO v. Bonsucro, NCP Complaint (11 March 2019), 3; UK NCP, Final Statement: IDI et al. v. Bonsucro (11 January 2022).

865 IDI, EC, and LICADHO v. Bonsucro, NCP Complaint (11 March 2019), 8 f.; UK NCP, Final Statement: IDI et al. v. Bonsucro (11 January 2022).

866 IDI, EC, and LICADHO v. Bonsucro, NCP Complaint (11 March 2019), 2 and 13; UK NCP, Final Statement: IDI et al. v. Bonsucro (11 January 2022).

867 IDI, EC, and LICADHO v. Bonsucro, NCP Complaint (11 March 2019), 2; UK NCP, Final Statement: IDI et al. v. Bonsucro (11 January 2022).

868 IDI, EC, and LICADHO v. Bonsucro, NCP Complaint (11 March 2019), 3 and 18 f.; UK NCP, Final Statement: IDI et al. v. Bonsucro (11 January 2022).

this second complaint in December 2018 on the grounds that it had not received 'cogent evidence that [...] Mitr Phol breached the terms of Bonsucro's Code of Conduct in place at the time'.[869]

On 25 September 2019, the UK NCP carried out an initial assessment, accepted the complaint, and initiated a mediation process. Mediation efforts between the parties were conducted in 2020; however, no agreement was reached. The UK NCP then embarked on further investigations of the complaint and issued its final statement on 11 January 2022, in which the NCP concluded that Bonsucro breached the OECD Guidelines.[870] Five points made in the final statement are particularly noteworthy. First, the UK NCP held that Bonsucro, a UK-based company with global operations, was indeed a multinational enterprise covered by the OECD Guidelines, despite its non-profit nature. Second, it concluded that there was a link between the alleged human rights abuses and Bonsucro as a result of its business relationship with Mitr Phol and, by extension, with Mitr Phol's subsidiaries. The presence of a business relationship between Bonsucro and Mitr Phol was established through the payment of membership fees by Mitr Phol, which enabled the latter to utilise Bonsucro's label and enjoy other associated advantages. Third, it concurred with the complainants that multistakeholder initiatives possess a unique leverage over their members, as companies derive reputational benefits from their membership. Consequently, it held that multistakeholder initiatives should ensure that reputational benefits associated with membership are exclusively bestowed on responsible businesses. Fourth, it noted that Bonsucro failed to provide evidence that it utilised its leverage vis-à-vis Mitr Phol prior to the company's readmission in 2015. Lastly, the UK NCP concluded that Bonsucro did not undertake appropriate HRDD, as it failed to provide the necessary information on its benchmarks regarding human rights compliance for companies to be admitted.[871]

This case demonstrates that mere participation in industry or multistakeholder initiatives should never be conflated with compliance with effective HRDD. Such initiatives can be valuable tools to support companies in implementing HRDD measures by, for instance, providing them with information on particular risks in their supply chains and a platform to jointly address these risks and thus increase leverage and reduce costs. Nevertheless, these initiatives vary widely in terms of their alignment with the UNGPs and the

869 IDI, EC, and LICADHO v. Bonsucro, NCP Complaint (11 March 2019), 19; UK NCP, Final Statement: IDI et al. v. Bonsucro (11 January 2022).

870 UK NCP, Final Statement: IDI et al. v. Bonsucro (11 January 2022).

871 Ibid. See also, CORCIONE, BHRJ 2023, 274.

OECD Guidelines and regularly only cover specific human rights risks or parts of the supply chain. This in itself is not problematic, as certain initiatives have developed into best practices precisely because they focus on a particular issue and/or section of the supply chain. However, it means that companies should carefully assess the credibility and alignment of such initiatives with the UNGPs and the OECD Guidelines.[872] In this regard, the alignment assessments of industry and multistakeholder initiatives carried out by the OECD may serve as an important source of information.[873]

In any case, the updated 2023 version of the OECD Guidelines now explicitly recognise the importance of joining industry and multistakeholder initiatives in effective HRDD and encourage participation therein.[874] At the same time, they underscore that companies participating in such initiatives remain individually responsible for carrying out effective HRDD.[875]

2.2 HRDD in the Financial Sector and Meaningful Stakeholder Engagement

a) EC and IDI v. Australia and New Zealand Banking Group

On 7 October 2014, several NGOs filed a complaint to the Australian NCP on behalf of 681 families who were allegedly forcibly displaced and dispossessed of their land, productive resources and in some cases houses, to pave the way for a sugar plantation and refinery project in Cambodia by the local company Phnom Penh Sugar Co. Ltd (PPS). The complainants argue that the project was partially financed by the Australia and New Zealand Banking Group (ANZ). In addition to forced evictions, military-backed land seizures and destruction of crops and property, the project was purportedly also linked to arbitrary arrests and intimidation of villagers, and the pervasive use of child labour as well as unsafe working conditions, which led to the death of multiple workers.[876]

872 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 12; OECD, Sustainability Initiatives & HRDD, 12.

873 These assessments examine the alignment of industry, government or multi-stakeholder initiatives with the recommendations of OECD due diligence guidance. The methodology and results of these assessments are published, see Organisation for Economic Co-operation and Development (OECD), 'OECD Alignment Assessments of Industry and Multi-Stakeholder Programmes'.

874 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 27.

875 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 12. See also, INGRAMS MARIAN G., The 2023 Update of the OECD Guidelines sets Stronger Standards for Companies but Weak Expectations for Governments – High and Lowlights from the New Text, Business and Human Rights Journal (BHRJ) 2023, 427 ff., 429.

876 IDI and EC v. ANZ, NCP Complaint (7 October 2014), 4 f.; Australian NCP, Final Statement: IDI and EC v. ANZ (27 June 2018), para. 7 ff.

The complaints particularly contended that ANZ breached the OECD Guidelines by financing PPS's project and thus contributing to the aforementioned human rights abuses through its actions and omissions, and failing to take appropriate measures to prevent and remedy them. The complainants argued that they had raised the issues connected with the PPS loan with ANZ on numerous occasions and that the case had also garnered much public attention prior to ANZs loan decision. The complainants asserted that ANZ proceeded with the approval of the loan to PPS, in spite of the controversies associated with the project and without attaching any human rights conditions to the provision of the loan.[877] The complainants concluded that ANZ should divest itself of the profits it unjustly generated from the project and thus compensate affected rights-holders.[878]

The Australian NCP accepted the case and initiated a mediation process.[879] However, after a series of talks from September until December 2015, the parties concluded that no satisfactory agreement could be reached.[880] On 27 June 2018, the Australian NCP issued its final statement. The NCP agreed with the complainants that ANZ could have been aware of the risks associated with PPS based on publicly available information, and found that there are significant inadequacies in the current policies and procedures ANZ implemented to ensure their investments are compliant with human rights standards.[881] The NCP provided multiple recommendations to ANZ, including the need for ANZ to implement measures promoting internal compliance with its own corporate standards and to clearly demonstrate the proper application of these standards to ensure they are aligned with the OECD Guidelines.[882] Furthermore, it noted that ANZ should strengthen its HRDD processes, including its screening and monitoring systems to ensure their appropriateness for managing risks connected to its lending activities.[883] The NCP lastly recommended ANZ to establish a grievance mechanism, which would support the effective implementation of its corporate standards in relation to human rights. According to the NCP, this would furthermore demonstrate that ANZ takes its responsibilities as a multinational enterprise in the financial

877 IDI and EC v. ANZ, NCP Complaint (7 October 2014), 5.

878 Ibid., 15; Australian NCP, Final Statement: IDI and EC v. ANZ (27 June 2018), para. 11

879 Australian NCP, Final Statement: IDI and EC v. ANZ (27 June 2018), para. 20.

880 Ibid., para. 21 f.

881 Ibid., para. 37 f.

882 Ibid., para. 46.

883 Ibid., para. 47.

sector seriously.[884] It called on ANZ to report back on the progress it has made in a year.[885]

Whereas the complainants generally welcomed these findings, they expressed dissatisfaction with the NCP's omission to call on the bank to address the harms it had contributed to. In light of this, several civil society organisations and ANZ shareholders wrote to ANZ's CEO, requesting that the victims of the project receive compensation for the damages they suffered. In October 2018, ANZ's CEO Shayne Elliott announced that the bank was indeed considering compensating the hundreds of families that suffered as a result of the bank's investment.[886] Following this statement, the complainants contacted ANZ, which eventually led to a request for the Australian NCP to initiate a new mediation process between the parties. On 7 February 2020, a meeting was set up that resulted in an agreement to resolve the complaint. While the details of the agreement were kept confidential, the parties released a joint statement setting out the broad terms.[887] These terms included two particularly noteworthy points. First, ANZ committed to pay the gross profit it generated from the loan to affected communities, thereby contributing to alleviating their hardships. Second, ANZ committed to review and strengthen its human rights policies and grievance mechanisms.[888]

Civil society hailed this agreement as a 'precedent-setting move' to make ANZ 'the first large commercial bank in the world to adopt a human rights policy that gives communities harmed by ANZ-financed projects a real path to justice'.[889] The case exposes human rights risks financial institutions may be involved with and demonstrates the necessity of clarifying HRDD in the financial sector due to its intricacies.[890] The OECD has contributed to the latter task by publishing guidance on HRDD in the financial sector over the years.[891]

884 Australian NCP, Final Statement: IDI and EC v. ANZ (27 June 2018), para. 48.

885 Ibid., 49.

886 OECD Watch, 'EC and IDI vs. Australia and New Zealand Banking Group, ANZ's Role in Displacing & Dispossessing Cambodian Families'.

887 Australian NCP, Follow-up Statement: IDI and EC v. ANZ (27 February 2020), para. 2 ff.

888 Ibid., para. 5.

889 BANKTRACK, 'ANZ Launches Human Rights Grievance Mechanism in a first for the Global Banking Sector' (3 November 2021), News article.

890 On the need to clarify HRDD for financial institutions, see further, DAVAANYAM OTGONTUYA, Articulating Responsibility for Human Rights and the Environment in the Financial Sector: Outlook on the Concrete Cases of the OECD National Contact Points, in: Davaanyam/Krajewski (eds.), Exploring Corporate Human Rights Responsibilities in OECD Case Law, Cham 2025, 51–82, 70 ff. and 76.

891 This includes guidance for investors, responsible corporate lending and securities underwriting, and project, asset and finance transactions, see Organisation for Economic

Moreover, the case illustrates how NCP complaints can be used to garner public scrutiny and pressure to hold companies accountable. However, this necessitates that NCPs investigate instances effectively, spell out breaches clearly, and furnish relevant recommendations in the first place.

b) Society for Threatened Peoples v. Credit Suisse

On 28 April 2017, the Swiss NGO Society for Threatened Peoples submitted a complaint with the Swiss NCP in regard to the business relationships between the North Dakota Access Pipeline (DAPL) and related companies with Credit Suisse, a bank headquartered in Switzerland. The DAPL project is based in the US and sparked major protests due to its potential threat to the primary source of drinking water for the indigenous population as well as potential leakages, which could affect 17 million people.[892] The complainants stated that Credit Suisse's ongoing relationship with its clients, despite its knowledge of potential human rights abuses linked to the DAPL project, breached the bank's own internal policies and the OECD Guidelines. With respect to the latter, the complainants notably alleged that Credit Suisse failed to conduct risk-based HRDD, including by failing to adequately consult indigenous communities and persuade its investees to prevent or mitigate the adverse impacts of the project.[893]

The Swiss NCP published its Initial Assessment on 19 October 2017, accepting the case for further investigation. While Credit Suisse had asked that the US NCP take charge of the case, given the DAPL project's location, the Swiss NCP noted that handling the case falls within its competence. This is because the key issue of the complaint surrounded the development and implementation of Credit Suisse's internal policies and their alignment with the OECD Guidelines. Furthermore, the Swiss NCP had consulted and agreed with the US NCP to take on the lead in the case.[894] Consequently, the Swiss NCP appointed an external mediator agreed to by both parties and several mediation sessions were held. According to the Swiss NCP, the parties agreed that the concept of Free, Prior and Informed Consent (FPIC) was essential in the context of the

Co-operation and Development (OECD), 'Responsible Business Conduct in the Financial Sector: Operationalizing RBC Due Diligence amongst Financial Sector Practitioners'.

892 Society for Threatened Peoples v. Credit Suisse, NCP Complaint (28 April 2017), 1; Swiss NCP, Initial Assessment: Society for Threatened Peoples v. Credit Suisse (19 October 2017), 1.

893 Society for Threatened Peoples v. Credit Suisse, NCP Complaint (28 April 2017), 2 f.; Swiss NCP, Initial Assessment: Society for Threatened Peoples v. Credit Suisse (19 October 2017), 1 f.

894 Swiss NCP, Initial Assessment: Society for Threatened Peoples v. Credit Suisse (19 October 2017), 7.

specific instance, and so the dialogue focused on the concept of FPIC and how Credit Suisse could implement it in its policies and practices.[895]

On 16 October 2019, the Swiss NCP issued a final statement outlining an agreement reached by the parties. Under the agreement, Credit Suisse agreed to incorporate FPIC in its internal sector specific policies for oil and gas as well as mining, forestry, and agribusiness sectors, and take measures to implement them effectively. These policies will namely set the expectation that clients are required to demonstrate alignment with the key objectives and requirements of the International Finance Corporation Performance Standard 7 – Indigenous Peoples. This standard integrates the UN Declaration on the Rights of Indigenous Peoples and the concept of FPIC.[896] The parties also agreed that the Swiss NCP would follow-up to ensure Credit Suisse's adherence to this commitment.[897]

In their press release, the complainants stated that they welcomed the improvement of Credit Suisse's internal guidelines and acknowledge this as the bank's first steps towards incorporating the rights of indigenous communities and a clear signal for the financial sector as a whole. At the same time, the complainants noted with concern that the bank's commitment is limited to project financing. As a result, company financing and stock broking are excluded from the bank's commitment. The complainants concluded that the amendment of Credit Suisse's internal policies and their implementation was ultimately only a small step towards the comprehensive protection of indigenous communities.[898]

This case is especially noteworthy from the perspective of indigenous rights-holders at the time, because the 2011 version of the OECD Guidelines did not explicitly reference the rights of indigenous peoples, but, similarly to the UNGPs, called on companies to simply respect all internationally recognised human rights.[899] The 2023 version now calls on companies to pay particular attention to adverse impacts on indigenous peoples, amongst other vulnerable and marginalised groups, when conducting HRDD. The Guidelines specifically refer to the UN Declaration on the Rights of Indigenous Peoples and note that OECD guidance, such as the OECD Due Diligence Guidance on Meaningful Stakeholder Engagement in the Extractive Sector, offer further

895 Swiss NCP, Final Statement: Society for Threatened Peoples v. Credit Suisse (16 October 2019), 2.

896 Ibid., 2 f.

897 Ibid., 3.

898 Society for Threatened Peoples, 'Credit Suisse Makes a Step Towards Indigenous Rights', Press Release (16 October 2019).

899 Cf. INGRAMS, BHRJ 2023, 431.

practical insights in this regard, including in relation to FPIC.[900] The case furthermore illustrates the integral part meaningful engagement with relevant stakeholders, particularly (potentially) affected rights-holders, plays in credible and effective HRDD overall.[901] The 2023 version of the OECD Guidelines better reflect the importance of stakeholder engagement throughout the due diligence process, as they contain numerous clarifications on how companies should meaningfully engage with stakeholders or their legitimate representatives, particularly those in positions of vulnerability and marginalisation.[902] The 2023 Guidelines notably stress that meaningful stakeholder engagement is not only a crucial component of due diligence, but may even be a right in and of itself.[903] This is a more assertive formulation than the one in the 2011 Guidelines.[904] Furthermore, the 2023 Guidelines highlight that meaningful stakeholder engagement entails creating a space in which rights-holders and other stakeholders feel safe to voice their opinions and concerns without fear of reprisal. In addition, the 2023 Guidelines call on companies to ensure that the means through which they enable stakeholder engagement are accessible and appropriate. This includes considering potential barriers (e.g. language and literacy levels in a particular context) as well as the vulnerability and marginalisation of certain groups. Finally, the 2023 Guidelines remind companies that the timely provision of information to stakeholders on the avenues through which they seek to consult stakeholders (e.g. meetings, hearings, complaints procedures) is a precondition for meaningful engagement.[905]

900 OECD Guidelines 2023, Commentary on Chapter IV: Human Rights, para. 45.

901 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 49 f.; Organisation for Economic Co-operation and Development (OECD), Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2017) (hereinafter: OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector), 14.

902 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28. See further, OMARI LICHUMA CAROLINE, 'Meaningful Stakeholder Engagement 2.0.?: Tracing Developments in the Revised 2023 OECD Guidelines for Multinational Enterprises', Nova Centre on Business, Human Rights and the Environment Blog (24 October 2023) (hereinafter: LICHUMA, OECD Guidelines 2023, NOVA BHRE Blog).

903 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28.

904 In the 2011 version of the Guidelines, companies were urged to '[e]ngage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities' (OECD Guidelines 2011, II. General Policies, para. 14.). See also, LICHUMA, OECD Guidelines 2023, NOVA BHRE Blog.

905 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28.

2.3 Downstream HRDD and Responsible Disengagement

a) Privacy International et al. v. Gamma International

On 1 February 2013, several NGOs filed a complaint with the UK NCP regarding the alleged use of surveillance technology produced by UK-based company Gamma International against human rights activists in Bahrain. The complainants argued that by selling this technology to and maintaining it for the Bahraini government, Gamma International facilitated the government's perpetration of human rights abuses, including abuses of the right to privacy, freedom of expression and freedom of association, as well as arbitrary arrest and torture.[906] The complainants namely contended that the supplied surveillance technology enabled Bahraini authorities to access and record private conversations, correspondence and other data (e.g. address books) of activists in Bahrain. The complainants alleged that based on the information obtained through this technology, these activists, who had not committed any criminal offences under Bahraini law, were subsequently detained and, in certain instances, subjected to torture by Bahraini security forces.[907] The complainants argued that Gamma was aware or ought to have been aware that its product was likely to be used in a manner incompatible with international human rights law. The complainants concluded that Gamma lacked an appropriate human rights policy enabling the company to ensure that its technology is used in line with international human rights standards.[908]

In June 2013, the UK NCP conducted an initial assessment and concluded that the complaint merited further examination.[909] It also extended an offer of mediation to the parties, which both parties accepted. However, no agreement was reached.[910] In December 2014, the UK NCP consequently issued its final statement, in which it made several noteworthy observations and recommendations with regard to downstream HRDD.[911] First, the UK NCP held that it was unable to verify the allegation according to which Gamma was linked to the human rights abuses allegedly committed by the Bahraini

906 Privacy International et al. v. Gamma International, NCP Complaint (1 February 2013), 4; UK NCP, Initial Assessment: Privacy International et al. Gamma International (21 June 2013), para. 1 f.

907 UK NCP, Initial Assessment: Privacy International et al. v. Gamma International (21 June 2013), para. 2.

908 UK NCP, Initial Assessment: Privacy International et al. v. Gamma International (21 June 2013), para. 3.

909 Ibid., para. 18.

910 Ibid., para. 13 f.

911 UK NCP, Final Statement: Privacy International et al. v. Gamma International (December 2014), para. 61 ff.

government.[912] Nevertheless, it noted that Gamma had not submitted any information that would allow the NCP to rule out a business relationship with the Bahraini authorities. In fact, the company refused to disclose any information with regard to the states it supplies with its products.[913] The UK NCP observed that the information provided by the complainants indicated that Gamma had been willing to market its products to security agencies in oppressive regimes, whose activities had reportedly raised human rights concerns in the past before.[914] Based on the submitted evidence, it considered it to be 'reasonably certain' that the technology used on the activists in Bahrain as having been Gamma's.[915] Second, the UK NCP observed that Gamma primarily relied on legal restrictions, i.e. sanctions, issued by the UK government and other European governments, to limit its customer base and rule out certain customers. While the NCP acknowledged that human rights assessments are part of the export control regime for certain products, it held that Gamma's human rights policy appears inappropriate in comparison to other companies' approach to human rights risks within the same sector. It deemed Gamma's HRDD to be insufficient to protect rights-holders from the abusive use of its products.[916] Third, the UK NCP considered Gamma's engagement with the NCP process to be poor, particularly in light of the severity of the raised issues.[917] Finally, the UK NCP concluded that Gamma's conduct breached the OECD Guidelines.[918] It recommended Gamma to consider the findings of relevant international bodies such as the UN and the UK government for its HRDD and not limit itself to sanctions, to participate in industry initiatives that promote best practices, to review its communication strategy and be more transparent, in accordance with sector requirements, and cooperate in remediation whenever it detects the misuse of its products.[919] In its follow-up statement published in February 2016, the UK NCP noted the absence of an update provided by Gamma and therefore concluded that no progress or effort have been made towards meeting its recommendations.[920] It also held that in view of

912 UK NCP, Final Statement: Privacy International et al. v. Gamma International (December 2014), para. 49 and 57.

913 Ibid., para. 52.

914 Ibid., para. 58.

915 Ibid., para. 56.

916 Ibid., para. 61 ff. and 68.

917 Ibid., para. 70.

918 Ibid., para. 68.

919 Ibid., para. 73.

920 UK NCP, Follow-up Statement: Privacy International et al. v. Gamma International (February 2016), para. 9.

available guidance on responsible business conduct in the information and communication technology (ICT) sector provided by the UK government and the UK NCP, Gemma's failure to take action was a choice rather than an inevitable consequence of the nature of its business.[921]

This case demonstrates the importance of companies including their downstream supply chain in their HRDD, especially in the ICT sector. While the 2011 OECD Guidelines already covered the downstream part of a company's supply chain, as illustrated by the cases handled by several NCPs[922], the inclusion of downstream business activities in HRDD is now made explicit in the updated Guidelines.[923] The new text clarifies that the term 'business relationships' encompasses entities in the supply chain that receive, license, buy, or use products or services from the company.[924] Downstream HRDD should thus include known or reasonably foreseeable circumstances associated with the use and improper use or misuse of the product or service, which may result in human rights abuses.[925] With respect to technology, the updates in the chapter on science, technology and innovation is noteworthy.[926] The updated 2023 Guidelines namely stipulate that enterprises should conduct risk-based due diligence on actual and potential adverse impacts related to science, technology and innovation, including by carrying out due diligence over harms stemming from the development, financing, sale, licensing, trade, and use of technology, gathering and using data, and scientific research and innovation.[927] The Guidelines now specify that due diligence should address known or reasonably foreseeable circumstances related to the proper or improper use, or misuse, of products or services in these fields.[928] The focus of the recommendations is on responsible data governance[929], the prevention of

921 Ibid., para. 10 f.

922 For a compilation of relevant cases, see, e.g., INGRAMS MARIAN G. / WILDE-RAMSING JOSEPH, 'Downstream Due Diligence: Setting the Record Straight' (16 December 2022), OECD Watch / Swed Watch / European Coalition of Corporate Justice et al..

923 Cf. FELD LEONARD, 'A (Slight) Raise of the Bar: Due Diligence in the 2023 Update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct', Nova Centre on Business, Human Rights and the Environment Blog (9 November 2023) (hereinafter: FELD, OECD Guidelines 2023, NOVA BHRE Blog); Ingrams, BHRJ 2023, 429.

924 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 17.

925 Ibid., para. 20.

926 For an analysis of these updates, see further INGRAMS, BHRJ 2023, 431.

927 OECD Guidelines 2023, Chapter IX: Science, Technology and Innovation, para. 1.

928 OECD Guidelines 2023, Commentary on Chapter IX: Science, Technology and Innovation, para. 112.

929 Ibid., para. 110.

misuse of civilian technology for harmful purposes[930], and children's rights in the digital environment[931].[932]

These clarifications are a significant step in view of the human rights risks associated with the downstream supply chain in general and the ICT sector in particular. However, there is a need for more detailed guidance on effective downstream HRDD to promote, harmonise, and streamline responsible corporate practices.[933]

b) SOMO Representing 474 Myanmar CSOs v. Telenor ASA

On 27 July 2021, the Centre for Research on Multinational Corporations (SOMO) filed a complaint against Telenor ASA, a MNE headquartered in Norway, to the Norwegian NCP on behalf of 474 Myanmar-based civil society organisations. The complaint alleged that Telenor's sale of its Myanmar business to the Lebanese company M1 Group breached the standards of responsible disengagement set out in the OECD Guidelines in three key respects: First, the complainants argued that Telenor failed to conduct appropriate HRDD and failed to seek to prevent or mitigate potential human rights abuses connected to the sale of its Myanmar operations. Second, they alleged that Telenor failed to meaningfully engage with relevant stakeholders regarding the sale of Telenor Myanmar to the M1 Group, including the Myanmar-based civil society organisations on whose behalf the complaint was filed. Third, they contended that Telenor was not transparent about its decision to disengage from its Myanmar operations.[934] Telenor however contended that the sale of its operations in Myanmar was its sole option to avoid involvement in human rights abuses perpetuated by the military junta and breaching EU data protection legislation, which Norway adheres to. This is because remaining in Myanmar would have forced Telenor to install technology enabling the surveillance of rights-holders.[935] The company asserted that its decision to disengage was 'taken as a last resort'

930 OECD Guidelines 2023, Commentary on Chapter IX: Science, Technology and Innovation, para. 111.

931 Ibid., para. 115.

932 INGRAMS, BHRJ 2023, 431.

933 FELD, OECD Guidelines 2023, NOVA BHRE Blog.

934 SOMO v. Telenor, NCP Complaint (27 July 2021), 3 f.; Norwegian NCP, Initial Assessment: SOMO v. Telenor (27 September 2021), 2. See also, AGUIRRE DANIEL / PIETROPAOLI IRENE, Heightened Human Rights Due Diligence in Practice: Prohibiting or Facilitating Investment in Conflict Affected Areas?, Journal of Human Rights Practice (JHRP) 2023, 541 ff., 552 ff.

935 Telenor, 'Continued Presence in Myanmar Not Possible for Telenor', Press Release (15 September 2021).

after considering alternatives and that it remained committed to adhere to international standards for responsible business conduct.[936]

Telenor's sale to M1 Group followed the Myanmar military's 1 February 2021 coup and violent crackdown on peaceful protests, civil society and independent media, as well as increased electronic surveillance. Civil society members in Myanmar involved in the complaint articulated their need for responsible telecommunications enterprises that will oppose repression and protect end users' right to privacy, rather than collaborate with the authoritarian government.[937] According to the complainants, the M1 Group is owned by the affluent Mikati family, who purportedly have a long history of operating in authoritarian regimes such as Syria, Sudan, and Yemen, and are facing unresolved allegations of corruption and terrorist financing.[938] The complainants expressed their lack of confidence in M1 Group's ability to respect human rights, comply with international due diligence standards, and thus refrain from providing the military junta with the data of over 18 million Telenor users, which would expose the latter to the risk of further human rights abuses.[939]

On 27 September 2021, the Norwegian NCP issued an initial assessment accepting the complaint for good offices.[940] One year later, the Norwegian NCP published a Memorandum of Understanding (MoU) agreed between the parties. The parties have been engaged in mediation since June 2022 and arrived at a preliminary MoU outlining the mediation discussions, the agreements and acknowledgements made by both parties, and a path forward for further mediation and agreement.[941] The parties agreed, among other things, to continue engaging in meaningful stakeholder dialogue. This encompasses Telenor sharing its experience and expertise regarding specific risks to digital rights and freedoms in Myanmar under the military junta that are linked to the digital ecosystem and the sale of Telenor Myanmar. Moreover, the parties agreed to jointly appoint an independent researcher to conduct an ICT ecosystem risk study to enhance Myanmar civil society's awareness of risks related to users' digital footprints in challenging human rights contexts. Besides

936 Norwegian NCP, Initial Assessment: SOMO v. Telenor (27 September 2021), 4.

937 WILDE-RAMSING JOSEPH, 'Complaint against Telenor for Irresponsible Disengagement from Myanmar' (27 July 2021), Centre for Research on Multinational Corporations (SOMO). For an analysis of the human rights situation in Myanmar post coup, see Office of the High Commissioner for Human Rights (OHCHR), 'Myanmar: UN Experts Condemn Military's "Digital Dictatorship"', Press Release (7 June 2022).

938 SOMO v. Telenor, NCP Complaint (27 July 2021), 6 f.

939 Ibid., 8 and 10.

940 Norwegian NCP, Initial Assessment: SOMO v. Telenor (27 September 2021), 9.

941 Norwegian NCP, Memorandum of Understanding (15 July 2022), 2.

financing the study, the parties agreed that Telenor would also support the implementation of the follow-up actions recommended in it. Lastly, Telenor committed to conducting an internal review process regarding responsible market entry and exit with the possibility for complainants to provide input.[942] The complaint is currently still pending before the Norwegian NCP, until a final agreement is reached.[943]

This case demonstrates the necessity of exercising heightened HRDD in particularly challenging human rights contexts and the complexity of deciding whether to remain or exit a particular context for a company. With regard to the latter, the 2023 Guidelines provide some clarifications: First, they highlight that disengagement should be treated as a last resort, i.e. after failed attempts at mitigating human rights abuses or where mitigation appears unfeasible. Second, they underscore the need for companies to take into account the potential social, environmental and economic adverse impacts related to their decision to disengage. Third, when deciding to disengage, companies should do so responsibly including by meaningfully consulting relevant stakeholders in a timely manner and taking reasonable and appropriate steps to prevent or mitigate adverse impacts linked to their disengagement.[944] Overall, the 2023 Guidelines emphasise that the decision to disengage does not absolve companies of their responsibilities.[945] While these updates consolidate the state-of-the art in terms of responsible disengagement[946], more detailed and context-specific guidance will likely be necessary to avoid politicised corporate decision-making and ensure a more uniform and streamlined application of criteria to the decision on whether to remain or disengage.[947]

3. Concluding Remarks

Overall, these cases illustrate the potential of NCPs as institutions that clarify the application of OECD Guidelines in various contexts and thus advance the refinement of due diligence standards. Crucially, some of the clarifications provided in the above cases are now explicitly laid out in the updated 2023 Guidelines, which helps combat a tick-box approach to HRDD and promote the harmonised implementation of meaningful HRDD instead.

942 Norwegian NCP, Memorandum of Understanding (15 July 2022), 4 f.

943 Norwegian NCP, 'Update in Specific Instance – MoU: A Joint Update from Telenor and SOMO' (28 October 2022).

944 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 25.

945 FELD, OECD Guidelines 2023, NOVA BHRE Blog.

946 Ibid.

947 Cf. AGUIRRE/PIETROPAOLI, JHRP 2023, 555. See also, Section I 3.2 g of this Chapter.

In addition to their essential role in the refinement of due diligence standards, the cases also demonstrate that NCPs possess considerable potential as non-judicial remedy sites. NCP complaint procedures are notably less costly and pose less technical challenges than litigation before courts. Furthermore, NCP procedures are less adversarial, which means that while claims still have to be substantiated, the level of persuasiveness in argument and thus necessary expertise as well as the evidentiary burden weigh less heavily on complainants.[948] In addition, through exercising their investigative and conflict resolution competence, NCPs can contribute to balancing out power disparities in ways civil courts cannot.[949]

However, the prerequisite for the NCP to fulfil its role is that it is well-equipped in terms of staff and resources and that the parties cooperate in the process in good faith. Without such cooperation, the fact-finding of NCPs is hampered and thus their ability to share pertinent insights, provide recommendations, and of course, help find a satisfactory solution for both parties. This is why some commentators argue in favour of accompanying state measures that sanction the reluctance of companies to participate in the NCP process in good faith, e.g., through limiting access to export promotion or other economic benefits.[950] Canada, for instance, has implemented an integrated approach to economic diplomacy as part of its enhanced corporate responsibility strategy for the extractive sector. A crucial element of that approach is making government support in foreign markets contingent upon a company's good faith participation in processes before the Canadian NCP. In 2015, that approach resulted in the withdrawal of Canadian trade commissioner services from a Canada-based mining company when it refused to cooperate after a complaint had been filed against it before the Canadian NPC.[951]

In any case, it is essential that the relationship between NCPs and judicial remedy remains a relationship of complementarity. This means that states should ensure that filing a complaint with an NCP does not preclude rights-holders from access to remedy before courts later on.[952]

948 Cf. BUHMANN, BHRJ 2023, 420.

949 Ibid., 423.

950 INGRAMS, BHRJ 2023, 432. See further, Human Rights Council, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', UN Doc. A/HRC/38/48 (2 May 2018) (hereinafter: Human Rights Council, WGBHR Report 2018), para. 80 ff.

951 Human Rights Council, WGBHR Report 2018, para. 81.

952 BUHMANN, BHRJ 2023, 422.

III. Summary

Both, the UNGPs and the OECD Guidelines have developed into authoritative international reference points for HRDD. The OECD framework with its Responsible Business Conduct and sector-specific guidance provides more contours to the concept of HRDD and promotes state-of-the-art practices for various business sectors regarding the implementation of effective HRDD. Moreover, with the NCP procedures, the OECD framework establishes a mechanism, albeit imperfect, through which rights-holders may file complaints regarding alleged breaches of the Guidelines and seek dispute resolution.

The OECD HRDD framework thereby tackles two of the most frequent criticisms levelled against the UNGPs, i.e. the ambiguity of the corporate responsibility to respect and its core component HRDD as well as the UNGPs' 'lack of teeth' as legally non-binding principles. While the NCPs do not have the power to force companies to participate in the complaint procedure in good faith or to comply with final statements, states may incentivise cooperation through the withdrawal of trade and investment-related benefits, for instance. NCPs therefore possess a considerable untapped potential as avenues for remedy and could complement litigation before national courts in a meaningful way.

Part III:
Mandatory Due Diligence Legislation in Selected Jurisdictions

Chapter 3: Mandatory Reporting Laws

As explained in the introductory part of this thesis, mandatory due diligence laws can be subdivided into three categories: disclosure laws requiring companies to report on human rights risks, laws describing human rights due diligence obligations that may contain sanctions for non-compliance, and laws which in addition to due diligence obligations contain civil liability provisions for corporate misconduct.[953] The present Chapter focuses on the first category: mandatory disclosure laws. Mandatory disclosure laws are *stricto sensu* not mandatory due diligence laws, since reporting is only one, i.e. the last, step of the due diligence process. Nevertheless, the first generation of laws aiming to improve corporate accountability with respect to human rights has focused on incentivising the exercise of human rights due diligence through disclosure of relevant information.[954] The rationale behind such laws is to improve the human rights performance of companies by enabling market forces, such as consumers and investors, to hold companies accountable through informed decision-making based on the disclosed information.[955] Investors, for instance, are notably increasingly relying on ratings of company performance based on environmental, social, and governance (ESG) criteria, which can intersect with human rights concerns.[956] Over the years, several such reporting laws have been adopted in different jurisdictions, both inside and outside of Europe.[957]

953 See Introduction III.

954 Cf. BRIGHT CLAIRE, 'Mapping Human Rights Due Diligence Regulations and Evaluating their Contribution in Upholding Labour Standards in Global Supply Chains', in: ILO Decent Work in a Globalized Economy, 77.

955 Cf. MARES RADU, Corporate Transparency Laws: A Hollow Victory?, Netherlands Quarterly of Human Rights (NQHR) 2018, 189 ff., 191 ff.

956 Cf. Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Sustainable Global Supply Chains: G7 Leadership on UNGP Implementation: Report by the Office of the UN High Commissioner for Human Rights for the 2022 German Presidency of the G7' (January 2022) (hereinafter: OHCHR, Sustainable Global Supply Chains), 44; Human Rights Council, 'Investors, Environmental, Social and Governance Approaches and Human Rights: Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises', UN Doc. A/HRC/56/55 (2 May 2024) (hereinafter: Human Rights Council, WGBHR Report: ESG and Human Rights), para. 1 ff. and 11 ff.

957 OHCHR Issues Paper, 5.

The analysis of the present Chapter focuses on the mandatory non-financial reporting provisions, i.e. art. 964a-964c, in the Swiss Code of Obligations (CO)[958], and the European Union's Corporate Sustainability Reporting Directive (CSRD)[959] that exemplify two such laws. The aim of this Chapter is twofold. First, it is to evaluate the alignment of these laws with international due diligence standards. Second, it is to demonstrate the potential and limitations of reporting laws with regard to the protection of human rights in general and each of these laws in particular.

The choice of legislation for this analysis is particularly pertinent because the Swiss reporting provisions are modelled after the European Union (EU)'s Non-Financial Reporting Directive (NFRD)[960], which established the reporting requirements on human rights and environmental issues at the EU level prior to the adoption of the CSRD[961]. The analysis and comparison of these laws can thus demonstrate the evolution of mandatory reporting laws and provide important insights regarding the effectiveness of such laws in protecting rights-holders from corporate human rights abuses. The analysis of the CSRD is also especially relevant in view of its complementary role to the EU Corporate Sustainability Due Diligence Directive (CSDDD)[962], which will be discussed in Chapter 5 II.

I. Non-Financial Reporting Provisions in the Swiss Code of Obligations

1. Context

On 29 November 2020, the Swiss electorate voted on the so-called Responsible Business Initiative (RBI).[963] If adopted, the RBI would have amended the

958 Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) (CO), SR 220, English translation.

959 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ 16.12.2022, L 322/15.

960 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, OJ 15.11.2014, L 330/01.

961 Cf. art. 1(1) NFRD and recital 7 f. CSRD.

962 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ 5.7.2024, L series.

963 For a chronological overview, see, Federal Chancellary, 'Eidgenössische Volksinitiative Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt', available in German, French, and Italian.

Swiss constitution and introduced a new provision on corporate accountability for human rights abuses and environmental damages for Swiss companies.[964] The initiative required the implementation of legal measures obliging companies that have their registered office, central administration or principal place of business in Switzerland to conduct comprehensive risk-based due diligence with regard to internationally recognised human rights and environmental standards. The due diligence obligations were meant to cover the activities of controlled[965] foreign companies and the activities of business relationships along global supply chains. The initiative also foresaw an obligation to report on the implementation of due diligence measures.[966] Under the initiative, Swiss companies could have been held liable for human rights abuses and violations of international environmental standards caused by the foreign companies they control. However, controlling companies could have exculpated themselves by providing proof that they had undertaken appropriate due diligence, i.e. taken reasonable measures in view of the concrete circumstances, to prevent the harm in question from occurring (due diligence defence).[967]

The Federal Council recommended the rejection of the initiative, despite declaring to share its core concerns.[968] In support of the initiative's core concerns, the Federal Council notably reaffirmed its expectation set out in the Swiss National Action Plan for the Implementation of the UNGPs (Swiss NAP)[969] that Swiss companies, regardless of their size, respect human rights wherever they operate, including abroad. Instead of the legal measures proposed by the initiative, the Federal Council advocated for a 'smart mix of legally binding and non-binding measures', as outlined in the Swiss NAP.[970] The Federal

964 Federal Dispatch RBI, 6340.

965 Under the RBI, 'control' encompasses both the legal control a parent company may exert over its subsidiary and the 'economic control' a lead company may for instance exert over a supplier in its supply chain, see, e.g. BUENO NICOLAS / BRIGHT CLAIRE, Implementing Human Rights Due Diligence through Corporate Civil Liability, International & Comparative Law Quarterly (ICLQ) 2020, 789 ff., 804.

966 Federal Dispatch RBI, 6353 f. and 6359.

967 Ibid., 6359 f. For more on the Responsible Business Initiative see, e.g., BUENO NICOLAS, The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability, in: Enneking/Giesen/Schaap et al. (eds.), Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains, Abingdon 2020, 239–259; MACCHI CHIARA / BRIGHT CLAIRE, Hardening Soft Law: The Implementation of the Human Rights Due Diligence Requirements in Domestic Legislations, in: Buscemi/Lazzerini/Magi et al. (eds.), Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law, Leiden 2020, 218–247; BUENO/BRIGHT, ICLQ 2020, 789 ff.

968 Federal Dispatch RBI, 6378.

969 Federal Council, 'Report on the Swiss Strategy for the Implementation of the UN Guiding Principles on Business and Human Rights' (9 December 2016).

970 Federal Dispatch RBI, 6370 f.

Council argued that the initiative 'went too far'. It particularly opposed the liability provision and held that regulation along the lines of the initiative could incentivise companies to move their registered office, central administration or principal place of business abroad, in an effort to circumvent the legislation. This could damage Switzerland's appeal as an international business hub. The Federal Council spoke out in favour of a 'coordinated' approach that is in line with international legislative efforts.[971]

The provision regarding legal liability also faced opposition in the Swiss parliament and sparked fierce parliamentary debates before the popular vote. In June 2018, the National Council endorsed a first counter-proposal. This first counter-proposal narrowed down the scope of due diligence to large companies and amended the legal liability provision to expressly exclude harm caused by a supplier.[972] In spite of these amendments, the majority of the members of the second parliamentary chamber, the Council of States, did not approve of this first counter-proposal. Critics held that it still included the principal elements of the RBI, notably a legal liability provision, and was thus not a viable option. Even though some companies voiced their support for the first counter-proposal, much of the private sector opposed it and lobbied against its adoption.[973] In June 2019, the Federal Council decided to mandate the Federal Office of Justice with the elaboration of 'an alternative approach'.[974] This approach would consist of reporting obligations that were inspired by the European Union (EU)'s Non-Financial Reporting Directive (NFRD)[975], the predecessor of the CSRD, and due diligence obligations without any liability provisions that focused on child labour and conflict minerals.[976] These due diligence obligations were inspired by the EU Conflict Minerals Regulation[977]

971 Federal Dispatch RBI, 6365 f. and 6378.

972 WERRO FRANZ, The Swiss Responsible Business Initiative and the Counter-Proposal, Journal of European Tort Law (JETL) 2019, 166 ff., 167; BUENO NICOLAS / KAUFMANN CHRISTINE, The Swiss Human Rights Due Diligence Legislation: Between Law and Politics, Business and Human Rights Journal (BHRJ) 2021, 1 ff., 3.

973 BUENO/KAUFMANN, BHRJ 2021, 544.

974 Federal Office of Justice (FOJ), 'Transparenz bezüglich nichtfinanzieller Belange und Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit (19 November 2019)' (hereinafter: FOJ, Report on Non-Financial Disclosure and HRDD Obligations), 5; BUENO/KAUFMANN, BHRJ 2021, 544.

975 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, OJ 15.11.2014, L 330/01.

976 Federal Council, 'Schweizer Unternehmen sollen über Einhaltung der Menschenrechte und Umweltschutzstandards berichten' (14 August 2019), available in German, French, and Italian; BUENO/KAUFMANN, BHRJ 2021, 544.

977 Regulation (EU) 2017/821 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 the Dutch Child Labour Due Diligence Act 2019 (CLDDA)[978].[979] This more restrictive approach to due diligence served as a basis for a second counter-proposal.[980]

The Council of States rejected the National Council's proposal and passed its own counter-proposal. In June 2020, both parliamentary chambers eventually voted in favour of the Council of States' counter-proposal. As a result, this watered-down counter-proposal would automatically enter into force in case the RBI did not win a majority of votes.[981]

The RBI ended up winning a majority of 50.7% of the people's vote. However, it failed to reach the required majority of the cantons and was rejected as a result. With the rejection of the RBI, the counter-proposal came into force.[982] This led to an amendment of the Swiss CO, an amendment of the Swiss Criminal Code (SCC)[983], and the adoption of a new Federal Ordinance on Conflict Minerals and Child Labour (DDTrO)[984] containing implementing provisions.

2. Personal Scope

According to art. 964a para. 1 CO, undertakings are obliged to report on non-financial matters if three requirements are *cumulatively*[985] met:

(1) They are companies of public interest within the meaning of art. 2 para. 1 let. c of the Auditor Oversight Act[986];

tungsten, their ores and gold from conflict-affected and high-risk areas OJ 19.5.2017, L 130/1.

978 Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid), 24.10.2019, Staatsblad 2019, 401.

979 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 5.

980 BUENO NICOLAS, Diligence en matière de droits de l'homme et responsabilité de l'entreprise: Le point en droit suisse, Swiss Review of International and European Law (SRIEL) 2019, 345 ff., 362; BUENO/KAUFMANN, BHRJ 2021, 544.

981 Federal Office of Justice (FOJ), 'Erläuternder Bericht zur Verordnung über Sorgfaltspflichten und Transparenz bezüglich Mineralien und Metallen aus Konfliktgebieten und Kinderarbeit (VSoTr)' (3 December 2021) (hereinafter: FOJ, Explanatory Report), 2; BUENO, SRIEL 2019, 362; BUENO/KAUFMANN, BHRJ 2021, 544.

982 Federal Office of Justice (FOJ), 'Nachhaltige Unternehmensführung zum Schutz von Mensch und Umwelt' available in German, French, and Italian.

983 Swiss Criminal Code of 21 December 1937 (SCC), SR 311.0, English translation.

984 Ordinance of 3 December 2021 on Due Diligence and Transparency in Relation to Minerals and Metals from Conflict-Affected Areas and Child Labour (DDTrO), SR 221.433, English translation.

985 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 11.

986 Federal Act of 16 December 2005 on the Admission and Supervision of Auditors (AOA), SR 221.302.

(2) they have at least 500 full-time employees as an annual average in two consecutive financial years, alone or together with the domestic or foreign undertakings they control;
(3) they, alone or together with the domestic or foreign undertakings they control, either exceed a balance sheet total of CHF 20 million or sales revenue of CHF 40 million in two consecutive financial years.

'Control' is to be understood in terms of legal control within the meaning of art. 963 para. 2 CO.[987] According to art. 963 para. 2 CO, an undertaking controls another undertaking if it
(1) directly or indirectly holds the majority of the votes in the highest management body;
(2) directly or indirectly holds the right to appoint or remove the majority of the members of the supreme management or administrative body; or
(3) is able to exercise a controlling influence on the basis of the articles of association, the foundation deed, a contract or comparable instruments.

There are two exemptions from the reporting obligations in art. 964a para. 1 CO. According to art. 964a para. 2 CO, controlled undertakings are exempt from the reporting obligation if
(1) the controlling undertaking is already required to comply with such a reporting obligation with respect to the controlled undertaking under Swiss law; or
(2) if it is required to submit an equivalent non-financial report under foreign law.

For instance, a Swiss undertaking would be exempt from its reporting obligations if its controlling undertaking is based in the European Union (EU) and is already required to submit a report under the CSRD. This is to avoid a duplication of duties within corporate groups.[988]

The personal scope of the Swiss reporting obligations is almost identical to the one of the NFRD.[989] The Swiss provision only deviates from the equivalent provision in the NFRD in that it requires *two* consecutive financial years instead of one with regard to the minimal number of full-time employ-

987 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 12.

988 Ibid., 13.

989 Ibid., 11 f. ATAMER YESIM M. / WILLI FLORIAN, CSR-Berichterstattung Ante Portas: Indirekter Gegenvorschlag zur Konzernverantwortungsinitiative, Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht (SZW) 2020, 686 ff., 689.

ees.[990] In any case, the sole focus on large undertakings of public interest in the Swiss reporting obligations and the NFRD is not aligned with the UNGPs, which call on all business enterprises, irrespective of their size, to report on how they respect human rights in practice.[991]

3. Material Scope

3.1 Covered Human Rights and Other Non-Financial Matters

Pursuant to art. 964b para. 1 sentence 1 CO, undertakings that fall under the personal scope of the reporting obligation must cover environmental matters (including CO2 targets), social issues, labour concerns, respect for human rights, and measures against corruption and bribery.[992] With respect to conflict minerals and child labour, specific reporting requirements are contained in art. 964l CO. These requirements are detailed in the Federal Ordinance on Conflict Minerals and Child Labour (DDTrO). These reporting requirements, together with the HRDD measures, will be discussed in the following chapter.

Reporting requirements regarding environmental matters, namely climate-related concerns, are specified in the Federal Ordinance on Mandatory Climate-Related Disclosures. This ordinance entered into force on 1 January 2024.[993] Environmental concerns, including climate-related issues, are beyond the scope of this thesis. Reporting and HRDD measures related to environmental concerns (including climate-related issues) will thus not be discussed in more detail.

The Federal Office of Justice considers social issues that undertakings must report on to include measures taken to protect various stakeholder groups such as customers, trade unions, and local communities.[994] Labour concerns that fall under the material scope of the corporate reporting obligations encompass working conditions, respect for the right of workers to be informed and consulted, respect for trade unions, the protection of workers' health and safety at work, and measures regarding gender equality. The Federal Office of Justice states in its report that undertakings shall use the ILO's core labour standards as a reference point for their reports.[995]

990 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 12; ATAMER/WILLI, SZW 2020, 689.

991 UNGP 14, UNGP 15, and UNGP 21 and Commentary thereto.

992 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 8 ff.

993 Verordnung vom 23. November 2022 über die Berichterstattung über Klimabelange, SR 221.434 (text available in German, French, and Italian only).

994 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 9.

995 Ibid., 9.

The human rights that must be covered encompass all the rights enshrined in human rights treaties ratified by Switzerland. These include *at least* the rights enshrined in the ICESCR, ICCPR, ICERD, CEDAW, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the CRC, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), the Convention on the Rights of Persons with Disabilities (CRPD), and the ILO's Core Labour Standards.[996] Thus, with the exception of the UDHR, the human rights covered by art. 964b para. 1 sentence 1 CO go beyond UNGP 12[997] and encompass the human rights of all nine core UN human rights treaties.[998]

In terms of covered non-financial matters, the Swiss provision slightly differs from the NFRD. The latter also explicitly includes reporting requirements with respect to an undertaking's diversity policy regarding aspects such as age and gender.[999] According to the Federal Office of Justice, diversity matters are already covered by reporting requirements on labour concerns. Moreover, reporting obligations related to gender equality measures were introduced with art. 734f CO as part of a revision of Swiss company law in 2020.[1000] The 2020 Swiss company law revision also introduced reporting obligations for companies in the extractive sector (art. 964d-art. 964h CO). These transparency requirements relate to corporate payments to public authorities in countries where the natural resources are extracted. They are a measure against corruption and bribery and as such beyond the scope of this thesis.[1001]

996 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 10.

997 UNGP 12 references the International Bill of Human Rights consisting of the UDHR, ICCPR, ICESCR, and the ILO Core Labour Standards.

998 Cf. Chapter 2 I 3.1 b

999 Art. 1(2)(a) NFRD amending art. 20(1)(g) of the Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ 29.6.2013, L 182/19, old consolidated version: 11.12.2014 (hereinafter: EU Accounting Directive (Version 2014) when referencing the old version).

1000 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 8. See also, ATAMER/WILLI, SZW 2020, 690 with further references.

1001 Federal Dispatch on the Revision of Swiss Company Law, 'Änderung des Obligationenrechts (Aktienrecht)', BBI 2017 399, 466 ff.

3.2 Covered Business Activities

Pursuant to art. 964b para. 2 no. 4 CO, undertakings must cover risks related to the non-financial matters that arise in connection with their own business operations and where 'relevant and proportionate' the risks linked to their business relationships, products or services. The Federal Office of Justice uses both the terminology 'supply chain' *(Lieferkette)*, i.e. direct and indirect suppliers, and 'value chain' *(Wertschöpfungskette)* referring to this provision.[1002] Consistent with the wording of the due diligence obligations regarding conflict minerals and child labour in art. 964k CO, meant is likely the upstream supply chain of the undertaking.[1003] There is no definition provided for the term supply chain and there are no further explanations on the depth of business activities to be covered.[1004] This is not only problematic in view of legal certainty considerations, but also the fact that the most severe human rights risks regularly occur in the lower tiers of the supply chain.[1005] To align themselves with the UNGPs and cover the most severe risks, companies should consider business activities throughout their value chains in their reporting.[1006]

The wording of art. 964b para. 2 no. 4 CO is almost identical to the wording in art. 1(1) NFRD[1007], which does not elaborate on the depth of covered business activities either. This leaves undertakings with considerable discretion to determine the depth of their reporting.[1008]

3.3 Content

According to art. 964b para. 1 CO, the report must contain the information necessary for an understanding of the undertaking's business performance, its business result, its situation, and the impact of its activities on environmental matters, social issues, labour concerns, human rights, and corruption and

1002 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 14 f.

1003 Similarly, ATAMER/WILLI, SZW 2020, 691 and BRAND PATRIC, Auslegeordnung zu den CSR-Berichterstattungs- und Sorgfaltsprüfungspflichten, Gesellschafts- und Kapitalmarktrecht (GesKR) 2021, 344 ff., 355. Differing opinion: KAUFMANN/BIGGOER, BK Commentary, art. 964a-c CO margin n. 21. An interpretation of art. 964b para. 2 no. 4 CO whereby companies must report on risks that arise throughout the value chain would be more consistent with the UNGPs.

1004 ATAMER/WILLI, SZW 2020, 691.

1005 Cf. OHCHR, Sustainable Global Supply Chains, 27.

1006 Cf. UNGP 13 and Commentary thereto.

1007 Art. 1(1) NFRD amending art. 19(a)(1)(d) EU Accounting Directive (Version 2014): '[...] linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services [...].'

1008 This has contributed to the lack of comparability of reports under the NFRD, see Section I. 3.3 of this Chapter.

bribery. The wording of art. 964b CO is rather vague. Unfortunately, this vagueness was not addressed by the Federal Council, which was only authorised to draw up more detailed reporting provisions with respect to conflict minerals and child labour.[1009] However, more specification regarding the non-financial matters in art. 964a–964c CO would have helped undertakings in implementing their reporting obligations.[1010] Art. 964b para. 3 CO merely points out that undertakings may consider other national, European or international standards complying with the minimum requirements set out in art. 964b CO, and that if they do so, must name them in their report.[1011] The OECD Guidelines are specifically mentioned in art. 964b para. 3 sentence 1 CO as an example of such international standards. The rather vague wording of art. 964b CO largely corresponds with art. 1(1) NFRD.[1012] In contrast to the Swiss reporting provisions, specification was, however, provided for by empowering the EU Commission in the NFRD to issue relevant guidance on the implementation of reporting requirements. Based on art. 2 NFRD, the EU Commission published non-binding guidelines to this effect.[1013]

The Federal Office of Justice notes that undertakings are only required to disclose information on the impacts of their activities on stakeholders, insofar as this information is also necessary to understand the company's business performance, results etc. It refers to it as a 'double materiality' requirement.[1014] While this may correspond with a common understanding of the term 'double',[1015] it is a narrow interpretation of the concept of double materiality considering the purported purpose of reporting obligations, i.e. improving corporate human rights and environmental performance. From

1009 See, art. 864j paras. 2-4 and art. 964k para. 4 CO. Nevertheless, the Federal Council still adopted more specific provisions related to climate issues in the Ordinance on Mandatory Climate-Related Disclosures (see Section I 3.1 of this Chapter).

1010 ATAMER/WILLI, SZW 2020, 690; BRAND, GesKR 2021, 355.

1011 Art. 964b para. 3 sentence 1 and 2 CO.

1012 Art. 1(1) NFRD amending art. 19(a)(1) EU Accounting Directive (Version 2014): '[...] containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, [...].'

1013 EU Commission, Communication from the Commission, Guidelines on Non-Financial Reporting (Methodology for Reporting Non-Financial Information) (2017/C 215/01), OJ 5.7.2017, C 215/1 (hereinafter: EC NFRD Guidelines) and Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related Information (2019/C 209/01), OJ 20.6.2019, C 209/1 (EC NFRD Guidelines Supplement).

1014 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 13. See also, KAUFMANN/BIGGOER, BK Commentary, art. 964a-c CO margin n. 19.

1015 Cf. HESELHAUS SEBASTIAN, Unternehmerische Sorgfaltspflichten – Die Entwicklungen in Europa und dem grössten Nachbarland Deutschland, Umweltrecht in der Praxis (URP) 2024, 4 ff., 15.

the perspective of rights-holders, civil society organisations, and consumers, information pertaining to an undertaking's impacts on people and the planet is arguably of primary concern. Whether these impacts simultaneously manifest in financial ramifications for the undertaking is likely secondary from their viewpoint.[1016] The NFRD does not explicitly mention double materiality as a requirement for reporting. However, the concept of materiality is reflected in art. 1(1) NFRD, which states that undertakings under the personal scope of the Directive shall publish non-financial information 'to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity'.[1017] Aimed at providing more clarity regarding the concept of materiality, the European Commission's NFRD Guidelines refer to art. 2(16) of the EU Accounting Directive. Art. 2(16) of the EU Accounting Directive defines material information as information whose omission or misstatement reasonably has the potential to influence the decision-making of users.[1018] Yet, the Guidelines do not provide clearer contours for undertakings on what non-financial information to include in their reporting that would satisfy the *double* materiality requirement. It is therefore unsurprising that the double materiality requirement has been considered unclear at best and as a result, interpreted in different ways.[1019] This is why the double materiality requirement is explicitly mentioned and newly worded in the provisions of the CSRD, which replaced the reporting rules under the NFRD from the financial year 2024 onward.[1020] In any case, the concept of (double) materiality departs from the UNGPs in at least two aspects: First, reporting under the UNGPs is a means for businesses to publicly communicate how human rights risks are identified and concretely addressed.[1021] Reporting under the UNGPs thus centres risks to rights-holders.[1022] Although financial and reputational risks to the business and its investors frequently interrelate with human rights

1016 As will be demonstrated in Section II 3.3 of this Chapter, such a narrow interpretation also departs from the understanding of double materiality under the CSRD.

1017 Art. 1(1) NFRD amending art. 19a(1) EU Accounting Directive (Version 2014).

1018 EC NFRD Guidelines, 5.

1019 DE GROEN WILLEM PIETER, ALCIDI CINZIA, SIMONELLI FELICE et al., Study on the Non-Financial Reporting Directive – Final Report (November 2020) on behalf of the European Commission, Directorate-General for Financial Stability, Financial Services and Capital Markets Union, Publications Office, Brussels 2021 (hereinafter: EC NFRD Study), 103; European Commission, 'Inception Impact Assessment, Revision of the Non-Financial Reporting Directive' (hereinafter: EC NFRD Inception Impact Assessment), 2.

1020 Art. 5(2) CSRD. For more on the CSRD, see Section II. 3.3 of this Chapter.

1021 UNGP 21 and Commentary thereto.

1022 CHAMBERS RACHEL / YILMAZ VASTARDIS ANIL, Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability, Law Chicago Journal of International Law (ChiJIntL) 2021, 323 ff., 360.

risks,[1023] they are not a relevant concern under the UNGPs when determining the information to report on.[1024]. Second, the concept of materiality does not exist under the UNGPs.[1025] Under the UNGPs, enterprises have a responsibility to respect all human rights. However, the UNGPs allow enterprises to prioritise areas where the risk of human rights impacts is particularly significant[1026] and where human rights impacts would be most severe.[1027] Severity is determined based on the scale, scope, and remediability of the impact in question,[1028] and considered in relation to other identified human rights risks[1029]. Thus, the appropriateness of the concept of materiality in the human rights context has been questioned.[1030] Whereas requiring companies to provide detailed separate reports focused on preventing and mitigating human rights and environmental risks to rights-holders would certainly be desirable from a human rights perspective, the concept of materiality is aligned with the purpose of disclosure laws, i.e. providing relevant insights on non-financial information to a variety of stakeholders.[1031]

The report must at least cover the following points (art. 964b para. 2 CO):

(1) a description of the undertaking's business model;
(2) a description of the policies adopted with respect to the non-financial matters mentioned in para. 1, including due diligence measures taken to implement these policies and an assessment of the effectiveness of implemented due diligence measures;
(3) an explanation of the principal risks associated with the non-financial matters referred to in para. 1 and an explanation on how the company manages those risks. This obligation includes principal risks arising from the undertaking's own business activities and, where 'relevant and proportionate', risks arising from a undertaking's business relationships, products or services;

1023 Cf. Human Rights Council, WGBHR Report: ESG and Human Rights, para. 28.

1024 Cf. CHAMBERS RACHEL / YILMAZ VASTARDIS ANIL, Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability, Law Chicago Journal of International Law (ChiJIntL) 2021, 323 ff., 360.

1025 CHAMBERS/YILMAZ VASTARDIS, ChiJIntL 2021, 359.

1026 Commentary to UNGP 17. These are referred to as 'salient' human rights issues, see OHCHR Interpretative Guide, 8.

1027 UNGP 24 and Commentary thereto.

1028 Commentary to UNGP 14.

1029 UNGP 24 and Commentary thereto.

1030 CHAMBERS/YILMAZ VASTARDIS, ChiJIntL 2021, 359.

1031 Cf. FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 13 f.

(4) key performance indicators regarding the non-financial matters mentioned in para. 1.

The term 'policies' *(Konzepte)* refers to the undertaking's internal guidelines and strategies with regard to the environment, social issues, employees, respect for human rights, and matters regarding anti-corruption and bribery. The report must thus elaborate on how the undertaking tackles these issues, i.e. how it identifies risks of adverse impacts related to these non-financial matters and what steps it has taken or intends to take to prevent and mitigate actual or potential adverse impacts.[1032]

The report shall provide information on the nature and extent of the principal risks related to an undertaking's business activities with regard to the non-financial matters. According to the Federal Office of Justice, principal risks are risks that are 'significant or weighty'. Reputational risks are to be included if they are significant. The Federal Office of Justice does not further elaborate on the requirement of significance. However, it highlights that it is necessary for undertakings to not only report on their efforts in risk management, but also to elaborate on adverse impacts and bad performance.[1033] As seen, undertakings are only required to report on significant risks linked to their business relationships, products or services where 'relevant and proportionate' (art. 964b para. 2 no. 4 let. b CO). The wording of art. 964b para. 2 no. 4 CO is nearly congruent with the wording of the relevant provision in the NFRD.[1034] Neither of the provisions in the respective texts specify what these conditions of relevancy and proportionality mean in practice. The EU Commission's non-binding guidelines do not clarify these points either.[1035] This leaves Swiss undertakings with considerable leeway to determine for themselves whether to report on risks in their supply chains.[1036]

1032 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 14.

1033 Ibid., 15

1034 Art. 1(1) NFRD amending art. 19(a)(1)(d) EU Accounting Directive (Version 2014): 'the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services [...]'. See also, FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 15.

1035 Cf. EC NFRD Guidelines, 12.

1036 Cf. ATAMER/WILLI, SZW 2020, 692; BRAND, GesKR 2021, 355. BRAND argues that companies should only be required to cover risks in their supply chains if they are more severe. This is because companies must already exclusively report on 'principal' or 'significant' risks with regard to their own business activities. Otherwise, the additional requirements of 'relevant and proportionate' with regard to risks arising in the supply chain would not make sense, he argues (BRAND, GesKR 2021, 355).

With the exception of CO2 targets, Swiss reporting provisions are largely retrospective and do not explicitly require forward-looking information.[1037] This neglects the proactive aspect of reporting under the UNGPs, according to which communication is part of the due diligence process and not an end in itself. As such communication should inform internal decision making in businesses to prevent and mitigate harm. Reporting should also connect businesses with their stakeholders, particularly rights-holders, to report on how they prevent and mitigate harms.[1038] When reporting is solely conducted with a view to compliance with formal requirements, the probable outcome is undertakings presenting a polished image of their human rights and environmental performance without any organisational learning, instead of providing relevant information that can be utilised by stakeholders to make informed decisions.[1039]

If an undertaking does not pursue any policies related to one or more non-financial matters pursuant to para. 1, it must clearly state the reasons for not doing so in its report (comply or explain approach, art. 964b para. 5 CO). According to the Federal Office of Justice, such a waiver may be justified in cases where the report would not allow for any new insights, because the undertaking has no or very low risks associated with its business activities for instance.[1040] The Federal Office of Justice considers the business activity of a real estate company, which is only active in Switzerland and does not do any construction work, to be an example of such a low risk activity.[1041] The comply-or-explain approach is an often utilised feature of corporate self-regulation in Switzerland.[1042] Its introduction in art. 964b para. 5 CO moreover illustrates that lawmakers wanted to prevent coupling any mandatory due diligence obligations with the adoption of the general non-financial reporting obligations in art. 964a–964c CO.[1043] Nevertheless, the obligation to report

1037 Cf. BUHMANN KARIN, Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action, Business and Human Rights Journal (BHRJ) 2018, 23 ff., 36 and 38.

1038 BUHMANN, BHRJ 2018, 35 and 38.

1039 Ibid., 37.

1040 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 16.

1041 Ibid.

1042 BÜHLER CHRISTOPH B., Ausserrechtliche Regulierungstendenzen in der Corporate Governance, Expert Focus (EF) 2016, 12 ff., *passim;* ATAMER/WILLI, SZW 2020, 692 f.

1043 Cf. ATAMER/WILLI, SZW 2020, 693. This is because the counter-proposal of the National Council had envisaged an introduction of additional due diligence obligations for the board of directors related to human rights and environmental matters (cf., FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 6).

on due diligence measures and their effectiveness implicitly requires undertakings to exercise due diligence in the first place.[1044] The comply-or-explain approach also prominently featured in the NFRD.[1045] However, for the CSRD, the option to comply or explain was considerably limited.[1046]

The extensive flexibility that the Swiss reporting provisions offer, together with the vagueness of the double materiality requirement, renders the comparability of reports more difficult. Furthermore, it increases the likelihood of companies failing to disclose meaningful information that is comprehensive and detailed enough to empower relevant stakeholders, such as investors and consumers, to make informed decisions and hold companies accountable. At worst, companies may use the afforded leeway to present a deceitful picture of their respect for human rights and environmental standards and thus use disclosure as a public-relations tool.[1047] In the case of the NFRD, at least some of these apprehensions were proven true.[1048] In a study on the NFRD conducted for the European Commission, the lack of standardisation of material information was identified as a major obstacle for investors to compare reports. The study concluded that a common single EU reporting framework would aid in overcoming this issue.[1049] This insight resulted in the adoption of a provision in the CSRD requiring undertakings to comply with detailed uniform reporting standards, i.e. the European Sustainability Reporting Standards (ESRS).[1050]

1044 Cf. FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 7; BRAND, GesKR 2021, 354.

1045 Art. 1(1) NFRD.

1046 See Section II. 3.3 of this Chapter.

1047 Cf. FERNÁNDEZ GAZTEA JOSEBA / MUÑOZ FERNÁNDEZ ALBERTO, "Comply or explain" in the EU, or the new human rights reporting obligation: an analysis of directive 2014/95/EU, Cuadernos de Derecho Transnacional (CDT) 2017, 285 ff., 298 margin n. 53 f.; CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 348. On the debate regarding the (in-)effectiveness of disclosure-based regulation in general, see further HESS DAVID, The Transparency Trap: Non-Financial Disclosure and the Responsibility of Business to Respect Human Rights, American Business Law Journal (ABLJ) 2019, 5 ff., 26 ff.; MARTIN JENA, The Use of Disclosure-Based Regulation to Advance the State's Duty to Protect, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, Cheltenham 2020, 176-197, 190 ff.

1048 Alliance for Corporate Transparency Project, '2018 Research Report: The State of Corporate Sustainability Disclosure Under the EU Non-Financial Reporting Directive', 6 ff.; European Commission, 'Summary Report of the Public Consultation on the Review of the Non-Financial Reporting Directive 20 February 2020 – 11 June 2020' (hereinafter: EC, Summary Report: Public Consultation re NFRD), 3 and 8 f. See also, European Parliament, European Parliamentary Research Service, 'Initial Appraisal of a European Commission Impact Assessment: Improving Corporate Sustainability Reporting' (July 2021) (hereinafter: EP, Improving Corporate Sustainability Reporting), 1 f.

1049 EC NFRD Study, 110 f. and 121.

1050 Art. 1(8) CSRD. See further, Section II 3.3 of this Chapter.

According to art. 964c para. 1 CO, the report is subject to approval and signature by the supreme management or governing body[1051] and approval by the governing body responsible for approving the annual accounts[1052]. Upon its approval, the report must be published and remain publicly available for at least 10 years (art. 964c para. 2 CO). A written and signed report must be kept and retained for ten years (art. 964c para. 3 CO in conjunction with art. 958f CO).

In contrast to the NFRD, there is no requirement to submit the non-financial report to audit firms and therefore no requirement imposed on audit firms to check whether the non-financial report exists and was duly published under the Swiss reporting provisions.[1053] Moreover, the content of the published reports is not subject to verification by independent auditors or any regulatory state oversight under the Swiss provisions.[1054] The verification of reports is a task that requires relevant expertise and is resource-intensive. As such, it is already challenging for market forces such as consumers, investors, and civil society organisations to fulfil without the support of a formal oversight mechanism. However, this task is even further complicated by the flexibility and discretion afforded to undertakings.[1055]

Similarly, there is no obligation for Member States to impose independent verification of the information in the non-financial statement under the NFRD. However, Member States may choose to require such verification by independent assurance service providers.[1056] This discretionary verification was transformed into an obligation under the CSRD: The CSRD establishes a mandatory audit and assurance regime to ensure the reliability of reported information.[1057]

1051 For companies limited by shares within the meaning of art. 620 para. 1 CO (Aktiengesellschaften), this will normally be the board of directors *(Verwaltungsrat)* (art. 716 CO).

1052 For companies limited by shares within the meaning of art. 620 para. 1 CO *(Aktiengesellschaften)*, this will be the general meeting *(Generalversammlung)* (art. 964c para. 1 CO in conjunction with art. 698 para. 2 no. 4 CO).

1053 Cf. art. 1(1)(5) NFRD.

1054 The Federal Office of Justice considers the added value of an audit solely regarding the existence of a non-financial report to be low and an independent verification of the content of non-financial reports to be (too) complex and expensive (FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 17).

1055 Cf. EC NFRD Inception Impact Assessment, 2; CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 348.

1056 Art. 1(1) NFRD amending art. 19a(6) EU Accounting Directive (Version 2014).

1057 Art. 1(10) and art. 1(13) CSRD. See further, Section II 3.3 of this Chapter.

4. Enforcement

4.1 Public Enforcement

Contrary to the NFRD, the Swiss reporting provisions are accompanied by criminal sanctions for non-compliance: Pursuant to art. 325ter para. 1 SCC, a person shall be liable to a fine of up to CHF 100,000 if he or she wilfully

(1) provides false information in the reports in accordance with art. 964a, art. 964b and art. 964l CO or fails to make the required reports;
(2) fails to comply with the statutory obligation to retain and document the reports in accordance with art. 964c and art. 964l CO.

A person who acts through negligence shall be liable to a fine of a maximum amount of CHF 50,000 (art. 325ter para. 2 SCC).

Art. 325ter SCC is a contravention under Swiss law.[1058] According to art. 102 para. 1 SCC, undertakings can be held criminally liable for felonies or misdemeanours only. Consequently, art. 325ter SCC exclusively applies to natural persons.

The qualification of breaches of reporting obligations under art. 964a-964c and art. 964l CO as mere contraventions is unsatisfactory for at least two reasons. First, large undertakings are characterised by decentralisation as well as division and delegation of competences. As a result, attributing responsibility to individuals may be difficult to ascertain. Second, if breaches of reporting obligations under art. 964a-964c and art. 964l CO had been considered misdemeanours, much higher fines could have been imposed. This would have been more appropriate in view of the high revenues large undertakings that fall under the personal scope of art. 964a-964c and art. 964l CO generate.[1059]

4.2 Private Enforcement

As seen in Section I 1. of this Chapter, the adopted counter-proposal did not envision the introduction of private enforcement mechanisms regarding art. 964a-964c CO. Swiss legislators expressly neither wanted to introduce any due diligence obligations with the general non-financial reporting provisions nor did they want to create a basis in the Swiss civil liability regime for victims of corporate human rights abuses to access remedy.

1058 According to art. 103 SCC, contraventions are acts that are punishable by a fine. In contrast, felonies are defined as offences that carry a custodial sentence of more than three years (art. 10 para. 2 SCC) and misdemeanours are defined as offences that carry a custodial sentence of up to three years or a monetary penalty (art. 10 para. 3 SCC).

1059 Cf. ATAMER/WILLI, SZW 2020, 699 f.

Nevertheless, there is a discussion in the literature of potential pathways to enforce the non-financial reporting obligations in art. 964a-964c CO through mechanisms in Swiss private law. However, neither of these pathways provides victims of human rights abuses with access to remedy.[1060]

In any case, a detailed analysis of these potential private enforcement mechanisms under Swiss law is beyond the scope of this thesis.[1061] This Section can only give a brief overview on such mechanisms.

a) Unfair Competition Act

According to art. 2 of the Unfair Competition Act (UCA)[1062], any conduct or business practice that is misleading or which otherwise violates the principle of good faith such that it influences the relationship between competitors or between suppliers and customers is considered unfair and unlawful.

If an undertaking, for instance, provides incorrect or misleading information about its products by claiming in its non-financial report that they are produced without any forced labour and thus gains an unfair competitive advantage, its conduct could potentially be considered unlawful pursuant to art. 3 para. 1 let. b UCA.[1063] Competitors who are threatened with or sustain damage to their economic interests as a result of unfair competition, may pursue legal action under art. 9 para. 2 UCA. Costumers, trade and professional associations, and organisations for consumer protection are equally able to bring legal actions under the UCA, if their economic interests are threatened or damaged by unfair competition (art. 10 para. 1 and 2 UCA). Under certain circumstances, the Swiss Confederation may pursue legal action as well (art. 10 para. 3 UCA).

1060 For a general discussion of the potential of non-financial reporting to alleviate some barriers to access to remedy before national courts for victims of human rights abuses, see CHAMBERS RACHEL / YILMAZ VASTARDIS ANIL, The New EU Rules on Non-Financial Reporting: Potential Impacts on Access to Remedy? Human Rights and International Legal Discourse (HR & ILD) 2015, 18 ff., 37 ff.

1061 For an overview of potential avenues to enforce corporate respect for human rights under Swiss private law before the RBI, see, e.g., KAUFMANN CHRISTINE / GOOD CHRISTOPH / GHIELMINI SABRINA et al., 'Extraterritorialität im Bereich Wirtschaft und Menschenrechte, Extraterritoriale Rechtsanwendung und Gerichtsbarkeit in der Schweiz bei Menschenrechtsverletzungen durch transnationale Unternehmen', Schweizerisches Kompetenzzentrum für Menschenrechte (August 2016).

1062 Federal Act of 19 December 1986 on Unfair Competition (UCA), SR 241, English translation.

1063 ATAMER/WILLI refer to greenwashing, i.e. advertising products or services as more environmentally friendly than they actually are, as a 'classic example' of unfair advertising within the meaning of art. 3 para. 1 UCA (ATAMER/WILLI, SZW 2020, 700). Since 1 January 2025, greenwashing is explicitly mentioned as unlawful conduct in art. 3 para. 1 let. x UCA.

b) Enforcement through Warranties Pursuant to Art. 197 CO

Another potential pathway is enforcement through warranties under sales law. Art. 197 para. 1 CO establishes that a seller is liable to the buyer for any breach of warranty of quality and for any defects that would materially or legally negate or substantially reduce the value of the object or its fitness for the designated purpose. The Federal Supreme Court defines a warranty of quality as circumscribed, objectively ascertainable facts which the seller asserts to the buyer.[1064] It has held that mere promotional statements cannot be considered warranties within the meaning of art. 197 para. 1 CO.[1065]

If incorrect statements are made in non-financial reports about certain products, e.g., that they are produced free of forced labour, and these statements influence the customers' purchase decision, the product could potentially be considered defective within the meaning of art. 197 para. 1 CO. In cases where producer and seller are one and the same, the seller would be liable to his customer under art. 197 para. 1 CO.[1066]

c) Liability Pursuant to Art. 754 CO

Pursuant to art. 717 para. 1 CO, members of the board of directors and third parties engaged in managing the company's business must perform their duties 'with all due diligence' and safeguard the interests of the company in good faith. In case they intentionally or negligently breach their duties, they are liable, both to the company and to individual shareholders and creditors, for any losses or damage arising as a result of that breach (art. 754 para. 1 CO). To determine whether a damage within the meaning of art. 754 para. 1 CO incurred, the Federal Supreme Court compares the difference between the company's current assets and the assets the company would have had, if the breach of duties had not occurred. The damage may take the form of a decrease in assets, an increase in liabilities or loss of profit.[1067] This means that adverse impacts on rights-holders are not considered 'damage' within the meaning of art. 754 para. 1 CO, unless they also negatively affect a company's financial performance.[1068]

1064 BGE 88 II 410, c. 3c; 109 II 24, c. 4; 104 II 265, c. 1.

1065 BGE 88 II 410, c. 3c; 109 II 24, c. 4.

1066 Cf. ATAMER/WILLI, SZW 2020, 700 with further references.

1067 BGer 4C.58/2007, c. 2.5; 4C.105/2004, c. 4.1; 4C.19/2004, c. 1.5; 4C.292/ 2003, c. 3.3; 4C.160/2001, c. 2d/aa; 4P.305/2001, c. 2b.

1068 Association for the Responsible Business Initiative, 'Erläuterungen zur Eidgenössischen Volksinitiative "Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt"' (hereinafter: Association RBI, Explanatory Notes), 11.

A violation of non-financial reporting obligations, for example, omitting information on risks related to forced labour in the supply chain, could potentially constitute a breach within the meaning of art. 754 para. 1 CO in conjunction with art. 717 para. 1 CO, if it leads to losses or damage to the company. It will be up to courts to decide whether a shareholder, for instance, could successfully bring a claim under art. 754 para. 1 CO for a breach of non-financial reporting obligations that resulted in a loss in share price.[1069] In any case, establishing a causal link between the violation of non-financial reporting obligations and the concrete damage in question will likely be difficult to achieve. Even if such a link is established, art. 754 para. 1 CO does not provide victims of human rights abuses with a direct cause of action to obtain remediation.

5. Concluding Remarks

The objective of introducing the Swiss reporting provisions was to improve the human right and environmental performance of companies by requiring them to disclose information, thereby enabling market forces, such as consumers and investors, to hold them accountable by making informed decisions based on the disclosed data.[1070] This presupposes that companies publish information that is comprehensive, relevant, comparable, and reliable. It also presupposes that investors and consumers are willing and able to base their investment and purchasing decisions on disclosed data and sanction irresponsible companies by investing their money into responsible ones.

However, empirical evidence on reporting laws, such as the NRFD, after which the Swiss reporting provisions are modelled, suggests that companies are likely to disclose data selectively to paint a favourable picture of their human rights and environmental performance.[1071] Even if the reported information is true, promoting human rights and environmental protection in one area does not 'offset a failure to respect human rights' in another.[1072] Many companies are likely to view disclosure as end in itself, instead of a process to stimulate internal decision making and change towards more responsible business policies and practices.[1073] As demonstrated by the experience with the NRFD, the risk of such superficial compliance is especially high whenever

1069 ATAMER/WILLI, SZW 2020, 701 with further references.

1070 FOJ, Explanatory Report, 26 f. See further, MARES, NQHR 2018, 191 ff.

1071 HESS, ABLJ 2019, 41; MARTIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 192 and 193.

1072 Commentary to UNGP 11. See also, HESS, ABLJ 2019, 41.

1073 Cf. BUHMANN, BHRJ 2018, 37; HESS, ABLJ 2019, 41.

reporting laws offer companies significant discretion in terms of whether to report (e.g. comply or explain provisions) and establish vague requirements on what and how to report.[1074] In the case of the NRFD, the extensive flexibility offered to companies and the vagueness of reporting requirements contributed to a lack of comparability of reports.[1075] Furthermore, the lack of third party verification of reports rendered the reliability of data questionable.[1076] In the absence of regulatory oversight, the burden of monitoring the content of reports was largely placed on civil society organisations and investors, as consumers typically lack the expertise to interpret reported data or are unwilling to base their purchasing decisions on it.[1077] These shortcomings of the NRFD were not rectified by Swiss lawmakers when adopting the provisions for the Swiss context. From this perspective, the Swiss reporting provisions are thus unlikely to be effective in improving corporate accountability. In any case, the private enforcement options under Swiss law, such as legal actions brought under the Unfair Competition Act, do not offer victims of human rights abuses access to remedy.

II. EU Corporate Sustainability Reporting Directive (CSRD)

1. Context

The CSRD was published in the Official Journal of the EU on 16 December 2022 and entered into force on 5 January 2023.[1078] Initially, EU Member States were required to transpose the CSRD into their national law by 6 July 2024.[1079] However, in February 2025, the European Commission adopted a package of proposals, the so-called 'Omnibus Package', to amend EU rules on sustainability reporting and human rights and environmental due diligence requirements in an attempt to reduce bureaucratic burdens as well as costs for companies, and thereby boost their competitiveness.[1080] These proposed amendments

1074 Cf. LANDAU, MJIL 2019, 236 f. See also, Human Rights Council, WGBHR Report: ESG and Human Rights, para. 33.

1075 Cf. EC NFRD Inception Impact Assessment, 2; EC NFRD Study, 110 f. and 121; EP, Improving Corporate Sustainability Reporting, 1 f.

1076 Cf. EC NFRD Inception Impact Assessment, 2; EP, Improving Corporate Sustainability Reporting, 1 f. and 3 f. See also, EC, Summary Report: Public Consultation re NFRD, 3.

1077 Cf. CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 348 and 251 f.

1078 Art. 7 CSRD.

1079 Art. 5(1) CSRD.

1080 European Commission, 'Commission Simplifies Rules on Sustainability and EU Investments, Delivering over €6 Billion in Administrative Relief', Press Release (26 February

include changes to the CSRD, particularly regarding the transposition deadline and the dates of application of certain corporate sustainability reporting requirements.[1081] On 14 April 2025, the so-called Stop-the-Clock Directive[1082] was adopted. As proposed by the Commission, this Directive postpones the transposition deadline to 31 December 2025 and the applicability of reporting obligations by two years for large companies that have not yet started reporting as well as listed small and medium-sized undertakings. These so-called wave 2 and 3 undertakings were initially required to comply from 1 January 2026, i.e. report based on data from the year 2025, and 1 January 2027, i.e. report based on data from the year 2026.[1083]

The adoption of the CSRD addresses several points of criticism that were levelled against the NFRD. These include the utilisation of the terminology 'sustainability information' instead of 'non-financial information'[1084], the expansion of the applicability of reporting obligations to small and medium-sized undertakings[1085] and non-EU undertakings[1086], the explicit incorporation of the double materiality principle[1087], the introduction of uniform EU-wide sustainability reporting standards (ESRS)[1088], and a requirement for external assurance of sustainability information[1089]. The aim of these regulatory amendments was to increase corporate accountability with regard to sustainability issues vis-à-vis investors, civil society organisations, and other stakeholders.[1090] The CSRD introduces these changes through amendments to the EU

2025) (hereinafter: EC, Omnibus Package Press Release); European Commission, 'Q&A "Omnibus" Package' (hereinafter: EC, Omnibus Package Q&A), Q2.

1081 European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements', COM(2025) 81 final (27 February 2025) (hereinafter: EC, Omnibus Proposal: CSRD and CSDDD), 14 ff. For a discussion of other proposed amendments, see Section II 5. of this Chapter.

1082 Directive (EU) 2025/794 of the European Parliament and of the Council of 14 April 2025 amending Directives (EU) 2022/2464 and (EU) 2024/1760 as regards the dates from which Member States are to apply certain corporate sustainability reporting and due diligence requirements, OJ 16.5.2025, L series.

1083 Art. 3(1) and art. 1 Stop-the-Clock Directive. See further, Section II 2. of this Chapter.

1084 Cf. recital 8 CSRD.

1085 Cf. recital 21 CSRD.

1086 Cf. recital 20 CSRD.

1087 Cf. recital 29 CSRD.

1088 Cf. recital 33 and 37 CSRD.

1089 Cf. recital 60 CSRD.

1090 Cf. recital 9 and 14 CSRD.

Accounting Directive, the EU Transparency Directive[1091], the EU Statutory Audits Directive[1092], and the EU Audit Regulation[1093].

2. Personal Scope

According to art. 1(4) CSRD, the following undertakings are required to report on sustainability information:

(1) large undertakings within the meaning of art. 3(4) of the EU Accounting Directive, i.e. undertakings that exceed at least two of the three following criteria: EUR 20 million balance sheet total, EUR 40 million net turnover, and an average number of employees of 250 during the financial year;

(2) small and medium-sized undertakings that are publicly-listed entities within the meaning of art. 2(1)(a) of the EU Accounting Directive. Small and medium-sized undertakings within the meaning of art. 3(2) and art. 3(3) EU Accounting Directive are undertakings that exceed at least two of the three criteria: EUR 350,000 balance sheet total, EUR 700,000 net turnover, and an average number of 10 employees during the financial year. Initially, small and medium-sized undertakings were required to comply with the CSRD from 1 January 2026, i.e. reporting in 2027 based on data from the year 2026.[1094] With the Stop-the-Clock Directive, this date is now postponed to 1 January 2028. This means that small and medium-sized undertakings are now required to report in 2029 based on data from the year 2028.[1095] They still enjoy certain exemptions from and alleviations of their reporting obligations[1096];

(3) non-EU undertakings that that generate a net turnover of more than EUR 150 million in the EU and have at least one subsidiary or branch in the EU

1091 Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ 31.12.2004, L 390/38.

1092 Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, OJ 9.6.2006, L. 157/87.

1093 Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC, OJ 27.5.2014, L 158/77.

1094 Art. 5(2) subpara. 3(c) CSRD.

1095 Art. 1(b)(ii) of the Stop-the-Clock Directive amending art. 5(2) subpara. 3(c) CSRD.

1096 Art. 1(4) and art. 1(8) CSRD. See further, Section II 3.3. of this Chapter.

from the financial year 2028 onward.[1097] However, their reporting obligations are reduced.[1098]

Exemptions from the reporting obligations apply to subsidiaries that are included in their parent undertaking's reporting drawn up in accordance with the Directive's requirements.[1099]

In comparison to the Swiss reporting provisions, which focus on large undertakings with more than 500 employees[1100], the personal scope of the CSRD is thus much wider and aligns more with the UNGPs.[1101]

3. Material Scope

3.1 Covered Human Rights and Other Matters Related to Sustainability

As previously mentioned, the CSRD replaces the term 'non-financial information' with 'sustainability information'. This is because stakeholders have deemed the term 'non-financial' to be inappropriate in view of the fact that the disclosed information does have financial implications, for instance on investment decisions.[1102] A recently published study supports this sentiment. According to this study, investors gain clearer insights into risks when companies are required to report on sustainability information. The study finds that this results in reduced investment risks and more stable financial markets. Thus, companies providing relevant and reliable data on their sustainability practices are likely to appear more trustworthy to investors.[1103]

Pursuant to art. 1(4) CSRD, the undertakings falling under the personal scope of the CSRD are required to report on 'sustainability matters'. Sustainability matters encompass environmental, social and employee matters, respect

1097 Art. 1(14) CSRD inserting art. 40a(1) subpara. 5 EU Accounting Directive and art. 5(2) subpara. 2 CSRD.

1098 Art. 1(14) CSRD inserting art. 40a(1) subpara. 1 and 3 EU Accounting Directive.

1099 Art. 1(4) CSRD amending art. 19a(9) EU Accounting Directive.

1100 Art. 964a para. 1 CO.

1101 Cf. Federal Office of Justice, 'Prüfauftrag des EJPD vom 23. Februar 2022; Analyse Vorschläge EU-Richtlinien über Sorgfaltspflichten und Berichterstattung zur Nachhaltigkeit und möglicher Anpassungsbedarf im Schweizer Recht' (25 November 2022) (hereinafter: FOJ, Analysis CSRD and CSDDD Draft), 15.

1102 Cf. recital 8 and 9 CSRD.

1103 KRUEGER PHILIPP / SAUTNER ZACHARIAS / TANG DRAGON YONGJUN et al., The Effects of Mandatory ESG Disclosure Around the World, Journal of Accounting Research (JAR) 2024, 1795 ff. A study conducted by Deloitte, Touche LLP, and The Fletcher School at Tufts University came to similar conclusions, see BONDAR MICHAEL / STEINMANN JENNIFER / DAVIS KRISSY, 'Investor Trust in Sustainability Data: An Opportunity for Corporate Leaders' (March 2024).

for human rights, and governance matters, i.e. anti-corruption and anti-bribery.[1104] In terms of human rights, the reporting must namely cover the human rights and fundamental freedoms enshrined in the International Bill of Human Rights (UDHR, ICCPR, and ICESCR) and other core UN human rights conventions, including the CRPD, the UN Declaration on the Rights of Indigenous Peoples, the ILO Core Labour Standards, and regional human rights conventions, notably the ECHR, the European Social Charter, and the Charter of Fundamental Rights of the European Union.[1105]

In this aspect too, the CSRD and Swiss reporting provisions differ. While the Swiss reporting provisions cover all nine UN human rights treaties (ICESCR, ICCPR, ICERD, CEDAW, CAT, CRC, ICMW, CPED, and CRPD) and the ILO Core Labour Standards, they do not reference the UN Declaration on Rights of Indigenous Peoples or regional human rights conventions such as the ECHR.[1106] In any case, both the CSRD and Swiss reporting provisions are largely aligned with the UNGPs, which call on business enterprises to respect the human rights enshrined in the UDHR, ICCPR, ICESCR, and the ILO Core Labour Standards.[1107]

3.2 Covered Business Activities

The reporting obligations extend to an undertakings' own operations and entities in its upstream and downstream value chain.[1108] The CSRD does not provide a definition for the term 'value chain'. However, the CSRD explicitly aims for consistency with the UNGPs and the OECD Guidelines.[1109] The term value chain should thus be interpreted in light of these international standards. ESRS 1 elaborates further on the reach of the reporting obligation into the value chain and the required information.[1110]

1104 Art. 1(2)(b) CSRD amending art. 2(17) EU Accounting Directive. Art. 1(2)(b) CSRD notably references sustainability factors defined in art. 2(24) of the EU Sustainable Finance Disclosure Regulation (SFDR) (Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, OJ 9.12.2019, L 317/1). Art. 2(24) SFDR defines sustainability factors as environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

1105 Art. 1(8) CSRD inserting art. 29b(2)(b)(iii) into the EU Accounting Directive.

1106 Cf. Section I 3.1 of this Chapter.

1107 UNGP 12 and Commentary thereto.

1108 Cf. art. 1(4) CSRD amending art. 19(a)(2)(f)(ii) and 19(a)(3) EU Accounting Directive, art. 1(7) CSRD amending art. 29a(2)(f)(ii) and art. 29a(3) EU Accounting Directive, and art. 1(8) CSRD inserting art. 29b(4) into the EU Accounting Directive.

1109 Recital 31 and 45 CSRD.

1110 ESRS 1, 5. Value Chain: 5.1 Reporting undertaking and value chain, para. 63 ff.

In terms of covered business activities, the CSRD is more aligned with the UNGPs than the Swiss reporting provisions. This is because under the Swiss reporting provisions, undertakings are required to report on risks in connection with their own operations and solely where 'relevant and proportionate' on risks linked to their business relationships, products or services. Furthermore, it is not clear whether reporting obligations extend to the downstream value chain or whether they focus on the upstream supply chain under the Swiss provisions.[1111]

3.3 Content

The management report is required to contain the necessary information to understand the impact of the undertaking's activities on sustainability matters, as well as the impact of sustainability matters on the undertaking's development, business performance, and position (double materiality requirement).[1112] The first perspective refers to impact materiality.[1113] The second perspective to financial materiality.[1114] Undertakings must consider each materiality perspective individually and disclose information that is material from both perspectives as well as information that is material from solely one.[1115] This interpretation of double materiality may not necessarily reflect how the term 'double' is commonly understood.[1116] However, limiting reporting to the intersection of impact materiality and financial materiality risks hindering the realisation of the purpose of sustainability reporting, i.e. improving corporate human rights and environmental performance. This is because rights-holders, civil society organisations, and consumers are arguably primarily concerned with impact materiality.[1117] From a human rights viewpoint, the broad approach to the notion of double materiality under the CSRD, according to which undertakings are also required to disclose information that exclusively focuses on their impacts on people and the planet, is thus preferable.

1111 Cf. Section I 3.2 of this Chapter.

1112 Art. 1(4) CSRD amending art. 19a(1) EU Accounting Directive and art. 1(7) CSRD amending art. 29a EU Accounting Directive.

1113 ESRS 1, 3. Double materiality as the basis for sustainability disclosures: 3.4 Impact materiality, para. 43 ff.

1114 ESRS 1, 3. Double materiality as the basis for sustainability disclosures: 3.5 Financial materiality, para. 47 ff.

1115 Recital 29 CSRD; ESRS 1, 3. Double materiality as the basis for sustainability disclosures: 3.3 Double materiality, para. 37 ff.

1116 Cf. HESELHAUS, URP 2024, 15.

1117 See also Section I 3.3 of this Chapter.

The materiality of information is still defined pursuant to art. 2(16) of the EU Accounting Directive, whereby material information is information whose omission or misstatement reasonably has the potential to influence the decision-making of users.[1118] As demonstrated in Section I 3.3 of this Chapter, this understanding of materiality may conflict with the spirit of reporting under the UNGPs, as the latter centres risks to rights-holders and is not concerned with risks from an investor's perspective.[1119] Whereas the CSRD's concept of materiality is not optimal from the perspective of rights-holders, it is aligned with the Directive's aim of providing relevant insights to a variety of stakeholders.[1120] Requiring companies to provide detailed separate reports focused on preventing and mitigating human rights and environmental risks to rights-holders would certainly be desirable from a human rights perspective. Yet, it would arguably increase the regulatory burden on companies, especially in view of additional reporting obligations under other EU laws, and potentially be duplicative. Therefore, the CSRD's double materiality requirement appears to be a pragmatic compromise.

However, more ambivalent may be the ESRS specifying that undertakings can report on both positive and negative impacts on people and the planet.[1121] While not problematic *per se*, undertakings could misuse reporting on the positive impacts of their activities on sustainability matters to hide negative impacts and/or paint a more favourable picture of their human rights and environmental performance overall. This would clearly conflict with the UNGPs, according to which businesses' efforts in contributing to the enjoyment of some human rights cannot offset their failure to respect other human rights throughout their operations.[1122]

The sustainability report must contain forward-looking, retrospective, qualitative, and quantitative information.[1123] This information must include the following points in particular: (1) a description of the undertaking's business model and strategy, including plans to ensure compliance with net zero targets, the effect of sustainability risks and opportunities, and how the strategy/plans reflect broader stakeholder interests; (2) sustainability targets, including absolute greenhouse gas emissions, and progress against them; (3) the

1118 Cf. art. 1(2) CSRD which only amends art. 2(5) and adds art. 2(17)-(20) EU Accounting Directive.

1119 See further, CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 360.

1120 Cf. recital 9 CSRD.

1121 ESRS 1, 3. Double materiality as the basis for sustainability disclosures: 3.4 Impact materiality, para. 43.

1122 Commentary to UNGP 11.

1123 Art. 1(8) CSRD amending art. 29b(3) EU Accounting Directive.

role of administrative, management and supervisory bodies with regard to sustainability matters; (4) a description of the undertaking's sustainability policies; (5) the due diligence process implemented for sustainability matters, including principal actual and potential adverse impacts throughout the value chain and measures taken to prevent, mitigate or remediate or cease impacts; (6) principal risks of the undertaking related to sustainability matters; and (7) relevant indicators.[1124] In addition, undertakings are required to report on the process carried out to identify these points[1125] and specify the information in short-, medium-, and long-term time horizons.[1126] The explicit requirement to incorporate forward-looking information, including climate change mitigation targets, with its concretisation in the ESRS, was a crucial step to reflect the proactive aspect of reporting under the UNGPs.[1127] Under the UNGPs, communication is notably part of the due diligence process.[1128] As such, it should not be an end in itself, but inform internal-decision making in businesses to prevent and mitigate harm. Reporting should also connect businesses with their stakeholders, particularly rights-holders, to report on how they prevent and mitigate harm.[1129]

While the CSRD is meant to align with the UNGPs and the OECD Guidelines[1130], the terminology of 'principal' risks and impacts is used in neither of these international standards.[1131] Instead, the UNGPs refer to the saliency and severity of impacts as a consideration that allows for prioritisation, whenever potential or actual impacts cannot all be addressed at the same time, as seen in Section I 3.3 of this Chapter.[1132] The CSRD does not elaborate on how the concept of principal risks and impacts relates to saliency and severity. ESRS 1 simply holds that an undertaking's principal risks, impacts, and oppor-

1124 Art. 1(4) CSRD amending art. 19a(2)(a)-(h) EU Accounting Directive.

1125 Art. 1(4) CSRD amending art. 19a(2) subpara. 2 EU Accounting Directive.

1126 Art. 1(4) CSRD amending art. 19a(2) subpara. 2 EU Accounting Directive. For a definition of these time horizons, see ESRS 1, 6. Time horizons: 6.4 Definition of short-, medium- and long-term for reporting purposes, para. 77 ff.

1127 Cf. Art. 1(8) CSRD amending art. 29b(3) EU Accounting Directive; Art. 1(4) CSRD amending art. 19a(2)(a)(iii) and (b) EU Accounting Directive; ESRS 1, 6. Time horizons, para. 74 ff.; ESRS E1: Climate Change.

1128 UNGP 21.

1129 BUHMANN, BHRJ 2018, 38 f.

1130 Recital 31 and 45 CSRD.

1131 HOLLY GABRIELLE / ANDREASEN LYSGAARD SIGNE / BLOCH VEIBERG CATHERINE et al., 'How do the Pieces Fit in the Puzzle? Making Sense of EU Regulatory Initiatives Related to Business and Human Rights' (Version VII, 29 April 2024), Danish Institute for Human Rights (DIHR) (hereinafter: HOLLY / ANDREASEN LYSGAARD / BLOCH VEIBERG et al., EU Regulatory Initiatives), 23.

1132 Commentary to UNGP 17 and UNGP 24.

tunities are understood to be the same as material risks, impacts, and opportunities.[1133] The term 'principal' was already used under the NFRD;[1134] even so, it may cause confusion.[1135]

As previously seen, undertakings must report on sustainability matters related to their own operations and their value chains.[1136] Nevertheless, for the first three years of the CSRD's application, certain alleviations apply to reporting related to the undertaking's value chain: If not all the necessary information is available with respect to the value chain, undertakings must explain the steps taken to collect the relevant information and the reasons why it was not obtained, and describe their plans to acquire the necessary data in the future (comply or explain).[1137] In any case, the information must be integrated in the management report[1138], respect the applicable reporting standards[1139], and be submitted in the electronic reporting format pursuant to art. 29d EU Accounting Directive[1140].

Small and medium-sized undertakings enjoy certain exemptions from and alleviations of their reporting obligations. First, small and medium-sized undertakings have the option to opt out of reporting on sustainability issues for the financial years starting before 1 January 2028, if they provide the reason for doing so in their management report (comply or explain approach).[1141] Second, small and medium-sized undertakings are required to report on less information.[1142] This alleviation particularly relates to compliance with net zero targets and greenhouse gas emission targets.[1143] Third, specific reporting standards apply to small and medium-sized undertakings that are proportionate and relevant to their capacities and characteristics and to the scale and complexity of their business activities.[1144]

1133 ESRS 1, 3. Double materiality as the basis for sustainability disclosures: 3.3 Double materiality, para. 41.

1134 Art. 1(1) NRFD amending art. 19a(1)(d) EU Accounting Directive.

1135 Similarly, HOLLY / ANDREASEN LYSGAARD / BLOCH VEIBERG et al., EU Regulatory Initiatives, 23.

1136 Art. 1(4) CSRD amending art. 19a(3) subpara. 1 EU Accounting Directive. See also, Section II 3.1 and 3.2 of this Chapter.

1137 Art. 1(4) CSRD amending art. 19a(3) subpara. 2 EU Accounting Directive.

1138 Art. 1(4) CSRD amending art. 19a(1) 2 EU Accounting Directive.

1139 Art. 1(4) CSRD amending art. 19a(4) EU Accounting Directive.

1140 Art. 1(10) CSRD amending art. 30(1) EU Accounting Directive.

1141 Art. 1(4) CSRD amending art. 19a(7) EU Accounting Directive.

1142 Art. 1(4) CSRD amending art. 19a(6) EU Accounting Directive.

1143 Art. 1(4) CSRD amending art. 19a(6)(a)-(e) EU Accounting Directive.

1144 Art. 1(4) and art. 1(8) CSRD amending art. 19a(6) subpara. 2 and art. 29c(1) EU Accounting Directive.

Undertakings are required to publish their duly approved management report together with the opinion and statement submitted by a statutory auditor or audit firm not more than 12 months after the balance sheet date.[1145] Member States shall then ensure that statutory auditors or audit firms express an opinion based on a limited assurance engagement as regards the compliance of the sustainability reporting with the requirements of the CSRD.[1146] In a limited assurance engagement, auditors state that no material misstatement of the subject matter has been identified.[1147] The Commission will adopt delegated acts to provide standards for limited assurance and set out the procedure for auditors and audit firms to draw their conclusions on the assurance of sustainability reporting.[1148]

Overall, the CSRD differs considerably from the Swiss reporting provisions in at least six points. First, the CSRD employs the term 'sustainability information' as opposed to the Swiss reporting requirements, which still use the term 'non-financial information' dating back to the NFRD.[1149] Second, under the CSRD, the notion of double materiality is wider than under the Swiss reporting provisions. Double materiality under the Swiss reporting provisions is notably understood as the intersection of impact materiality and financial materiality.[1150] Third, the CSRD is more specific in terms of the expected form of reporting and applicable reporting standards than the Swiss reporting obligations. This is because the CSRD explicitly requires the integration of sustainability matters in the management report, the applicability of specific standards, i.e. the ESRS, and the usage of the electronic reporting format.[1151] Fourth, the CSRD requires the sustainability report to contain forward-looking information. In contrast, reporting under the Swiss provisions is primarily retrospective, since it lacks a comparable requirement.[1152] This neglects the proactive aspect of reporting under the UNGPs, according to which communication is part of the due diligence process. As such, communication should

1145 Art. 1(10) CSRD amending art. 30(1) EU Accounting Directive.

1146 Art. 1(13) CSRD amending art. 34(1)(aa) EU Accounting Directive.

1147 A limited assurance engagement also involves fewer tests compared to a reasonable assurance engagement. The latter is typically expressed in a positive form whereby an auditor provides an opinion on the measurement of the subject matter against previously defined criteria. It involves extensive procedures, including consideration of internal controls within the reporting entity and substantive testing (recital 60, para. 1 and 2 CSRD).

1148 Art. 3(15) CSRD inserting art. 26a(3) into the EU Statutory Audits Directive.

1149 FOJ, Analysis CSRD and CSDDD Draft, 14. See further, Section I 3.3 of this Chapter.

1150 See Section I 3.3 of this Chapter.

1151 FOJ, Analysis CSRD and CSDDD Draft, 16 and 17. See further, Section I 3.3 of this Chapter.

1152 An exception would be the CO2 targets (see Sections I 3.1 and 3.3 of this Chapter).

not be an end in itself, but inform internal decision making in businesses to prevent and mitigate harm. Reporting should also connect businesses with their stakeholders, particularly rights-holders, to report on how they prevent and mitigate harm.[1153] The CSRD, with the concretisation of reporting requirements in the ESRS, at least lays the foundation to reflect this proactive aspect by explicitly requiring forward-looking information, including climate change mitigation targets.[1154] Fifth, whereas the comply or explain approach under the CSRD is solely applicable for a limited period of time, Swiss undertakings are able to opt out of reporting if they provide their reasons for it.[1155] Sixth, the CSRD foresees third party verification of sustainability reports, as opposed to the Swiss provisions.[1156] Even though the CSRD is not fully aligned with the spirit of the UNGPs, i.e. reporting focused on preventing and mitigating risks to rights-holders, it is more so than the Swiss reporting provisions, and thereby the NFRD. As such, the adoption of the CSRD marks a step forward in human rights and environmental reporting.

4. Enforcement

Under the CSRD, enforcement focuses on the conduct of statutory auditors and audit firms, not the conduct of undertakings required to report on sustainability information. Member States are obliged to ensure that there are effective systems of investigations and sanctions in place to identify, correct, and prevent inadequate execution of the statutory audit and the assurance of sustainability reporting.[1157] Member States are namely required to implement effective, proportionate, and dissuasive sanctions against statutory auditors and audit firms in the event that statutory audits or assurance of sustainability reporting are not carried out in compliance with the applicable provisions.[1158] To do so, Member States must empower competent authorities to impose administrative measures and/or sanctions for breaches of relevant provisions. These include, but are not limited to, the provision of notices requiring the natural or legal person responsible for the breach to cease its conduct and to abstain from any repetition of that conduct, the temporary

1153 BUHMANN, BHRJ 2018, 38 f.

1154 Cf. Art. 1(8) CSRD amending art. 29b(3) EU Accounting Directive; Art. 1(4) CSRD amending art. 19a(2)(a)(iii) and (b) EU Accounting Directive; ESRS 1, 6. Time horizons, para. 74 ff.; ESRS E1: Climate Change.

1155 Cf. FOJ, Analysis CSRD and CSDDD Draft, 17. See further, Section I 3.3 of this Chapter.

1156 Cf. FOJ, Analysis CSRD and CSDDD Draft, 17. See Section I 3.3 of this Chapter.

1157 Art. 3(20) CSRD amending art. 30(1) EU Statutory Audits Directive.

1158 Art. 3(20) CSRD amending art. 30(2) EU Statutory Audits Directive.

prohibition to carry out audits and/or the assurance of reports, the provision of a public statement indicating the person responsible and the nature of the breach, and the imposition of administrative pecuniary sanctions on natural and legal persons.[1159] Member States may decide not to lay down rules for administrative sanctions for infringements which are already subject to national criminal law. In that event, they shall communicate to the Commission the relevant criminal law provisions.[1160] The implementation of third-party verification of reported information through audits and limited assurance engagements strengthens its credibility. Coupled with the introduction of state-based oversight and public enforcement mechanisms, this represents a departure from solely relying on stakeholders, such as investors, consumers, and civil society organisations, and therefore progress in holding undertakings accountable. This is because the experience with the NFRD suggests that independent oversight and enforcement mechanisms are fundamental to improve the relevance and reliability of reported data and thus for reporting laws to attain their legislative objective of enabling corporate accountability.[1161]

Under the CSRD, administrative measures and sanctions are more diverse and explicitly required to be proportionate to the breach as opposed to under Swiss law. As seen, under Swiss law, solely natural persons can be held criminally liable for breaches of relevant reporting provisions, with relatively low fines of up to CHF 100,000. Furthermore, there is no independent verification of reported content and no competent national oversight authority monitoring the conduct of statutory auditors and audit firms or the implementation of reporting requirements under the Swiss provisions.[1162]

5. Concluding Remarks

Overall, the CSRD reflects some of the criticism levelled against the NFRD and incorporates features that enhance the relevance, comparability, and reliability of reported data. The CSRD accomplishes this by eliminating some of the extensive flexibility and vagueness of reporting requirements under the NFRD. This includes the clarification of the double materiality requirement, the reduction of the comply-and-explain approach to time-limited exceptions, and the introduction of sustainability reporting standards as well as a uniform

1159 Art. 30a(1) EU Statutory Audits Directive.

1160 Art. 3(20) CSRD amending art. 30(2) subpara. 2 EU Statutory Audits Directive.

1161 Cf. FERNÁNDEZ GAZTEA / MUÑOZ FERNÁNDEZ, CDT 2017, 298 margin n. 55; EC NFRD Inception Impact Assessment, 2; CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 364 and 366.

1162 Cf. FOJ, Analysis CSRD and CSDDD Draft, 17. See Section I 3.3 of this Chapter.

reporting format. The requirement of third-party verification of sustainability reports enhances the reliability of reported information and helps stakeholders, particularly investors and civil society organisations, in holding undertakings accountable for their human rights and environmental performance. The reliability of reported data is further strengthened by Member States having to establish national oversight mechanisms that monitor the conduct of statutory auditors and audit firms and impose sanctions for non-compliance.

As previously explained in Section II 1. of this Chapter, the EU Commission adopted the Omnibus Package to propose amendments to the CSRD. Besides postponing the transposition deadline and the application dates of reporting requirements for wave 2 and 3 undertakings, which have, as seen, already been adopted with the Stop-the-Clock Directive, the Omnibus Proposal also contains substantive changes.[1163] The most drastic of the proposed amendments is arguably the reduction of the CSRD's personal scope to large companies exceeding 1,000 employees and either generating a turnover above EUR 50 million or a balance sheet total above EUR 25 million. This amendment would dramatically lower the number of in-scope undertakings by approximately 80% and therefore cannot be considered 'simplification' of rules. This proposed change would eventually align the personal scope of the CSRD more closely with the one of the CSDDD, which will be discussed in Chapter 5 II.[1164] If adopted, this means that small and medium-sized undertakings would not have to report on sustainability matters under the CSRD. On the one hand, sustainability reporting is aimed at improving corporate human rights and environmental performance by enabling market forces, such as civil society organisations, consumers, and investors, to hold companies accountable through informed decision-making based on disclosed information. Investors notably increasingly rely on sustainability data, including from small and medium-sized undertakings, to identify risks as well as opportunities and make their investment decisions.[1165] Sustainability reporting incentivises

1163 Cf. EC, Omnibus Package Press Release; EC, Omnibus Proposal: CSRD and CSDDD, 14 ff.

1164 EC, Omnibus Package Q&A, Q5.

1165 In a joint statement, the Institutional Investors Group on Climate Change (IIGCC), the European Sustainable Investment Forum (Eurosif), and the Principles for Responsible Investment (PRI), as well as 163 investors warned against a weakening of the CSRD, see IIGCC/Eurosif/PRI, 'Investor Joint Statement on Omnibus Legislation' (4 February 2025) (hereinafter: IIGCC/Eurosif/PRI, Investor Joint Statement on Omnibus Legislation). This was reiterated by the Eurosif in an additional statement once the details of the Omnibus Proposal were published: Eurosif, 'Eurosif Warns Omnibus Proposals Risk Undermining Investment and Competitiveness', Press Release (27 February 2025) (hereinafter: Eurosif, Press Release re EC Omnibus Proposal).

companies to conduct due diligence and could thus prepare small and medium-sized undertakings, which are currently out of the CSDDD's scope, for heightened expectations regarding their human rights and environmental conduct from consumers and other companies maintaining business relationships with them. On the other hand, the experience with disclosure laws has demonstrated that they are by themselves insufficient to substantially change the *status quo* for rights-holders without accompanying due diligence obligations and robust enforcement mechanisms able to investigate and monitor in-scope companies' human rights and environmental conduct.[1166] This is because disclosure laws do not provide rights-holders with a direct cause of action to prevent human rights abuses and environmental harm or obtain redress for the damage suffered. Due to the lack of accompanying due diligence obligations for small and medium-sized undertakings under the CSDDD, the proposed reduction of the CSRD's personal scope may appear less alarming from a rights-holders' perspective.

Certainly problematic is the fact that the Omnibus Proposal exposes companies that have already invested into compliance with reporting requirements to significant legal uncertainty, regardless of the postponed application dates.[1167] Moreover, the recent push for deregulation could end up spiralling into even more far-reaching amendments that could undo years of advocacy for carefully crafted legislation to enhance corporate human rights and environmental accountability. From this perspective, the Omnibus Proposal is concerning. Even more so, since its adoption by the European Commission was not preceded by an adequate consultation of a variety of stakeholders, including civil society organisations.[1168]

1166 Cf. MARES, NQHR 2018, 213; HESS, ABLJ 2019, 41; MARTIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 194 f. and 196 f.; CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 366.

1167 Cf. BERTRAM ALICE, 'How the EU Omnibus Packages Roll Back the European Green Deal', Verfassungsblog (20 March 2025); Network of National Human Rights Institutions, 'ENNHRI Raises Important Concerns over the European Commission's Omnibus I Proposal', Statement (March 2025) (hereinafter: ENNHRI, Statement on EC Omnibus I), 3; UVAROVA OLENA, 'The Simplification Omnibus and the Rule of Law: Undermining Corporate Sustainability in the EU and Beyond?', Business and Human Rights Journal Blog (12 March 2025) (hereinafter: UVAROVA, The Simplification Omnibus and the Rule of Law, BHRJ Blog).

1168 Cf. ENNHRI, Statement on EC Omnibus I, 2 f.; UVAROVA, The Simplification Omnibus and the Rule of Law, BHRJ Blog. The lack of prior consultation even prompted a coalition of eight NGOs to file a formal complaint with the European Ombudsoffice, see European Coalition for Corporate Justice, 'NGOs Challenge European Commission's Undemocratic 'Omnibus' Process', Joint Press Release (18 April 2025). On 23 May 2025, the Ombudswoman opened an inquiry to investigate this complaint, see European Ombudsman, 'Ombudswoman Opens Inquiry Concerning how Commission Prepared

In a next step, the European Parliament and the Council will each adopt their respective positions on the Omnibus Proposal and trilogue negotiations will begin. While the proposal to postpone the transposition deadline and applicability of reporting obligations for wave 2 and 3 companies was accepted swiftly with the Stop-the-Clock Directive, other amendments to the CSRD will be more contentious and likely involve lengthier negotiations.[1169]

III. Summary

There are considerable differences in the personal scope (inclusion of small and medium-sized undertakings), covered business activities (inclusion of upstream and downstream value chain), content (double materiality, specificity of reporting standards, third-party verification etc.), and enforcement (regulatory oversight and sanctions) between the Swiss reporting provisions and the CSRD. The adoption of the CSRD introduced important changes to sustainability reporting under the NFRD in that the amended provisions allow for better comparability and reliability of reports as well as for information to be shared that is relevant and detailed enough to enable stakeholders, particularly investors and civil society organisations, to make informed decisions and hold companies accountable. Overall, the CSRD is more aligned with the UNGPs' conception of reporting.

Considering the foregoing, Swiss provisions, which are modelled after the NFRD, appear outdated and, based on the experience with the NFRD, likely less effective than the CSRD in animating companies to improve their human rights and environmental performance. Furthermore, large Swiss public interest companies in particular are already impacted by the CSRD. Against this backdrop and in view of the expressed desire for a 'coordinated' approach that is in line with international legislative efforts,[1170] Swiss lawmakers should look into updating the Swiss reporting provisions. Following the European Commission's Omnibus Proposal, the Swiss Federal Council announced that it will decide on proposing changes to the current Swiss reporting requirements once EU lawmakers have agreed on potential amendments to the CSRD or

a Legislative Proposal as Part of its Omnibus Package of Simplification Measures', Case 983/2025/MAS.

1169 MCNALLY FIONA, 'EU Omnibus: Co-Legislators Gear up for Next Steps on CSRD, CSDDD Changes', Responsible Investor article (6 March 2025) (hereinafter: MCNALLY, EU Omnibus: Next Steps for CSRD/CSDDD).

1170 Cf. Federal Dispatch RBI, 6365 f. and 6378. See further, Section I 1. of this Chapter.

latest in Spring 2026.[1171] In light of the Federal Council's aforementioned statement, it is thus likely that the Federal Council will propose modelling new reporting obligations closely after the (amended) CSRD.

In any case, reporting laws should only serve as one regulatory tool amongst others to enhance corporate human rights and environmental performance. Reporting laws alone will notably not bring about necessary change in corporate accountability without comprehensive and meaningful mandatory due diligence legislation with robust enforcement mechanisms and improved access to remedy for victims of human rights abuses, as empirical evidence has demonstrated.[1172]

1171 Federal Council, 'Nachhaltige Unternehmensführung: Bundesrat will bald über konkrete Vorschläge diskutieren', Press Release (21 March 2025) (hereinafter: Federal Council, Press Release: Changes to Swiss Reporting and Due Diligence Obligations in Light of EU Developments).

1172 Cf. MARES, NQHR 2018, 213; HESS, ABLJ 2019, 41; MARTIN, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 194 f. and 196 f.; CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 366.

Chapter 4: Mandatory Due Diligence Laws

This Chapter focuses on the analysis of the mandatory due diligence provisions in the Swiss Code of Obligations (Section I) and the German Supply Chain Due Diligence Act 2021 (SCDDA)[1173] (Section II). Both pieces of legislation represent the second type of mandatory HRDD law, i.e. laws that describe due diligence obligations that may contain sanctions for non-compliance.[1174] The aim of this Chapter is threefold. First, it is to evaluate the alignment of these laws with international due diligence standards. Second, it is to compare and contrast the potential of these laws for the protection of rights-holders from transnational corporate misconduct. Third, it is to explore the complementary role the soft law and voluntary instruments analysed in Chapter 2 could play in informing effective human rights due diligence in the application of these laws.

The choice of the Swiss due diligence provisions and the German SCDDA is based on three reasons. First, the Swiss due diligence provisions stipulate the least comprehensive due diligence obligations in comparison to those in the neighbouring countries of Germany and France. This is because the Swiss approach to due diligence is an industry- and issue-specific one. Second, the German SCDDA indirectly impacts Swiss companies whenever they supply a company based in Germany that falls under the SCDDA's personal scope.[1175] The analysis of the German SCDDA is therefore particularly pertinent from a Swiss perspective as well. Third, as will be demonstrated in the following Chapter, the German SCDDA was one of the key pieces of legislation that the EU CSDDD drew on for its design.[1176] EU Member States will thus be able to considerably benefit from the experience with the German Act when transposing and implementing the EU Directive.

1173 Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten vom 16.7.2021, BGBl. I 2021, Nr. 46, 2959.

1174 See Introduction III.

1175 Federal Council, 'Portal for Small and Medium-Sized Enterprises: Supply Chain Act (LkSG) Germany' (hereinafter: Federal Council: Portal for SMEs: SCDDA).

1176 See Chapter 5 II.

I. The Mandatory Due Diligence Provisions in the Swiss Code of Obligations

The focus of this Section is to discuss the provisions on HRDD introduced as a result of the failed RBI. These are the due diligence and reporting obligations related to conflict minerals and metals and child labour that are contained in art. 964j-964l CO and specified in the DDTrO. Other, previously existing due diligence obligations, such as HRDD obligations related to the provision of private security services[1177] and the supply of timber and timber products[1178], are not the subject of this discussion.

As seen in the previous Chapter, art. 964j-art. 964l CO and their corresponding implementing provisions in the DDTrO are inspired by the EU Conflict Minerals Regulation[1179] and the Dutch CLDDA[1180].[1181] The DDTrO references the UNGPs, the OECD Guidance on Responsible Business Conduct, and the OECD Guidance on Conflict Minerals[1182] and explicitly acknowledges them as internationally recognised standards.[1183] Similarly, the EU Conflict

1177 Federal Act of 27 September 2013 on Private Security Services provided Abroad (PSSA), SR 935.41.

1178 Ordinance of 12 May 2021 on Placing Timber and Wood Products on the Market (Timber Trade Ordinance, TTO), SR 814.021. This Ordinance is inspired by the Regulation (EU) 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ 12.11.2010, L 295/23. This Regulation was replaced by the Regulation (EU) 2013/115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ 9.6.2023, L 150/206. The Swiss Federal Council decided against adapting the Timber Trade Ordinance for the time being.

1179 The EU Conflict Minerals Regulation entered into force on 8 June 2017 pursuant to art. 20(1) of the Regulation. Certain articles regarding the due diligence obligations of union importers and the obligations of enforcement authorities, however, only apply since 1 January 2021 according to art. 20(3) of the Regulation.

1180 Following the CLDDA's adoption, the Dutch government announced its intention to integrate the CLDDA into comprehensive due diligence legislation at the EU Level, i.e. the EU Corporate Sustainability Due Diligence Directive. The CLDDA has therefore not entered into force (cf. ENNEKING LIESBETH, Putting the Dutch Child Labour Due Diligence Act into Perspective, An Assessment of the CLDD Act's Legal and Policy Relevance in the Netherlands and Beyond, Erasmus Law Review (ELR) 2019, 20 ff., 23; KAUFMANN/BIGGOER, BK Commentary, art. 964j-l CO margin n. 29).

1181 See, Chapter 3 I 1.

1182 Organisation for Economic Co-operation and Development (OECD), Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016).

1183 Art. 9 DDTrO and Annex 2 DDTrO.

Minerals Regulation explicitly refers to the OECD Guidelines for Multinational Enterprises and the OECD Guidance on Conflict Minerals as sources of its provisions.[1184]

1. Definitions

1.1 Undertaking

For the purpose of the due diligence and reporting obligations pursuant to art. 964j-art. 964l CO, art. 2 para. 1 let. a DDTrO defines undertakings as natural persons, legal entities and partnerships which have their seat, domicile, head office or principal place of business in Switzerland and operate a business. The Federal Office of Justice elaborates in its report that for the purpose of the Ordinance, a business is an organised, continuous economic activity carried out with the intention of generating profit.[1185]

1.2 Supply Chain

According to art. 2 para. 1 let. b DDTrO, a supply chain is a process encompassing an undertaking's own business activities and that of all upstream economic operators that:

(1) have possession *(Gewahrsam)*[1186] of minerals or metals originating from conflict-affected and high-risk areas and that are involved in their shipment, treatment, and processing in the final product,

(2) offer products or services in relation to which there are reasonable grounds to suspect that they have been manufactured or provided using child labour.

1184 E.g., in art. 2(g), (o), (q) and (r) for definitions.

1185 FOJ, Explanatory Report, 10.

1186 The French version of art. 2 para. 1 let. b no. 1 DDTrO does not employ the term 'possession', but refers to 'responsibility' instead: *'[…] les opérateurs économiques en amont […] auxquels incombe la responsabilité de minerais ou de métaux […]'*. The Italian version also refers to 'responsibility' instead of 'possession': *'[…] operatori economici a monte […] ai quali incombe la responsabilità dei minerali o dei metalli […]'*. This difference was not addressed by the Federal Office of Justice (cf. FOJ, Explanatory Report, 11). Nevertheless, it may at least partly be explainable by looking at the different language versions of the EU Conflict Minerals Regulation: The French and Italian version of the EU Conflict Minerals Regulation use the same wording in art. 2(e) as art. 2 para. 1 let. b no. 1 DDTrO to describe the supply chain traceability system that Union importers are required to implement as part of their due diligence obligations. Similarly to the German version of art. 2 para. 1 let. b no. 1 DDTrO, the German version of art. 2(e) EU Conflict Minerals Regulation uses the term *Gewahrsam* to describe the supply chain traceability system. However, the English version of art. 2(e) EU Conflict Minerals Regulation does not use the term 'possession', but 'custody' instead.

In contrast to the DDTrO, the EU Conflict Minerals Regulation differentiates between the upstream supply chain and the downstream supply chain. According to art. 2(j) EU Conflict Minerals Regulation, the upstream supply chain encompasses all business activities from the extractions sites to the smelters and refiners. These are the companies that handle the raw materials, i.e. mining companies, raw material traders, smelters, and refiners. Art. 2(k) EU Conflict Minerals Regulation defines the downstream supply chain to encompass the business activities following the smelters and refiners to the final product. Downstream economic operators are the companies that transform the metals produced by upstream companies into the final product.[1187]

1.3 Minerals and Metals

Pursuant to art. 2 para. 1 let. c DDTrO, minerals are defined as ores and concentrates that contain tin, tantalum or tungsten, as well as gold as specified in Annex 1 Part A DDTrO. Minerals in the form of by-products are included.

Metals that contain or consist of tin, tantalum or tungsten, as well as gold as specified in Annex 1 Part A DDTrO, including in the form of by-products, are also covered by the due diligence and reporting obligations (art. 964 j para. 1 no. 1 CO in conjunction with art. 2 para. 1 let. d DDTrO).

According to the Federal Office of Justice, the term by-product within the meaning of the DDTrO is to be interpreted in accordance with the EU Conflict Minerals Regulation.[1188] The EU Conflict Minerals Regulation defines by-products as minerals or metals that

(1) either fall within the scope or the Regulation and have been obtained by processing a mineral or metal not covered by this Regulation; or
(2) would not have been obtained without the processing of the primary mineral or metal falling outside the scope of this Regulation.[1189]

In accordance with the EU Conflict Minerals Regulation, other minerals and metals, such as cobalt, that are in high demand and sourced from equally challenging human rights contexts, are not covered. This impacts the effectiveness of the Swiss due diligence provisions related to conflict minerals.[1190]

1187 European Commission, 'Conflict Minerals Regulation: The Regulation Explained' (hereinafter: EC, The Conflict Minerals Regulation Explained).

1188 FOJ, Explanatory Report, 12.

1189 Art. 2(f) EU Conflict Minerals Regulation.

1190 On human rights challenges in the cobalt supply chain see, e.g., Amnesty International, 'Time to Recharge, Corporate Action and Inaction to Tackle Abuses in the Cobalt Supply Chain' (November 2017). For a critical appraisal of the Swiss HRDD provisions related to conflict minerals and metals see Section I. 3.1 a of this Chapter.

1.4 Conflict-Affected and High-Risk Areas

According to art. 2 para. 2 let. e DDTrO, conflict-affected and high-risk areas are areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security. Such areas include failed states and states in which widespread and systematic violations of international law, including human rights abuses, are committed.

The definition of conflict-affected and high-risk area of the DDTrO corresponds to the definition used in art. 2(f) EU Conflict Minerals Regulation. For guidance on the identification of conflict-affected and high-risk areas, the Federal Office of Justice refers to the EU Commission's Recommendation 2018/1149[1191] and the indicative, non-exhaustive list that was developed by RAND Europe on behalf of the EU Commission for this purpose.[1192]

1.5 Child Labour

The definition of child labour in art. 2 para. 2 let. f DDTrO corresponds with the definition developed by the ILO and explicitly references the ILO Conventions No. 182 and 138, which have been ratified by Switzerland.[1193]

2. Personal Scope

2.1 With Respect to Conflict Minerals and Metals

Pursuant to art. 964j para. 1 no. 1 and para. 2 CO, all undertakings, regardless of their size, shall comply with due diligence obligations throughout their supply chains and report on their due diligence if:

(1) their seat, head office or principal place of business is in Switzerland;
(2) they import minerals or metals containing tin, tantalum, tungsten or gold from conflict and high-risk areas into free circulation in Switzerland or process them in Switzerland;
(3) and the quantity they import exceeds a certain threshold that is determined by the Federal Council on a yearly basis.

1191 EU Commission, Recommendation 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council, OJ 17.8.2018, L 208/94

1192 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 19; FOJ, Explanatory Report, 13. The list is available on a dedicated website that was developed with funding from the European Union.

1193 Cf. FOJ, Explanatory Report, 13.

In addition to the import of conflict minerals or metals for the purpose of resale, the import for the purpose of processing in Switzerland is also covered. If foreign companies import conflict minerals or metals to Switzerland, Swiss undertakings that process them fall within the scope of due diligence obligations.[1194] The terminology in art. 964j CO is based on the Swiss Customs Act[1195].[1196]

Undertakings are partly exempted from their due diligence obligations if they can prove that they solely import and process metals exclusively derived from recycling (art. 12 para. 3 DDTrO).[1197] Such undertakings are namely only required to establish a supply chain policy in accordance with art. 10 DDTrO as well as a supply chain traceability system in accordance with art. 12 DDTrO and comply with their reporting obligations under art. 964l CO.[1198]

Art. 964l para. 1 no. 1 and para. 2 CO are largely in line with the personal scope of the EU Conflict Minerals Regulation. Under the EU Conflict Minerals Regulation, due diligence and reporting obligations apply to 'Union importers' that import conflict minerals or metals above a certain threshold (art. 1(2)). According to art. 2(1) EU Conflict Minerals Regulation, a Union importer is any legal or natural person that declares conflict minerals or metals for free circulation in the EU area or any natural or legal person on whose behalf such declaration is made. In this context, art. 2(l) EU Conflict Minerals Regulation refers to art. 201 of the EU Customs Code Regulation[1199]. Art. 1(2) in conjunction with art. 2(l) EU Conflict Minerals Regulation implicitly requires that Union importers must be based in the EU to fall under the personal scope of the Regulation.[1200] Similarly to art. 12 para. 3 DDTrO, Union importers that solely import recycled metals[1201] are partly exempted from the due diligence obligations

1194 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 19.

1195 Zollgesetz vom 18. März 2005 (ZG), SR 631.0 (text available in German, French, and Italian only).

1196 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 19.

1197 The Federal Office of Justice defines recycling as the reuse of waste products for their original purpose or for other purposes (FOJ, Explanatory Report, 37).

1198 FOJ, Explanatory Report, 37.

1199 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ 10.10.2013, L 269/1.

1200 EC, The Conflict Minerals Regulation Explained; FEHSE MARTHE-LOUISE / MARKMANN FRIEDRICH, Die Konfliktmineralienverordnung der Europäischen Union, Neue Pflichten für Unionseinführer und nationaler Vollzug, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2021, 113 ff., 115. MACCHI CHIARA, A Glass Half Full: Critical Assessment of EU Regulation 2017/821 on Conflict Minerals, Journal of Human Rights Practice (JHRP) 2021, 270 ff., 276.

1201 According to art. 2(s) EU Conflict Minerals Regulation, recycled metals are 'reclaimed end-user or post-consumer products, or scrap processed metals created during product

under the EU Conflict Minerals Regulation (art. 1(6)). Such Union importers are namely only required to publicly disclose the fact that they exclusively import recycled metals and report on the due diligence measures they implemented to come to that conclusion (art. 4(7) EU Conflict Minerals Regulation).

Pursuant to art. 4 para 1 DDTrO, the annual import and processing thresholds for minerals and metals which determine whether an undertaking is required to comply with the due diligence obligations set out in art. 964k and art. 964l CO, are listed in Annex 1 of the Ordinance. These volume thresholds are based on the thresholds contained in Annex 1 of the EU Conflict Minerals Regulation.[1202] Art. 4 para. 2 DDTrO clarifies that if an undertaking controls one or more other undertakings within the meaning of art. 963 para. 2 CO, the volume thresholds apply to the entire corporate group.[1203]

In contrast to the EU Conflict Minerals Regulation, the Swiss provisions do not address so-called due diligence scheme owners. Art. 3(3) in conjunction with art. 8(1) of the EU Conflict Minerals Regulation notably enables these scheme owners to apply to have their scheme recognised as equivalent to the due diligence and disclosure requirements of the Regulation. This is meant to facilitate compliance with the Regulation. Pursuant to art. 8(2) EU Conflict Minerals Regulation, it is the Commission that assesses the equivalence of submitted schemes. In accordance with art. 8(2) EU Conflict Minerals Regulation, the Commission shall adopt delegated acts to define the methodology and the criteria used for the assessment of equivalence.[1204]

In any case, basing the applicability of due diligence obligations solely on annual import and processing thresholds is not aligned with the UNGPs, which call on all business enterprises to conduct risk-based due diligence.[1205] While higher volume and processing thresholds may correlate with a higher risk of involvement in widespread and systematic violations of international law, including human rights abuses, other factors, such as the specific region

manufacturing, including excess, obsolete, defective, and scrap metal materials which contain refined or processed metals that are appropriate for recycling in the production of tin, tantalum, tungsten or gold. For the purposes of this definition, minerals partially processed, unprocessed or a by-product from another ore are not considered to be recycled metals [...]'.

1202 FOJ, Explanatory Report, 15.

1203 Ibid., 15 and 21.

1204 The Commission did so in Delegated Regulation (EU) 2019/429, OJ 19.3.2019, L 75/59. According to art. 2(1)(e) in conjunction with art. 4(2) Delegated Regulation 2019/429, schemes must be fully aligned with the OECD Guidance on Conflict Minerals to be considered equivalent. The Commission therefore bases its assessment on the methodology developed by the OECD to determine equivalence.

1205 UNGP 14 and Commentary thereto.

within conflict and conflict-affected areas, from which the mineral or metal is sourced, may be just as relevant.

2.2 With Respect to Child Labour

Pursuant to art. 964j para. 1 no. 2 CO, all undertakings, irrespective of their size, shall comply with due diligence obligations throughout their supply chains and report on their due diligence if,

(1) their seat, head office or principal place of business is in Switzerland; and
(2) they offer products or services in Switzerland for which there are 'reasonable grounds to suspect' that they have been manufactured or provided using child labour.

For guidance on the interpretation of what would constitute 'reasonable grounds to suspect', the Federal Office of Justice refers to the OECD's Guidance on Child Labour in Mineral Supply Chains[1206] and to the Swiss doctrine and case law on money laundering which employs the same terminology[1207].[1208] Accordingly, reasonable grounds for suspicion are considered to exist if there is evidence or there are concrete and substantiated indications or observations that give rise to fears of use of child labour.[1209] The Federal Office of Justice states that undertakings cannot be expected to systematically check all products and services for any suspicion of child labour. However, they must remain vigilant and initiate investigations as soon as they have a suspicion. Suspicions may arise from internal sources, such as documents relating to a supplier or an on-site visit. External sources such as media reports, court rulings or communications and publications from administrative authorities, international organisations and civil society organisations, may also be relevant.[1210] The ILO-IOE Guidance Tool on Child Labour, for instance, considers business activities and sectors such as the following to be at risk for use of child labour: sourcing agricultural products such as cocoa, coffee, tea, and sugar; sourcing clothing, shoes or accessories; producing electronic end products with gradual manufacturing in the supply chain; purchasing goods from current conflict

1206 Organisation for Economic Co-operation and Development (OECD), 'Practical Actions for Companies to Identify and Address the Worst Forms of Child Labour in Mineral Supply Chains' (2017).

1207 Cf. art. 9 of the Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 (AMLA), SR 955.0, English translation.

1208 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 19.

1209 Ibid., 19 f.; FOJ, Explanatory Report, 19 f.

1210 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 20.

areas or from countries with a pronounced shadow economy.[1211] Such Guidelines should be an important source of information for undertakings and trigger investigations for use of child labour.[1212] Undertakings are notably well advised not to remain passive and wait until they are alerted to specific potential or actual instances of child labour, but take proactive steps to understand their exposure to the risk of involvement with child labour. This is because the absence of reasonable grounds for suspicion can hardly be established without conducting at least a preliminary risk assessment in the first place.[1213]

Based on art. 964j para. 3 CO, the Federal Council is authorised to define exemptions from due diligence and reporting obligations for small and medium-sized undertakings as well as for undertakings with low child labour risks. The Federal Council did so in art. 6 and art. 7 DDTrO.

According to art. 6 para. 1 DDTrO, small and medium-sized undertakings are not obliged to check whether there are reasonable grounds to suspect child labour and are exempt from the due diligence and reporting obligations. Art. 6 para. 2 DDTrO defines small and medium-sized undertakings as undertakings which, together with the domestic and foreign undertakings that they control, do not exceed two of the three key figures stated below in two successive business years:

(1) balance sheet total of CHF 20 million;
(2) sales revenue of CHF 40 million;
(3) 250 full-time equivalent positions on average for the year.[1214]

Exempting small and medium-sized undertakings from due diligence obligations is not aligned with the UNGPs, which call on all business enterprises to conduct risk-based due diligence.[1215] More indicative of the risk of involvement in child labour than company size, and consequently a more adequate factor to consider when defining the personal scope, would have especially been

1211 ILO-IOE Child Labour Guidance Tool for Business (2015), 3.

1212 Similarly, ATAMER/WILLI, SZW 2020, 695. The Federal Office of Justice is not of the opinion that the business activities and sectors described in the ILO-IOE Child Labour Guidance Tool for Business should automatically spark suspicion of child labour and thus trigger corresponding due diligence obligations. Nevertheless, the tool is recognised as an important source for identifying and assessing risks related to child labour (see, e.g., FOJ, Explanatory Report, 42 f.). Furthermore, the tool is listed in Annex 2 DDTrO as an internationally recognised equivalent standard, see also Section I 2.3 of this Chapter.

1213 Cf. BUENO/KAUFMANN, BHRJ 2021, 546.

1214 Art. 6 para. 2 DDTrO borrows from art. 727 para. 2 no. 2 CO which defines the conditions for undertakings to be exempted from the obligation to conduct an ordinary audit (FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 20).

1215 UNGP 14 and Commentary thereto. See also, BUENO/KAUFMANN, BHRJ 2021, 548.

the business sector in which companies operate and the type of business activities they engage in.[1216]

The exemptions in the DDTrO go even further: Even if these thresholds are exceeded, undertakings still do not have to check whether there are reasonable grounds to suspect child labour and are thus exempted from the due diligence and reporting obligations, if they can demonstrate that they source products or services from countries with low child labour risks (art. 7 para. 1 DDTrO). Pursuant to art. 7 para. 2 DDTrO, a low risk for child labour is presumed for undertakings operating in countries whose due diligence response is rated as 'basic' by the United Nations Children's Fund (UNICEF) in its Children's Rights in the Workplace Index[1217]. The Federal Office of Justice considers a check of the UNICEF index for all countries involved in the supply chain of a product to hardly be feasible with reasonable effort, especially for products that consist of numerous components from different countries of origin. Undertakings can therefore limit their checks to the countries in which they manufacture their products or purchase their products from, in accordance with the indication of origin ('made in') (art. 7 para. 2 let. a DDTrO). The checks must be carried out annually.[1218] With respect to services, checks can be limited to the countries where the services were primarily procured or provided (at least 50% of the value added) (art. 7 para. 2 let. b DDTrO).[1219] Pursuant to art. 7 para. 3 DDTrO, undertakings that are considered to have a low risk in relation to child labour must document the reasons why this is the case. With this exemption grounded in the UNICEF index, the DDTrO introduces a risk-based element, albeit a rigid[1220] one, to limit the applicability of due diligence

1216 Cf. ILO-IOE Child Labour Guidance Tool for Business (2015), 3.

1217 The UNICEF Index is part of the UNICEF Children's Rights and Business Atlas. The Atlas was developed by UNICEF and provides expertise and information for the protection and promotion of children's rights worldwide. The UNICEF Children's Rights and Business Atlas is designed to help businesses examine their potential and actual impact on children's rights and integrate their findings into their due diligence processes. The UNICEF Index is based on publicly available country data, industry data and internationally recognised indices in different thematic areas. It is available on UNICEF's website.

1218 FOJ, Explanatory Report, 22.

1219 Ibid.

1220 It is notably unclear how frequently the index is updated. Moreover, while the geographic region in which a company operates or sources from is an important indicator for the risk of child labour, concrete risks at suppliers' may still exist in countries rated 'basic' (cf. KAUFMANN/BIGGOER, BK Commentary, art. 964j-l CO margin n. 38). According to international due diligence standards, companies should therefore also take enterprise-level risks into account when conducting risk assessments (OECD RBC Guidance, 25 and 62 f.).

and reporting obligations. Instead of excluding small and medium-sized undertakings, a risk-based approach should have guided the definition of the personal scope in the first place.

According to art. 8 DDTrO, art. 5–7 DDTrO are not applicable and the undertaking is subject to due diligence and reporting obligations, if it offers products or services that have 'evidently' been produced or provided using child labour. The Federal Office of Justice deems the use of child labour 'evident' in cases where the use of child labour has been established with certainty. Certainty arises from reliable, objective, and independent sources such as court rulings, ILO reports, and corporate reports in which the use of child labour has been explicitly confirmed.[1221] Although a minor carve-out, this means that small and medium-sized undertakings are at least required to comply with due diligence and reporting obligations where the use of child labour is evident.

In comparison to the Dutch CLDDA, which the Swiss provisions were modelled after, the personal scope of the Swiss provisions appears narrow and worded in an unnecessarily complex manner.[1222] The Dutch Act notably imposes due diligence obligations on *any* company that supplies goods or services to Dutch end-users, irrespective of whether the company is registered in the Netherlands or abroad.[1223] Nevertheless, the CLDDA too, allows for the exemption of certain categories of undertakings, such as those operating in low-risk sectors, from HRDD obligations through secondary legislation.[1224]

2.3 Exemption based on the Application of 'Alternative International Standards'

Another exemption from due diligence and reporting obligations is contained in art. 964j para. 4 CO in conjunction with art. 9 DDTrO. This exemption applies to undertakings that comply with 'internationally recognised equivalent regulations' enlisted in Annex 2 DDTrO.

With respect to conflict minerals, these are the OECD Guidance on Conflict Minerals with all annexes and supplements *or* the EU Conflict Minerals Regulation (Annex 2 Part A).

1221 FOJ, Explanatory Report, 24.

1222 Cf. FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 18; ATAMER/WILLI, SZW 2020, 694.

1223 Art. 4(1) CLDDA. See further, ENNEKING, ELR 2019, 21 ff.

1224 Art. 6 CLDDA. See further, ENNEKING, ELR 2019, 22.

With respect to child labour, these are ILO Conventions No. 138 as well as No. 182 *and* the ILO-IOE Child Labour Guidance Tool for Business[1225], *in combination with either* the OECD Due Diligence Guidance for Responsible Business Conduct *or* the UNGPs (Annex 2 Part B).

2.4 Exemption from Separate Reporting Obligations for Controlled Undertakings

Art. 964l para. 5 CO in conjunction with art. 17 para. 2 DDTrO exempts controlled undertakings within the meaning of art. 963 para. 2 CO from separate reporting obligations, if the following conditions are met:

(1) the controlling legal entity is registered abroad; and
(2) already prepares a report related to conflict minerals and metals or child labour that is equivalent to reports prepared under art. 964l para. 1-4 CO.

While such undertakings do not have to provide a separate report on their due diligence, they are required to comply with certain disclosure obligations specified in art. 17 para. 3 DDTrO.[1226]

3. Material Scope

3.1 Covered Human Rights and other Protected Grounds

The due diligence and reporting obligations contained in art. 964j-art. 964l CO do not explicitly mention human rights. However, conflict minerals and child labour are linked to a myriad of human rights abuses, which will be elaborated on hereinafter.

a) Conflict Minerals

Art. 964k para. 2 CO obliges undertakings to identify and assess the risks of 'harmful impacts' in their supply chain. With respect to conflict minerals and metals, the Federal Office of Justice considers that such risks namely exist when the procurement of minerals or metals contributes to financing conflicts and fuels human rights abuses, e.g. by making payments to non-state armed groups or engaging with suppliers sourcing from such groups or other parties committing human rights abuses.[1227] In this context, the Federal Office of Justice

1225 These standards must *cumulatively* be complied with, see also FOJ, Explanatory Report, 25.

1226 See Section I 3.3 e of this Chapter.

1227 FOJ, Explanatory Report, 29. Similarly, the EU Conflict Minerals Regulation is aimed at '[p]reventing the profits from the trade in minerals and metals being used to fund

refers to the human rights abuses, violations of international criminal law, and violations of international humanitarian law described in Annex II of the OECD Guidance on Conflict Minerals[1228].[1229] These include torture and other cruel, inhuman or degrading treatment, forced labour, the worst forms of child labour, war crimes, crimes against humanity, and genocide.[1230]

The focus on a selection of specific minerals and metals, i.e. tin, tantalum, tungsten, and gold, from conflict-affected areas renders the material scope very narrow. While this selection is in line with the sector-specific OECD Guidance on Conflict Minerals, other minerals and metals, such as cobalt, are linked to conflicts[1231] and gross human rights abuses (e.g. large-scale forced evictions[1232], hazardous working conditions, and abuses related to water pollution[1233]) as well.[1234]

Recently, there has been a significant increase in the demand for cobalt in particular. Cobalt is a mineral used in the batteries of most modern electronics, such as smartphones and laptops. In addition, the mineral plays a significant role in the development of electronic vehicles and the advancement of energy storage technologies: cobalt is present in three out of the four major lithium-ion batteries available on the market. Besides being utilised for electronic vehicles, lithium-ion batteries are also used to store energy derived from solar, wind, and other green technologies. Cobalt has consequently emerged as a pivotal mineral for the green transition.[1235]

armed conflict' and thereby curbing human rights abuses in conflict-affected and high-risk areas (recital 1-3 and 26 as well as art. 1(1) EU Conflict Minerals Regulation).

1228 OECD Guidance on Conflict Minerals, 20 f.

1229 FOJ, Explanatory Report, 29.

1230 OECD Guidance on Conflict Minerals, 20 f.

1231 CHURCH CLARE / CRAWFORD ALEC, 'Green Conflict Minerals: The Fuels of Conflict in the Transition to a Low-Carbon Economy', International Institute for Sustainable Development, Report August 2018) (hereinafter: CHURCH/CRAWFORD, Green Conflict Minerals IISD Report), 19.

1232 Amnesty International, 'DRC: Powering Change or Business as Usual? Forced Evictions at Industrial Cobalt and Copper Mines in the Democratic Republic of the Congo', Report (September 2023).

1233 SCHEELE FLEUR / DE HAAN ESTHER / KIEZEBRINK VINCENT, 'Cobalt Blues: Environmental Pollution and Human Rights Violations in Katanga's Copper and Cobalt Mines', SOMO Centre for Research on Multinational Corporations (April 2016), 17 ff.

1234 For a critical analysis of the human rights concerns with regard to cobalt mining in the Democratic Republic of the Congo specifically, see, e.g., UMPULA EMMANUEL / DUMMETT MARK, The Blood Cobalt Narrative: Addressing Human Rights Concerns or Scaremongering?, Business and Human Rights Journal (BHRJ) 2024, 308 ff. 309 ff.

1235 CHURCH/CRAWFORD, Green Conflict Minerals IISD Report, 17.

While the EU does not regulate cobalt as part of the EU Conflict Minerals Regulation, it covers the mineral with its Batteries Regulation[1236]. The EU Batteries Regulation establishes due diligence obligations for economic operators who intend to market or provide service for batteries within the EU.[1237] The Regulation mandates that economic operators verify the origin of certain raw materials, i.e. cobalt, natural graphite, lithium, nickel, and their chemical compounds, utilised in the manufacturing of batteries that are placed on the market.[1238] It aims to ensure that materials used for battery manufacturing are sourced responsibly by mandating companies to identify and mitigate the social and environmental risks associated with raw materials extraction, processing, and trading.[1239] These risks include child labour, forced labour, infringements on trade union freedoms, occupational health and safety, and soil, water, and air pollution.[1240]

If the severity of risks and the necessity of an 'internationally coordinated approach' are the rationales for focusing on minerals and metals that are linked to conflicts and gross human rights abuses[1241], Swiss lawmakers ought to have looked beyond the regulation of tin, tantalum, tungsten, and gold. This is especially true in light of the clear legislative trend at the European level, which was already apparent at the time of the adoption of the Swiss counter-proposal.[1242]

In any case, a broader selection of minerals and metals would have been more in line with UNGP 12 which calls on companies to conduct due diligence with regard to 'all internationally recognized human rights'. As seen in Chapter 2 I 3.1 b, these include at least the rights enshrined in the International Bill of Rights, which is composed of the UDHR, ICCPR, and ICESCR, and the ILO Core Labour Standards.[1243]

b) Child Labour

Child labour, as defined in art. 2 para. 2 let. f DDTrO, constitutes a violation of ILO Convention Nos. 182 and 138, which are both part of the ILO's Core Labour

1236 Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC, OJ 28.7.2023, L 191/1.

1237 Art. 47 ff. EU Batteries Regulation.

1238 Art. 49(2) in conjunction with Annex X(1) EU Batteries Regulation.

1239 Art. 50 EU Batteries Regulation.

1240 Annex X(2) EU Batteries Regulation. See further, HOLLY / ANDREASEN LYSGAARD / BLOCH VEIBERG et al., EU Regulatory Initiatives, 49 f.

1241 Cf. Federal Dispatch RBI, 6365 f. and 6378. See also, Chapter 3 I 1.

1242 BUENO/KAUFMANN, BHRJ 2021, 547 f.

1243 Commentary to UNGP 12.

Standards.[1244] The narrow focus of Swiss due diligence provisions on only one out of the five Core Labour Standards[1245] is clearly not aligned with the UNGPs. Furthermore, if the eradication of products and services provided with child labour on the Swiss market is the legislative objective, simply obliging companies to conduct due diligence with respect to child labour is not the solution to adequately tackle the problem. Combatting child labour warrants a more comprehensive approach, as child labour has its root causes in poverty and is thus interrelated with other human rights abuses.[1246] Poverty namely renders households more susceptible to resorting to child labour to meet basic needs and manage uncertainty and unexpected events. For instance, research has demonstrated that households may respond to health shocks, such as the sudden ill-health of caregivers or primary wage earners, by enlisting their children in the workforce.[1247] Consequently, companies should rather also be obliged to ensure that workers in their supply chains are paid wages that enable a decent living for themselves and their families (art. 7(a)(ii) ICESCR) and are protected against loss of income due to illness or disability (art. 9 ICESCR).[1248]

Shortly after the adoption of the Dutch CLDDA, there has been a push to discuss the elaboration of comprehensive mandatory due diligence legislation in the Netherlands.[1249] In this sense too, the Swiss due diligence legislation appears outdated.[1250]

3.2 Covered Business Activities

Undertakings that fall within the personal scope of art. 964j CO must carry out due diligence and report on their efforts with regard to their own business activities and the activities of entities in their upstream supply chain (art. 964k and art. 964l CO in conjunction with art. 2 para. 1 let. b DDTrO). This

1244 Art. 2(1) CLDDA also relies on ILO Convention Nos. 182 and 138 for its definition of child labour.

1245 The five Core Labour standards freedom of association and collective bargaining, freedom from forced labour, freedom from child labour, freedom from discrimination at work, and a right to a safe and healthy working environment (ILO Declaration on Fundamental Principles and Rights at Work (2022), para. 2).

1246 International Labour Organization (ILO), Child Labour: Causes; United Nations Children's Fund (UNICEF), Child Protection Advocacy Brief 2018/002, 1 ff.

1247 International Labour Organization (ILO), 'World Report on Child Labour: Economic Vulnerability, Social protection and the Fight Against Child Labour', Geneva 2013, 11 ff.

1248 Cf. CRC, General Comment No. 16 (2013), para. 36 in conjunction with 43.

1249 See, e.g., HOFF ANNELOES, 'A Bill for Better Business: Dissecting the new Dutch Mandatory Human Rights Due Diligence Initiative', Völkerrechtsblog (5 May 2021).

1250 Cf. BUENO/KAUFMANN, BHRJ 2021, 547 f.

focus on upstream activities is in line with the EU Conflict Minerals Regulation (art. 3(1) in conjunction with art. 2(d)).[1251]

The CLDDA appears to be vaguer in this regard. If narrowly interpreted, due diligence obligations would only extend to the first tier of the supply chain, i.e. direct contractual partners.[1252]

In any case, the focus of the Swiss provisions on the activities of a company's upstream business partners is not aligned with the UNGPs, which call on business enterprises to conduct due diligence throughout their value chains.[1253]

3.3 Content

The Federal Office of Justice describes the due diligence and reporting obligations in art. 964j and art. 964k CO as an ongoing, repetitive process that is comprised of certain steps that build on each other and are interrelated.[1254] It clarifies that the due diligence obligations according to art. 964j and art. 964k CO are obligations of effort *(Bemühenspflichten/Handlungspflichten)* and not obligations of result *(Erfolgspflichten)*[1255].[1256] This means that it is not prohibited

1251 While obligations under the EU Conflict Minerals Regulation are focused on upstream activities, Union importers additionally have an obligation to disclose up-to-date information obtained through their compliance with their due diligence obligations to their immediate downstream purchasers pursuant to art. 7(2) (see Section I 3.3 e of this Chapter). Companies forming part of the downstream supply chain can also be Union importers within the meaning of art. 2(l) and thus be required to comply with supply chain due diligence obligations as set out in art. 3(1), if they import products in their metal stage. In contrast, downstream companies importing products beyond the metal stage that only contain tin, tantalum, tungsten or gold, such as laptops and smartphones, are not covered by the personal scope of the EU Conflict Minerals Regulation (cf. EC, The Conflict Minerals Regulation Explained. For a critique regarding the exclusion of such downstream companies from the Regulation's personal scope, see, e.g., MACCHI, JHRP 2021, 282).

1252 KRAJEWSKI MARKUS / FARACIK BEATA, 'Substantive Elements of Potential Legislation on Human Rights Due Diligence', briefing requested by the European Parliament's Subcommittee on Human Rights (June 2020) (hereinafter: KRAJEWSKI/FARACIK, Briefing Potential HRDD Legislation), 10. According to Ennecking, the obligations under the Act 'in principle' extend to all business activities in the supply chain (ENNEKING, ELR 2019, 32).

1253 Cf. Commentary to UNGP 13 and UNGP 17 (a).

1254 FOJ, Explanatory Report, 5 and 26.

1255 The French version of the Federal Office of Justice's explanatory report employs a slightly different terminology, i.e. 'obligations of means'(*obligations de moyens*), but similarly contrasts them with obligations of result (*obligations de réussite*), see Federal Office of Justice (FOJ), 'Rapport explicatif de l'ordonnance sur les devoirs de diligence et de transparence en matière de minerais et de métaux provenant de zones de conflit ou à haut risque et en matière de travail des enfants (ODiTr)' (3 December 2021) (hereinafter: FOJ, French Explanatory Report), 25.

1256 FOJ, Explanatory Report, 5 and 26. In this context, the Federal Office of Justice refers to a 'best effort approach' without further explanation. NERI-CASTRACANE points out

to import minerals or metals from conflict and high-risk areas or to import products where there are reasonable grounds to suspect child labour. Rather, respect for human rights ought to result from a continuous influence of due diligence and disclosure on the play of market forces. The 'sanctioning bodies' of this system ought to be consumers, investors as well as civil society actors and organisations.[1257]

a) Management System: Supply Chain Policy & Traceability System

Art. 964k para. 1 CO obliges undertakings to have a management system in place. The Federal Office of Justice defines a management system as the embodiment of processes, instruments, and methods with which a company directs its activities towards specific objectives.[1258] The management system must specify two points. First, it must describe the supply chain policy for minerals and metals that may originate from conflict and high-risk areas, as well as for products or services where there is a reasonable suspicion of child labour (art. 10 and 11 DDTrO). The supply chain policy shall specify the instruments that the undertaking uses to identify, assess, eliminate, and mitigate the risks of potential adverse impacts in its supply chain (art. 10 para. 2 and art. 11 para. 2 DDTrO). Such instruments may include, for example,[1259] on-site

that this may be conflated with the 'best efforts standard' that is used in certain jurisdictions to imply a higher standard of care than the 'reasonable efforts standard' (NERI-CASTRACANE GIULIA, Diligence and Reporting Duties under Art. 964j-l CO, Gesellschafts- und Kapitalmarktrecht (GesKR 2023), 48 ff., 56). However, the OECD Conflict Mineral Guidance, the EU Conflict Minerals Regulation and the Dutch Child Labour Due Diligence Act, after which art. 964j-art. 964l CO were modelled, do not make such a distinction. The OECD Guidance on Conflict Minerals, for instance, continuously refers to 'reasonable steps' and 'good faith efforts' to describe the diligence companies should exercise in their endeavours (OECD Guidance on Conflict Minerals, 14, 64, 86, 97, and 103). Furthermore, the diligence standard applied under the Swiss Code of Obligations (e.g., in art. 41 CO and art. 717 para. 1 CO for members of the board of directors) is the one of a 'reasonable person'. As seen in Chapter 3 I. 4.2 c, members of the board of directors must perform their duties 'with all due diligence' (*mit aller Sorgfalt / avec toute la diligence nécessaire*) and safeguard the interests of the company in good faith (art. 717 para. 1 CO). To determine whether members of the board of directors acted with all due diligence, the Federal Supreme Court compares their conduct to the one of a reasonable and conscientious person that is in a comparable situation (instead of many: BGE 139 III 24 c. 3.2, with further references). Thus, the use of the terminology 'best effort approach' is more likely the result of an unfortunate choice of ambiguous words rather than a deliberate attempt to introduce the concept of a best efforts standard (similar conclusion, NERI-CASTRACANE, GesKR 2023, 56).

1257 FOJ, Explanatory Report, 26 f.

1258 Ibid., 27.

1259 The Federal Office of Justice highlights that the list in art. 10 para. 2 DDTrO contains exemplary instruments that the undertaking may decide to use (FOJ, Explanatory Report, 27).

visits, information received from public authorities and civil society organisations, the consultation of experts, obtaining assurances from business partners, and using recognised standards such as the OECD Guidance on Conflict Minerals and certification schemes that are in line with the OECD Guidance on Conflict Minerals[1260] (art. 10 para. 2 let. a–e DDTrO).[1261] Second, it must implement a supply chain traceability system (art. 12 and art. 13 DDTrO).[1262]

b) Risk Assessment

Pursuant to art. 964k para. 2 sentence 1 CO in conjunction with art. 15 para. 1 DDTrO, undertakings must identify and assess risks of adverse impacts in their supply chains according to the likelihood of their occurrence and their severity. The identification and assessment of risks must be carried out considering the supply chain policy and the information from the traceability system.[1263]

As part of their risk identification efforts, undertakings must establish a complaint mechanism that allows interested parties to report concerns regarding potential or actual adverse impacts related to conflict minerals and metals or child labour (art. 964k para. 2 CO in conjunction with art. 14 DDTrO).[1264] Since Swiss lawmakers decided against accompanying due diligence obligations with liability provisions, this mechanism is not envisioned as a grievance mechanism that provides remediation to victims of human rights abuses and affected communities.[1265] The complaint mechanism may be ensured by means of multistakeholder initiatives, through the involvement of external experts, committees or an ombudsman's office.[1266] In any case, it is crucial that the complaint mechanism is accessible, unbureaucratic and anonymous. Undertakings shall internally communicate risks and adverse impacts reported through the complaint mechanism.[1267] According to art. 14

1260 As seen in Section I. 2.1 of this Chapter, the EU Conflict Minerals Regulation also refers to schemes that can help facilitate compliance with the due diligence obligations of the Regulation. These due diligence schemes must be fully aligned with the OECD Guidance on Conflict Minerals to be considered equivalent to the Regulation.

1261 FOJ, Explanatory Report, 30 ff.

1262 Ibid., 27.

1263 Ibid., 40.

1264 Similarly, art. 4(e) EU Conflict Minerals Regulation requires Union importers to establish a mechanism that serves as an early-warning risk-awareness system.

1265 FOJ, Explanatory Report, 39.

1266 This is in line with art. 4(e) EU Conflict Minerals Regulation, according to which such a mechanism may be provided through collaborative arrangements with other economic operators or organisations, or by promoting access to an external expert or body, such as an ombudsman.

1267 FOJ, Explanatory Report, 40.

para. 2 DDTrO, all reported concerns and received complaints must be documented in writing.

c) Risk Management Plan: Measures to Prevent, Minimise, and Eliminate Risks

Pursuant to art. 964k para. 2 sentence 2 CO in conjunction with art. 15 para. 1 DDTrO, undertakings must draw up a risk management plan and take measures to minimise the identified risks. The risk management plan must describe the methods used by the undertaking to identify and assess the risks of adverse impacts throughout the supply chain. It shall also describe the chosen approach to prevent and mitigate these risks and name actual adverse impacts that have occurred. The level of detail of the risk management plan is to be determined by the undertaking and depends on its type and size as well as the nature of its business activity.[1268] In drawing up the risk management plan, undertakings shall consider the standards listed in Annex 2 DDTrO, particularly Annex III of the OECD Guidance on Conflict Minerals as well as the ILO-IOE Child Labour Guidance Tool (art. 15 para. 1 DDTrO).[1269] Based on their risk management plan, undertakings must take measures to prevent, eliminate, or minimise the identified risks of adverse impacts in their supply chain according to the likelihood of their occurrence and their severity. Undertakings must then review the effectiveness of these measures at least once a year (art. 964k para. 2 sentence 2 CO in conjunction with art. 15 para. 2 DDTrO).[1270]

Overall, companies are given a lot of discretion in how they prevent, eliminate, or minimise identified risks pursuant to art. 964k para. 2 sentence 2 CO in conjunction with art. 10 ff. DDTrO. While this discretion gives companies the flexibility to adapt their measures to their particular circumstances, it also creates the risk of a superficial and formalistic approach to compliance with due diligence obligations, whereby companies unduly focus on implementing the steps required under the provisions without actual concern for the achievement of the legislative objective, i.e. the procurement of minerals or metals that do not finance conflicts and fuel human rights abuses, and the provision of products or services free of child labour.[1271] Three factors render compliance with due diligence provisions particularly prone to such cosmetic compliance: First, art. 964k para. 2 sentence 2 CO in conjunction with art. 10 ff. DDTrO does not sufficiently clarify the role of industry and multistakeholder

1268 FOJ, Explanatory Report, 41.

1269 Ibid., 43 f.

1270 Ibid., 43.

1271 Cf. LANDAU, MJIL 2019, 232 ff. See further, Chapter 2 I 3.2 a.

initiatives in effective due diligence and thereby creates a risk of overreliance on contractual assurances, certifications, and social audits. Second, the provisions do not prescribe meaningful engagement with stakeholders at all stages of due diligence. Third, the provisions do not define the criteria for company withdrawal from certain business relationships and contexts and do not establish the requirements for responsible disengagement. These points will be elaborated on in more detail hereinafter.

As seen, art. 964k para. 2 CO in conjunction with art. 10 para. 2 and art. 11 para. 2 DDTrO lists several instruments that undertakings may use to identify, assess, eliminate or mitigate risks related to conflict minerals and child labour.[1272] These instruments include on-site visits, written assurances from suppliers and other business partners, and recognised initiatives as well as certification schemes. The list is not exhaustive and does not place these instruments in any hierarchical order. While industry or multistakeholder initiatives can support companies in implementing effective due diligence by, for instance, providing them with information on particular risks in their supply chains and a platform to jointly address these risks, mere participation in such initiatives should never be conflated with compliance with due diligence obligations.[1273] This is because initiatives are not necessarily aligned with international due diligence standards and may only address specific aspects of due diligence.[1274] Furthermore, participation does not equate to effective implementation, as not all initiatives contain independent monitoring and enforcement mechanisms that verify whether members adhere to the initiative's standards and foresee corrective measures in case they do not.[1275]

Certain initiatives offer certifications regarding particular due diligence risk issues, proof of chain of custody, and management systems, for instance. Certifications are third-party statements regarding products, sites or companies that inform business partners about the fulfilment of specific human rights- and environment-related criteria. Certifications are typically conferred following the successful completion of a periodic social audit by the

1272 See Section 3.3 a of this Chapter.

1273 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 12; OECD, Sustainability Initiatives & HRDD, 12. See further, Chapter 2 II 2.1 c.

1274 Cf. OECD, Sustainability Initiatives & HRDD, 9 and 18 f. For a thorough analysis of the limitations of multistakeholder initiatives with respect to the protection of rights-holders, see further, Institute for Multi-Stakeholder Initiative Integrity, 'Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance', Report (July 2020) (hereinafter: MSI Integrity, Not Fit-for-Purpose).

1275 Cf. OECD, Sustainability Initiatives & HRDD, 13. See also, Chapter 2 II 2.1. c.

certification body.[1276] As such, they are tied to the limitations of audits. These have been well documented over the years and include 'snapshot' and box-ticking approaches to assessing working conditions instead of meaningful engagement with workers and trade unions, potential conflicts of interests between the auditing firm and their paying client, reliance on incomplete or inaccurate information, and even audit fraud.[1277]

Art. 10 para. 2 DDTrO does state that initiatives and certification schemes have to be 'recognised' and the Federal Office of Justice holds that this means alignment with the OECD Guidance on Conflict Minerals.[1278] However, the Federal Office of Justice proceeds to list initiatives which were rated as only partially aligned with the OECD Framework (e.g. Code of Practices and Chain of Custody Standards of the Responsible Jewellery Council)[1279] and initiatives that have been criticised for their ineffectiveness by civil society organisations (e.g. Voluntary Principles on Security and Human Rights)[1280].[1281] Furthermore, the last alignment assessment of initiatives with the OECD Guidance on Conflict Minerals was conducted in 2018. Such alignment assessments are time-consuming and therefore less reactive to changes. Thus, sole reliance on initiatives and certification schemes that were at some point recognised as aligned with international due diligence standards should not be deemed sufficient for companies to fulfil their due diligence obligations in art. 964k CO.[1282] Rather, companies should understand the scope and methodology of initiatives and certification schemes, critically assess their credibility, and apply them in combination with other measures.[1283]

Likewise, companies should not solely rely on assurances by suppliers and business partners stating that minerals or metals are procured without financing conflicts and fuelling human rights abuses, and that the products or services supplied are free of child labour. Instead, companies should always verify these assurances through independent research and the employment

1276 OECD, Sustainability Initiatives & HRDD, 6 and 11.

1277 VAN HO / TERWINDT, ERPL 2019, 382 ff.; NOLAN/FRISHLING, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 121 ff.; WILKS/BLANKENBACH, Beyond Social Auditing, 2; Human Rights Watch, Social Audits and Labour Rights Abuses, 10 ff.; NOLAN, IJCJ & SD 2022, 7. For cases illustrating the limitations of social audits, see Chapter 1 III 2.2 b and Chapter 2 II 2.1 a and b.

1278 FOJ, Explanatory Report, 31.

1279 OECD, Alignment Assessment with OECD Guidance on Conflict Minerals, 76 ff.

1280 Cf. MSI Integrity, Not Fit-for-Purpose, 45, 101, 111, 167, and 177.

1281 Cf. FOJ, Explanatory Report, 32.

1282 OECD, Sustainability Initiatives & HRDD, 15 f.

1283 Cf. OECD, Sustainability Initiatives & HRDD, 17.

of accompanying measures such as on-site visits, meaningful stakeholder engagement, and methodologically sound and credible third-party social audits.[1284] Furthermore, it should not suffice for companies to cascade their supply chain policy down their supply chain by including it in contracts and agreements with suppliers.[1285] To align themselves with international due diligence standards, companies should rather help support their suppliers in their compliance with the requirements outlined in the supply chain policy and their contractual obligations related to it.[1286]

Neither the provisions in the DDTrO nor the explanatory report by the Federal Office of Justice clarify the role of recognised initiatives, certification schemes, and written assurances in effective due diligence. The Federal Office of Justice simply holds that the choice of the instrument should be risk-based and that more than one instrument 'may' have to be employed. The latter insinuates that the combination of instruments is the exception, rather than the rule. In any case, the lack of clarification in art. 964k CO in conjunction with art. 10 ff. DDTrO affords companies considerable discretion in the implementation of their due diligence measures, thereby creating a risk of overreliance on these instruments. Such overreliance would constitute a formalistic and superficial approach to compliance with art. 964k CO in conjunction with art. 10 ff. DDTrO.

Similarly, the fact that Art. 964k CO in conjunction with art. 10 ff. DDTrO does not prescribe meaningful engagement with stakeholders at all stages of due diligence creates a risk of superficial and formalistic compliance. Meaningful engagement with stakeholders, particularly (potentially) affected rights-holders (e.g. workers, local trade unions, and local communities) and other relevant stakeholders (e.g. local NGOs and National Human Rights Institutions) is absolutely fundamental for credible due diligence.[1287] This is because taking into account the concerns and experiences of (potentially)

1284 Cf. OECD RBC Guidance, 18, 50, and 66 f.; OECD Conflict Minerals Guidance, 106 ff.; OECD Child Labour in Mineral Supply Chains Guidance, 32 ff.

1285 Cf. art. 10 para. 1 let. b DDTrO.

1286 OECD RBC Guidance, 30 f. and 80. On the role and constituents of responsible contractual arrangements in human rights compliance, see further, SCHELTEMA MARTIJN, The Mismatch Between Human Rights Policies and Contract Law: Improving Contractual Mechanisms to Advance Human Rights Compliance in Supply Chains, in: Enneking/Giesen/Schaap et al.(eds.), Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains, London 2019, 259-278.

1287 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 49 f.; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 14. For an illustrative case on the importance of meaningful stakeholder engagement, see also Chapter 2 II 2.2 b.

affected rights-holders and communities is the best way to gauge human rights- and environment related risks and evaluate the effectiveness of company responses.[1288] Amplifying the voices of the very people and communities the legislation aims to protect also renders legislation more legitimate from a critical decolonial perspective described in Chapter 1 III 2.1 b. Prescribing meaningful stakeholder engagement can therefore help combat a tick-box approach to compliance with due diligence obligations.[1289]

Stakeholder engagement is meaningful if it is based on a continuous dialogue held in good faith. This implies that stakeholders are empowered to freely express their opinions and concerns without fear of reprisal, that the process is readily accessible to them, and that companies approach the process with the intention of understanding how the interests of stakeholders may be affected by their business operations. To ensure the accessibility of the process, companies should consider potential barriers (e.g. language and literacy levels in a particular context) and pay attention to the vulnerabilities of marginalised groups. Lastly, stakeholders need to be informed in a timely manner about the avenues through which the company seeks to engage with them (e.g. meetings, hearings, complaints procedures), to be able to express themselves in the first place. [1290]

Art. 964k CO in conjunction with art. 10 ff. DDTrO do not capture the importance of companies considering the perspectives of rights-holders and human rights experts in host countries throughout all due diligence steps. This undermines the legitimacy of the Swiss due diligence provisions. Art. 964k CO in conjunction with art. 10 ff. DDTrO solely expressly mandates stakeholder engagement in connection with the complaints mechanism (art. 964k para. 2 CO in conjunction with art. 14 DDTrO). Pursuant to the UNGPs, complaints mechanisms serve three main purposes: raising concerns for (potentially) affected people, i.e. assessing risks (UNGP 18), tracking the effectiveness of company responses to identified human rights abuses (UNGP 20), and providing access to remediation for human rights abuses that have occurred (UNGP 22). Art. 14 DDTrO only expressly considers the first purpose and is therefore not aligned with UNGP 20 and 22. Furthermore, art. 14 DDTrO neither lists

1288 Cf. UNGP 18 and 20 (b). See also, WILKS/BLANKENBACH, Beyond Social Auditing, 4.

1289 DEVA, for instance, considers meaningful stakeholder engagement as one of the key constituents of effective due diligence laws (DEVA SURYA, Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?, Leiden Journal of International Law (LJIL) 2023, 1 ff., 17). For more on the risks of tick-box approaches to due diligence, see Chapter 2 I 3.2 a.

1290 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 49 f.

the criteria for meaningful stakeholder engagement nor does it highlight the need to involve stakeholders in the design and performance evaluation of the complaints mechanism. The explanatory report by the Federal Office of Justice simply states that the complaint mechanism must be accessible, unbureaucratic, and anonymous.[1291] The complaints mechanism described in art. 964k para. 2 CO in conjunction with art. 14 DDTrO thus also falls short of UNGP 31.[1292]

Stakeholder engagement may be implied as part of the 'on-site checks' mentioned in art. 10 para. 2 let. a DDTrO and the information gathering from civil society mentioned in art. 10 para. 2 let. b DDTrO. However, as demonstrated, the use of these instruments to identify, assess, eliminate, and mitigate risks of adverse impacts is not mandatory. In any case, the absence of clear requirements leaves companies with considerable discretion regarding the implementation of stakeholder engagement, and renders compliance with due diligence obligations in art. 964k CO in conjunction with art. 10 ff. DDTrO prone to a tick-box-approach, instead of being outcome-driven.[1293]

Lastly, art. 964k CO in conjunction with art. 10 ff. DDTrO does not draw any red lines regarding the effectiveness of due diligence in achieving its legislative purpose, i.e. the procurement of minerals and metals that do not finance conflicts and do not fuel human rights abuses, and the provision of products or services free of child labour, in certain contexts. Drawing such red lines would oblige companies to disengage from specific contexts or prevent them from entering these contexts in the first place. In absence of such red lines, companies may legitimise remaining in countries or entering certain markets with the argument of having a due diligence process in place, despite the near inevitability of contributing to financing conflicts, fuelling gross human rights abuses, and being involved in child labour.[1294]

As the provisions do not outline situations in which disengagement from business relationships is necessary, they also do not define the criteria for responsible disengagement. Responsible disengagement would entail that companies carefully consider and mitigate the potential adverse impacts disengagement would have on rights-holders, such as job loss for workers.[1295]

1291 FOJ, Explanatory Report, 39 f. See further, Section I 3.3 b of this Chapter.

1292 See Chapter 2 I 4.

1293 For more on the elements that render legislation prone to a tick-box approach see, LANDAU, MJIL 2019, 232 ff.

1294 Cf. VAN HO, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 385 ff.; QUIJANO/LOPEZ, BHRJ 2021, 251 ff.; DEVA, LJIL 2023, 18. See further, Chapter 2 I 3.2 g.

1295 Cf. Commentary to UNGP 19; OECD Guidelines 2023, II. General Policies, Commentary on Chapter II: General Policies, para. 25. See further, Chapter 2 I 3.2 g.

d) Third Party Audit

Art. 964k para. 3 CO stipulates that undertakings must have their compliance with the due diligence obligations regarding minerals and metals audited by an independent audit firm. With respect to child labour, an analogous provision regarding third-party audits does not exist.[1296] The Federal Office of Justice has not explained the reasoning behind the waiver for child labour.[1297]

With regard to conflict minerals and metals, undertakings may choose any auditor that is licensed by the Swiss Federal Audit Oversight Authority as an audit expert to perform the audit (art. 16 para. 1 DDTrO). The audit must be carried out annually in a report to the highest management and administrative body of the undertaking in question (art. 16 para. 1 DDTrO). The audit firm examines whether there are indications that the due diligence obligations pursuant to art. 964k para. 1 and 2 CO have not been complied with (art. 16 para. 2 DDTrO). However, the audit firm is neither called to evaluate the effectiveness of the undertaking's due diligence management system, nor is it obligated to make recommendations on how to improve its due diligence practices.[1298] While the latter diverges from art. 6(1)(c) EU Conflict Minerals Regulation, which obliges auditors to make such recommendations, the question arises whether auditors, which typically lack relevant human rights expertise, would indeed be well-equipped to conduct effectiveness assessments regarding implemented due diligence and provide recommendations for improvement in the first place.[1299]

e) Reporting and Disclosure

Lastly, undertakings must report on their due diligence efforts on a yearly basis (art. 964l para. 1 CO). The report must contain substantive information on whether and how the due diligence obligations have been fulfilled. For conflict minerals and metals, the report must include a summary of the audit results. Thus, it is not sufficient for the report to simply state that the obligations have been complied with.[1300] The report shall be prepared by an undertaking's supreme management or governing body (art. 964l para. 1 CO)[1301]

1296 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 22 f. The Federal Office of Justice does not provide any justification for waiving the obligation to conduct a third-party audit with respect to child labour.

1297 Cf. FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 23; FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 44.

1298 Cf. FOJ, Explanatory Report, 45.

1299 Cf. CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 358.

1300 FOJ, Explanatory Report, 46.

1301 For companies limited by shares within the meaning of art. 620 para. 1 CO *(Aktiengesellschaften),* this is the board of directors *(Verwaltungsrat)* (art. 964l para. 1 CO in

and shall be published online within six months of the end of the financial year (art. 964l para. 3 no. 1 CO).[1302] The report must remain publicly available for a minimum of ten years (art. 964l para. 3 no. 2 CO). A written report, that is signed by the members of the undertaking's supreme management or governing body who are responsible for its preparation, must be kept and retained for ten years (art. 964l para. 3 CO in conjunction with art. 958f CO). As mentioned in Section I 2.4 of this Chapter, controlled undertakings are exempted from separate reporting obligations, if the controlling legal entity is required to provide a report related to conflict minerals and metals or child labour that is equivalent to the reports prepared under art. 964l para. 1–4 CO. Such undertakings are required to disclose the other legal entity in whose report they are included. They shall do so in the notes to their financial statement (art. 17 para. 3 DDTrO). Furthermore, undertakings that are exempted from separate reporting obligations must publish the consolidated report (art. 17 para. 3 DDTrO).

The disclosure obligations in art. 964l CO differ from the ones under the EU Conflict Minerals Regulation. The disclosure obligations under the EU Conflict Minerals Regulation are notably more comprehensive in several aspects. Two are particularly worth highlighting: First, Union importers must submit third-party audit reports or evidence of conformity with a recognised due diligence scheme[1303] to a competent national oversight body that is responsible for the application of the Regulation.[1304] These national oversight bodies are called to ensure the effective and uniform implementation of the Regulation.[1305] Second, Union importers are obligated to provide their immediate downstream purchasers with up-to-date information obtained through their compliance with their due diligence obligations.[1306] This transparency can

conjunction with art. 716a para. 2 no. 5 CO). Art. 964l para. 1 CO differs from the non-financial reporting obligations in this regard: Art. 964c CO does not require the supreme management or governing body to prepare the report, only to approve it. The Federal Office of Justice does not explain the reasons for this difference (cf. FOJ, Explanatory Report, 46).

1302 In this regard, art. 964l CO differs from the reporting obligations related to non-financial matters in art. 964c CO. Contrary to the report on non-financial matters, the report pursuant to art. 964l CO does not require the approval of the general meeting *(Generalversammlung)* before its publication (cf. art. 964c para. 2 no. 1 in conjunction with art. 964c para. 1 CO). The Federal Office of Justice does not elaborate on the reasons for this difference (cf. FOJ, Explanatory Report, 46).

1303 Pursuant to art. 8(3) EU Conflict Minerals Regulation, due diligence schemes that are recognised by the Commission and effectively implemented by the Union importer are considered equivalent to the due diligence and reporting obligations of the Regulation. See Section I. 2.1.

1304 Art. 7(1) in conjunction with art. 10(1) EU Conflict Minerals Regulation.

1305 Art. 10(3) EU Conflict Minerals Regulation.

1306 Art. 7(2) EU Conflict Minerals Regulation.

in turn enhance due diligence practices of downstream companies such as companies marketing smartphones and laptops to consumers.[1307]

In sum, the obligations in art. 964j-art. 964l CO are largely in line with the EU Conflict Minerals Regulation for conflict minerals and metals *as well as* for child labour. To increase synergies, Swiss lawmakers deliberately decided against the adoption of separate due diligence obligations related to child labour.[1308] As seen, one striking exception, however, is the obligation to conduct a third-party audit which only applies to conflict minerals and metals. The Federal Office of Justice has not explained the reasoning behind the waiver for child labour.[1309] Notwithstanding the foregoing, due diligence is essentially conceptualised as a continuous process that is comprised of five steps under both, the Swiss provisions and the EU Conflict Minerals Regulation. These steps are (1) establishing a management system that includes a supply chain policy and a supply chain traceability system, (2) identifying and assessing risks, (3) implementing a strategy to address identified risks, i.e. a risk management plan, (4) carrying out third party audits, and (5) reporting on supply chain due diligence.[1310] This five-step process is in line with the OECD Guidance on Conflict Minerals.[1311]

4. Enforcement

4.1 Public Enforcement

As seen in Chapter 4 II. 3.1, art. 325ter para. 1 SCC only holds natural persons criminally liable to a fine of up to CHF 100,000 if they provide false information in the reports in accordance with art. 964a, art. 964b and art. 964l CO, fail to make these reports or omit to keep the reports in accordance with art. 964c and art. 964l CO. This means that breaches of the due diligence obligations in art. 964j-art. 964k CO are not criminally sanctioned, which is surprising, as the violation of due diligence obligations has more potential ramifications for rights-holders and would thus warrant a more severe sanction.[1312] Together

1307 MACCHI, JHRP 2021, 281.

1308 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 21.

1309 Cf. FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 23; FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 44.

1310 FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 21; EU Commission Recommendation 2018/1149, Annex Section 2.2.

1311 OECD Guidance on Conflict Minerals, 17 ff. See also, EU Commission Recommendation 2018/1149, Annex Section 2.2; FOJ, Report on Non-Financial Disclosure and HRDD Obligations, 21.

1312 Similarly, ATAMER/WILLI, SZW 2020, 698.

with the relatively low criminal fines, this incoherence diminishes the deterrent effect of the potential sanction. At the same time, criminal proceedings take time and the imposition of criminal sanctions is contingent upon a high evidentiary threshold. A more effective public enforcement mechanism would have entailed the establishment of an independent oversight body equipped with relevant human rights expertise, investigative powers to detect breaches of due diligence obligations before abuses occur, and the competence to impose administrative sanctions for failure to comply.[1313]

The Swiss public enforcement mechanism is even weaker than the one under the EU Conflict Minerals Regulation[1314]: Under the EU Conflict Minerals Regulation, Member States are not obliged to impose any criminal sanctions on Union importers that breach their due diligence and/or disclosure obligations. Nevertheless, Member States shall require the national oversight bodies responsible for the implementation of the Regulation to investigate compliance of Union importers with their due diligence and disclosure obligations.[1315] In case of detected non-compliance, Members States shall require the competent national oversight body to issue a notice of remedial action to be taken by the culprits.[1316] In instances where Union importers do not comply with notices of remedial action, enforcement may be achieved through court proceedings. Yet, court proceedings are typically lengthy and thus less suitable to improve the conduct of Union importers within reasonable time.[1317] Enforcement of the Regulation may be strengthened in the future: Pursuant to art. 17(2), the EU Commission shall review the effectiveness of the Regulation. Measures to improve the Regulation's effectiveness may include the introduction of penalties for Union importers which continuously fail to comply with their obligations under the Regulation (art. 17(3)).[1318] The aim of the

1313 Cf. CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 363 ff.

1314 Cf. MACCHI, JHRP 2021, 283 considering the enforcement mechanism under the EU Conflict Minerals Regulation 'rather weak'.

1315 Art. 3(2) in conjunction with art. 11 EU Conflict Minerals Regulation.

1316 Art. 16(3) in conjunction with art. 10 (3) EU Conflict Minerals Regulation.

1317 International Peace Information Service (IPIS), 'Regulating Responsible Sourcing of 3TG Minerals – Comparative Analysis of Section 1502 of the US Dodd-Frank Act and the EU Conflict Minerals Regulation, Lessons Learned and Risks for Implementation' (December 2019) (hereinafter: IPIS, Insights on Due Diligence in Mineral Sourcing), 22; Macchi, JHRP 2021, 283.

1318 In a report published in September 2024, the EU Commission, however, concluded that no amendments to the Regulation were necessary to enhance its functionality or effectiveness at this point in time (European Commission, 'Review of the Functioning and Effectiveness of Regulation (EU) 2017/821 (Conflict Minerals Regulation) pursuant to Article 17 (2) of Regulation (EU) 2017/821', COM(2024)415 final (24 September 2024), 24).

Regulation is to curtail financing armed groups and security forces in conflict and conflict-affected areas through controlling trade with conflict minerals and metals. The due diligence and disclosure obligations shall only indirectly contribute to the protection of rights-holders from human rights abuses.[1319] As a result, the Regulation does not contain provisions on access to remedy for victims of human rights abuses.

The Swiss approach to enforcement also appears less robust than the CLDDA: Under the Dutch Act, compliance with both, due diligence and disclosure[1320] obligations, is enforced through a regulatory authority which may impose administrative fines (art. 7(1)-art. 7(3) CLDDA). Furthermore, any natural or legal person whose interests have been affected by a company's failure to comply with its due diligence obligations may submit a complaint to the regulatory authority (art. 3(2) and art. 3(3) CLDDA). The regulatory authority can issue binding instructions to companies that breached their obligations under the Act (art. 7(4)). If companies do not follow up with these instructions within the set time frame, the regulatory authority can impose an administrative fine of up to 10% of the company's annual turnover (art. 7(1)-art. 7(3) CLDDA). In addition, criminal sanctions can be imposed in case of repeated transgressions (art. 9 CLDDA). These sanctions include fines and prison sentences for natural persons, i.e. company officers.[1321] The CLDDA does not contain any provisions regarding access to remedy for victims of human rights abuses. However, this does not preclude victims from pursuing litigation based on existing Dutch company and/or Dutch tort law norms.[1322]

4.2 Private Enforcement

The three potential private enforcement mechanisms discussed in Chapter 3 I 4.2, which do not provide victims of corporate human rights abuses with access to remedy, also apply, *mutatis mutandis,* to the due diligence obligations related to conflict minerals and metals and child labour. Firstly, claims under unfair competition law could be envisioned as an enforcement mechanism. Currently, there is scholarly debate on the extent to which the exploitation of what is referred to as 'an international legal disparity' may trigger successful claims under unfair competition law. It is being argued that by not complying with due diligence obligations, companies are able to save costs and improve

1319 Recitals 1-3 and 26 and art. 1(1) EU Conflict Minerals Regulation.

1320 Pursuant to art. 4(1) CLDDA, companies must issue a declaration stating that they exercise due diligence with a view to preventing child labour from being used in the production of their goods and services.

1321 See further, ENNEKING, ELR 2019, 22.

1322 ENNEKING, ELR 2019, 29.

earnings in comparison to their law-abiding competitors, which could be considered an unfair advantage under art. 2 UCA. As a result, a Swiss company that, for instance, markets cheaply produced products at particularly favourable conditions despite well-founded suspicions of child labour, could be sued by competitors under Art. 9 UCA and, under certain conditions, by the Federal government under art. 10 para. 3 UCA.[1323]

Secondly, sellers could be held accountable under art. 197 para. 1 CO for selling products produced with child labour that they have marketed as child labour-free to customers.[1324] Exposing such companies that use due diligence to create a false image of compliance may help combat white- and greenwashing.

Thirdly, breaches of due diligence obligations related to conflict minerals and metals and child labour may trigger liability pursuant to art. 754 para. 1 CO, if damage has occurred to the company.[1325] As previously noted in Chapter 3 I 4.2 c, damage will only be considered relevant under art. 754 para. 1 CO, if it not only materialises in adverse impacts on rights-holders but also affects the company's financial performance. In the context of art. 964j-art. 964l CO, reputational damage suffered as a result of involvement in child labour, for instance, may lead to financial losses relevant under art. 754 CO.[1326]

While Swiss lawmakers did not introduce new or modify existing civil liability provisions[1327] and accompanying procedural measures, civil liability for violations of due diligence obligations under current tort law provisions is theoretically still an option. However, two challenges regarding access to remedy from a material law perspective are particularly worth pointing out[1328]: First, it is unclear whether a breach of due diligence obligations would

1323 ATAMER/WILLI, SZW 2020, 700 with further references; WEBER ROLF H., Sorgfaltspflichten in der Lieferkette, Neue gesetzgeberische Herausforderungen für die Schweiz, in: Jusletter 29 March 2021, n. 25.

1324 Cf. ATAMER/WILLI, SZW 2020, 700; WEBER, Jusletter 29 March 2021, n. 26.

1325 Cf. WEBER, Jusletter 29 March 2021, n. 27; NERI-CASTRACANE, GesKR 2023, 60.

1326 Cf. WEBER, Jusletter 29 March 2021, n. 27; NERI-CASTRACANE, GesKR 2023, 60.

1327 Cf. FOJ, Explanatory Report, 5; Federal Office of Justice (FOJ), 'Prüfauftrag des EJPD vom 23. Februar 2022; Analyse Vorschläge EU-Richtlinien über Sorgfaltspflichten und Berichterstattung zur Nachhaltigkeit und möglicher Anpassungsbedarf im Schweizer Recht Bericht Entwürfe Nachhaltigkeitspflichten EU und geltendes Recht Schweiz' (25 November 2022) (hereinafter: FOJ, Analysis EU Due Diligence and Reporting Directives), 12.

1328 Other challenges for victims of human rights abuses could include establishing the jurisdiction of a Swiss court, questions related to the applicability of Swiss law, and procedural barriers such as financial hurdles, cf. Chapter 1 III 2.2. For an overview on barriers to access to remedy under Swiss law specifically, see also FRÖHLI CARINA, Geschäftsherrenhaftung der Muttergesellschaft für Handlungen von Tochtergesellschaften, doctoral thesis, University of St. Gallen 2021, 85 ff.

constitute an unlawful act within the meaning of art. 41 CO.[1329] Second, there is no established case law on the liability of the parent company for the conduct of its subsidiaries based on art. 55 CO.[1330] Together with the lack of amendments to procedural measures that could have facilitated access to remedy, this means that substantial power imbalances persist in favour of companies and that victims of human rights abuses will continue to face considerable legal, financial, and practical barriers in bringing claims before Swiss courts.[1331]

Thus, upholding the *status quo* Swiss civil liability regime and accompanying procedural measures leaves victims of human rights abuses with significant uncertainty regarding the prospects of successful litigation in Switzerland. In combination with the lack of sanctions for violations of due diligence obligations, deterrence from corporate misconduct is further curtailed.[1332]

Rights-holders may have better chances at accessing remedy by filing a complaint before the Swiss NCP. However, the outcome of such complaints will largely depend on a company's readiness to cooperate in the complaint procedure in good faith and willingness to agree to a solution.[1333]

5. Concluding Remarks

The Swiss due diligence provisions are not aligned with the UNGPs. As seen, the personal scope of the Swiss due diligence obligations is very narrow. Instead

1329 NERI-CASTRACANE, GesKR 2023, 58. According to art. 41 para. 1 CO, any person who unlawfully causes damage to another, whether wilfully or negligently, is obliged to provide compensation. The person can be a natural or legal person. Conduct is considered to be unlawful if it (1) violates an absolute right of the injured party such as life, physical integrity, and property *(Verletzung absoluter Rechte)*, or it (2) causes purely pecuniary damage by violating a relevant protective norm *(Schutznorm)*. A protective norm within the meaning of Swiss tort law is a norm of conduct that has the purpose of protecting the interests of the injured party against damage of the kind that has occurred (BGE 119 II 127, c. 3 with further references). To determine whether the injuring party acted negligently, his or her actual conduct is compared to the hypothetical conduct of an average, reasonable person in the same situation (BGer 4C.225/2003, c. 5.2). With respect to the due diligence obligations in art. 964j ff. CO, it is unclear whether these norms could be considered protective norms and whether their violation could thus potentially trigger tort liability. Affirming their character as protective norms: HOFSTETTER KARL, Gegenvorschlag zur Konzernverantwortungsinitiative und Unternehmenshaftung, Schweizerische Juristen-Zeitung (SJZ) 2021, 571 ff., 578. Negating their character as protective norms: BRAND, GesKR 2021, 350 and 360. The latter author argues that because the due diligence obligations are obligations of effort rather than result, they cannot be qualified as protective norms.

1330 FOJ, Analysis EU Due Diligence and Reporting Directives, 12; NERI-CASTRACANE, GesKR 2023, 60.

1331 Cf. DEVA, LJIL 2023, 18.

1332 Cf. WILKS/BLANKENBACH, Beyond Social Auditing, 5.

1333 See Chapter 2 II 3.

of following a risk-based approach, the applicability of due diligence obligations is based on annual import as well as processing thresholds with regard to minerals and metals[1334], and company size with regard to child labour[1335]. In addition, there are exemptions from the personal scope for companies applying 'alternative international standards'[1336] and companies which are considered to operate in countries with a low risk for child labour[1337]. Furthermore, the due diligence provisions regarding conflict minerals exclude downstream companies, i.e. companies that sell products potentially containing conflict minerals such as laptops and smartphones to customers, from their personal scope.[1338]

In terms of their material scope, five points of criticism are particularly noteworthy: First, the provisions narrowly focus on certain conflict minerals and metals as well as child labour. In absence of any parallel overarching due diligence legislation such a narrow approach to due diligence is not aligned with the UNGPs and outdated in view of the current legislative trend.[1339] Second, the provisions focus on the activities of a company's upstream business partners.[1340] Third, the provisions do not sufficiently clarify the role of industry and multistakeholder initiatives in effective due diligence, and they create a risk of overreliance on contractual assurances, certifications, and social audits. Fourth, the provisions do not prescribe meaningful engagement with stakeholders at all stages of due diligence. This undermines the legitimacy of the provisions. Fifth, the provisions do not define the criteria for company withdrawal from certain business relationships and contexts and do not establish the requirements for responsible disengagement.[1341]

In terms of enforcement, the due diligence obligations are not accompanied by a strong public enforcement mechanism and fail to challenge the *status quo* of the Swiss civil liability regime for corporate misconduct.[1342] In the absence of strong public and private enforcement mechanisms, companies are more likely to engage in cosmetic compliance with due diligence obligations. This would clearly undermine the effectiveness of the Swiss provisions

1334 See Section I 2.1 of this Chapter.

1335 See Section I 2.2 of this Chapter.

1336 See Section I 2.3 of this Chapter.

1337 See Section I 2.2 of this Chapter.

1338 See Section I 2.1 of this Chapter.

1339 See Section I 3.1 of this Chapter.

1340 See Section I 3.2 of this Chapter.

1341 See Section I 3.3 c of this Chapter.

1342 See Section I 4 of this Chapter.

in achieving their legislative purpose, i.e. preventing companies from importing or processing minerals or metals that finance conflicts and fuel human rights abuses, as well as offering products and services using child labour.[1343]

Overall, the introduction of art. 964j-964l CO and the enactment of the DDTrO is a step in the right direction. Nevertheless, measured against the key demands of the RBI and in comparison to the legislation in neighbouring countries and the legislative developments in the EU, the introduced legislative amendments also mark a missed opportunity to substantially improve the protection of rights-holders from corporate human rights abuses.

II. The German Supply Chain Due Diligence Act 2021

1. Context

Inspired by legal developments in France, the introduction of mandatory human rights due diligence obligations started being discussed in Germany in the mid-2010s.[1344] Upon recommendation, including by the Office of the UN High Commissioner for Human Rights, the German government initiated a multistakeholder process involving various government ministries, representatives of business organisations, and representatives from civil society organisations, to draw up the German National Action Plan for the Implementation of the UNGPs (German NAP).[1345] The latter's drafting process was shaped by discussions on whether to adopt voluntary or mandatory measures.[1346] While the voluntary approach eventually succeeded, the adopted German NAP held that mandatory measures would be considered if its monitoring revealed that less than 50% of all companies with more than 500 employees based in Germany had sufficient human rights due diligence measures in place and that the NAP requirements had therefore not been adequately implemented on a 'voluntary' basis.[1347]

1343 Cf. WILKS/BLANKENBACH, Beyond Social Auditing, 5; DEVA, LJIL 2023, 18.

1344 KRAJEWSKI MARKUS / TONSTAD KRISTEL / WOHLTMANN FRANZISKA, Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?, Business and Human Rights Journal (BHRJ) 2021, 550 ff., 552; BRUNCK BASTIAN, Menschenrechtscompliance, Eine Untersuchung menschenrechtlicher Verhaltenspflichten von Unternehmen und ihrer Umsetzung im Gesellschaftsrecht, Tübingen 2022, 457.

1345 German NAP 2016-2020, 6.

1346 KRAJEWSKI/TONSTAD/WOHLTMANN, BHRJ 2021, 552.

1347 German NAP 2016-2020, 10.

The target of a 50% compliance rate set in the German NAP was clearly missed: The government commissioned monitoring of corporate practices revealed that only 13–17% of all companies with more than 500 employees implemented human rights due diligence measures.[1348]

As a result, discussions shifted from questioning whether legally mandating human rights due diligence was necessary, to considering different options regarding the design and key features of a new law. The Federal Government proved to be split on the matter. The Social Democratic Party of Germany (SPD) with Labour Minister Heil and backed up by Development Minister Müller of the conservative Christian Social Union (CSU) advocated for an ambitious law based on the UNGPs. As a response to intensive lobbying by business and industry associations, Economics Minister Altmaier of the Christian Democratic Union (CDU) supported a watered-down version of the law. After more than a year, the government eventually managed to find a political compromise.[1349] A draft of the proposed law was submitted to the Federal Parliament *(Bundestag)* on 19 April 2021.[1350] After deliberations and the consultation of experts in the Parliamentary Committee on Labour and Social Affairs, the Federal Parliament adopted the bill with a couple of amendments, making the final version lag behind previous drafts in some points. For example, the personal scope is significantly narrower and the reach of due diligence obligations into the supply chain is considerably shorter. In addition, the final version of the law explicitly excludes civil liability for violations of its provisions.[1351] In this respect, the final version proves to be more of a political compromise rather than an ambitious implementation of the UNGPs.[1352] The Federal Parliament passed the SCDDA on 11 June 2021. It was published in the Federal Gazette on 22 July 2021 and entered into force on 1 January 2023.[1353]

1348 KRAJEWSKI/TONSTAD/WOHLTMANN, BHRJ 2021, 552; BRUNCK, Menschenrechtscompliance, 457.

1349 KRAJEWSKI/TONSTAD/WOHLTMANN, BHRJ 2021, 552; BRUNCK, Menschenrechtscompliance, 457.

1350 Federal Parliament, 'Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten, Drucksache 19/28649 vom 19.04.2021' (hereinafter: Federal Parliament, SCDDA Draft 19/28649).

1351 KRAJEWSKI/TONSTAD/WOHLTMANN, BHRJ 2021, 552 f.; BRUNCK, Menschenrechtscompliance, 458.

1352 GRAF VON WESTPHALEN FRIEDRICH, Es kreißten die Berge, Zeitschrift für Wirtschaftsrecht (ZIP) 2021, 435 ff., 435; BRUNCK, Menschenrechtscompliance, 458.

1353 Cf. KRAJEWSKI/TONSTAD/WOHLTMANN, BHRJ 2021, 553; BRUNCK, Menschenrechtscompliance, 458.

In contrast to the Swiss approach, the German government thus decided against integrating due diligence provisions in its civil code and opted to create a separate law dedicated to corporate human rights and environmental due diligence instead.

2. Definitions

Contrary to the Swiss due diligence provisions, definitions and elaborations are contained in the SCDDA itself and not in an implementing legal act.

2.1 Human Rights Risk

Sec. 2(2) SCDDA defines a human rights risk as a situation which with sufficient probability may result in the violation of the prohibitions listed in nos. 1-12.[1354]

2.2 Environmental Risk

According to sec. 2(3) SCDDA, an environmental risk is considered to arise from a situation which with sufficient probability may result in the violation of the prohibitions listed in nos. 1-8.[1355]

2.3 Supply Chain

The Act uses the term 'supply chain' to refer to all steps in Germany and abroad that are necessary for the production of goods and the provision of services, starting from the extraction of the raw materials to the supply of the products and services to end customers (sec. 2(5) SCDDA). The supply chain encompasses the company's own business activities *(eigener Geschäftsbereich)* and the activities of direct and indirect suppliers (sec. 2(5) nos. 1-3 SCDDA).

The company's own business activities cover all activities aimed at achieving the business objective. This includes any activity for the creation and exploitation of products and services, regardless of whether it is carried out at a location in Germany or abroad. In corporate groups, the parent company's own business activities include the activities of an affiliated company if the parent company exercises a 'controlling influence' *(bestimmenden Einfluss)* on said affiliated company.[1356] The Act does not define what would constitute such a 'controlling influence'.[1357]

1354 For more on covered human rights and other protected grounds see Section II. 4.1 of this Chapter.

1355 For more on covered human rights and other protected grounds see Section II. 4.1 of this Chapter.

1356 Section 2(6) SCDDA.

1357 For more on this, see Section II. 3 of this Chapter.

Sec. 2(7) SCDDA defines a direct supplier as a party to a contract for the supply of goods or the provision of services whose supplies are necessary for the production of the company's goods or for the provision and use of the services in question.

An indirect supplier is any company that is not a direct supplier and whose supplies are necessary for the production of the company's goods or for the provision and use of the services in question (sec. 2(8) SCDDA).

Thus, the Act focuses on the upstream supply chain. Activities in the downstream supply chain are not covered.[1358]

3. Personal Scope

Similarly to the Swiss due diligence provisions related to child labour, the German SCDDA also bases its personal scope on the size of the company, and excludes small and medium-sized enterprises (SMEs) from due diligence obligations, instead of taking a risk-based approach.[1359]

The German SCDDA focuses on large companies, irrespective of their legal form, which have their central administration, their principal place of business, their administrative headquarters, or their statutory seat in Germany and exceed certain employee thresholds (sec. 1(1) sentence 1). The Act also applies to foreign companies of the same size that have their domestic branch office in Germany (sec. 1(1) sentence 2).

However, a gradual lowering of the required number of employees, and thus a gradual expansion of the personal scope, is envisioned. As of 1 January 2023, the SCDDA initially only applied to companies with more than 3,000 employees in Germany; as of 1 January 2024, companies with more than 1,000 employees in Germany have also been included (sec. 1(1) sentence 1 no. 2 and sentence 3 SCDDA).

The gradual approach is intended to prevent smaller companies from being overburdened by giving them a longer lead time for the implementation of the Act. SMEs with less than 500 employees are completely excluded from the personal scope. However, it is doubtful whether SMEs will be spared in practice. This is because SMEs are included in the supply chains of large companies which will pass on their obligations to their contractual partners

1358 Cf. German Federal Ministry of Labour and Social Affairs (BMAS) / German Federal Ministry for Economic Affairs and Climate Action (BMWK) / German Federal Office for Economic Affairs and Export Control (BAFA), Official Information Portal on the Supply Chain Due Diligence Act, FAQ (hereinafter: BMAS/BMWK/BAFA, FAQ on the SCDDA), no. 6.8.

1359 Cf. BRUNCK, Menschenrechtscompliance, 460; Section I 2 of this Chapter.

in order to satisfy their own supply chain due diligence obligations.[1360] This is even expressly prescribed for them in sec. 6(4) SCDDA as a supplier-related preventive measure.[1361] Moreover, it is not clear why the German government assumed that companies with more than 500 employees should comprehensively fulfil the core elements of human rights due diligence in the NAP, but with respect to the SCDDA fears that these companies would be overburdened.[1362]

The SCDDA conceptualises corporate groups as separate legal entities and not as a single economic unit. Due diligence obligations with respect to a company's own business activities would therefore typically only include the activity of the legal entity in question. However, sec. 2 (6) sentence 3 SCDDA stipulates that the business activities of affiliated companies are attributed to the parent company if the parent company exercises a 'controlling influence' *(bestimmenden Einfluss)*. As previously mentioned, the Act does not contain a definition of the terminology 'controlling influence'. According to the Parliamentary Committee on Labour and Social Affairs, determining a controlling influence should depend on an individual assessment of each case, taking into account all relevant aspects. For this purpose, all economic, personnel, organisational and legal ties between the affiliate and parent company are to be considered and weighed in context.[1363] Indications for a controlling influence are, *inter alia*, a high majority of shares in the subsidiary, the existence of a group-wide compliance system, the assumption of responsibility for the control of core processes in the subsidiary, overlapping personnel at the (business) management level, a considerable influence on the supply chain management of the subsidiary, and the exercise of influence through the shareholders' meeting.[1364] This influence may not only be exercised over subsidiaries, but over lower tier subsidiaries as well. The decisive factor is whether the parent company can legally and factually influence the behaviour of the affiliated company.[1365]

1360 WAGNER ERIC / RUTTLOFF MARC, Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung, Neue Juristische Wochenschrift (NJW) 2021, 2145 ff., 2145; BRUNCK, Menschenrechtscompliance, 460.

1361 WAGNER/RUTTLOFF, NJW 2021, 2145; BRUNCK, Menschenrechtscompliance, 460.

1362 Cf. German NAP 2016-2020, 10; BRUNCK, Menschenrechtscompliance, 460; Section II 1. of this Chapter.

1363 Parliamentary Committee on Labour and Social Affairs, 'Beschlussempfehlung und Bericht, Drucksache 19/30505 vom 09.06.2021' (hereinafter: Parliamentary Committee on Labour and Social Affairs, Proposed Resolution and Report), 38.

1364 Parliamentary Committee on Labour and Social Affairs, Proposed Resolution and Report, 38.

1365 BRUNCK, Menschenrechtscompliance, 460.

4. Material Scope

4.1 Covered Human Rights and other Protected Grounds

Sec. 2(1) SCDDA holds that the protected legal positions within the meaning of the Act arise from the labour rights conventions and human rights treaties listed in nos. 1–11 of the Annex. These are the majority of ILO's Core Labour Standards[1366], the ICCPR, and the ICESCR. The list is exhaustive. The Federal Council justified its choice of conventions and treaties by referencing the UNGPs, the OECD Guidelines, and the EU Taxonomy Regulation[1367], which is aimed at facilitating sustainable investments by providing benchmarks for responsible business conduct.[1368] Strikingly, neither the UDHR nor European regional human rights instruments of which Germany is a member state, such as the ECHR[1369], are part of this enumeration. The reasons for the exclusion of the former are unclear, especially since the Commentary to the UNGPs explicitly refers to the rights enshrined in the UDHR as forming part of the 'internationally recognized human rights' business enterprises should respect.[1370] The exclusion of the latter is possibly due to the differences in the scope and level of protection between European regional human rights instruments on the one hand and instruments within the realm of the UN on the other. Exclusively focusing on UN human rights treaties can enable companies to navigate their human rights-related due diligence obligations with greater legal certainty.[1371] In addition, the special UN human rights treaties for the

1366 The right to a safe and healthy work environment was added to the ILO Core Labour Standards in June 2022, i.e. after the adoption of the SCDDA, see ILO Declaration on Fundamental Principles and Rights at Work (2022).

1367 Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ 22.6.2020, L 198/13.

1368 Federal Council, 'Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten, Drucksache 239/21 vom 26.03.21' (hereinafter: Federal Council, SCDDA Draft 239/21), 34.

1369 Germany has ratified the ECHR on 5 December 1952, see Federal Gazette, BGBI. II 1952, 685.

1370 Commentary to UNGP 12. However, the exclusion of the UDHR is likely due to its soft law nature (BRUNCK, Menschenrechtscompliance, 465). In view of its significance as a foundational document of international human rights protection, its inclusion in the UNGPs, and its role as a point of reference for numerous national constitutions, the exclusion of the UDHR from the Annex is still surprising (see also, German Institute for Human Rights (GIHR), 'Stellungnahme im Rahmen der Verbändeanhörung zum Referentenentwurf des Bundesministeriums für Arbeit und Soziales, Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten vom 28. Februar 2021' (March 2021) (hereinafter: GIHR, Statement to the SCDDA Bill), 4).

1371 See further, ZIMMERMANN ANDREAS / WEISS NORMAN, Völker- und verfassungsrechtliche Parameter eines deutschen Lieferkettengesetzes, Archiv des Völkerrechts (AVR) 2020, 424 ff., 451 ff.

protection of historically disadvantaged and marginalised individuals and groups (e.g. CRC, ICERD) are not enlisted in the Annex either, even though Germany has ratified these treaties[1372] and the importance of these rights in the context of business activities has been stressed by human rights bodies and demonstrated in case law.[1373] However, the UNGPs are rather ambiguous regarding the corporate responsibility to respect human rights beyond the rights enshrined in the International Bill of Rights, which is composed of the UDHR, ICCPR, and ICESCR, and the ILO Core Labour Standards.[1374] It is moreover doubtful whether simply listing these additional treaties in the Annex would have improved the protection of rights-holders, if the consideration of their particular vulnerabilities was not simultaneously reflected in the formulation of the due diligence obligations.

Rather than defining the scope of protection for each right, sec. 2(2) SCDDA formulates prohibitions that companies must observe to comply with the Act. These prohibitions are based on the enumerated conventions and treaties in nos. 1-11 of the Annex. The prohibitions in sec. 2(2) SCDDA relate to children's rights (nos. 1-2), labour rights (nos. 3-8), rights regarding sustenance (no. 9), land rights (no. 10), and the protection of rights-holders from certain abuses perpetrated by private and public security providers (no. 11).

With respect to labour rights, the prohibition of disregarding occupational health and safety in sec. 2(2) no. 5 SCDDA solely relates to violations under the national law of the host state. Referencing the national law of the host state instead of international occupational health and safety standards is not unproblematic, since national labour laws may fall short of these international standards and insufficiently protect rights-holders from abuses of their fundamental labour rights, as enshrined in ILO Conventions Nos. 155 and 187, as well as their human rights, notably their right to life (art. 6(1) ICCPR), health (art. 12 ICESCR), and safe and healthy working conditions (art. 7(b) ICESCR).[1375] In order to comply with the UNGPs, companies should thus adhere to the higher standard, whenever national laws and international labour standards offer different levels of protection for workers.[1376]

1372 Federal Gazette, BGBl 2001 II, 1237; BGBl 1992 II, 121; BGBl 1969 II, 961.

1373 See Chapter 1 III 1.2.

1374 See Commentary to UNGP 12 and Chapter 2 I 3.1 b.

1375 Cf. SCHMITZ, KKR SCDDA Commentary, sec. 2 margin n. 155 ff. Possible drivers of poor labour law and human rights protection in host states have been discussed in Chapter 1 II 2.1.

1376 Cf. OHCHR Interpretive Guide, 77; OHCHR, BHR in Challenging Contexts: Considerations for Remaining and Exiting, 6. See also, SCHMITZ, KKR SCDDA Commentary, sec. 2 margin n. 162.

With respect to the ICCPR and the ICESCR, various rights are not covered by the prohibitions listed in sec. 2(2) nos. 1–11 SCDDA. For instance, there is no reference made to the right to social security (art. 9 ICESCR), even though the importance for companies to respect this right has already been stressed by the CESCR in 2008.[1377] Even where certain rights are included, protection remains incomplete: The right to an adequate standard of living pursuant to art. 11(1) ICESCR is notably only partially considered in sec. 2(2) no. 9 SCDDA: the right to housing and clothing is not protected and the protection of the rights to food, water, sanitary facilities, and health in art. 2(9) SCDDA solely applies in relation to specific corporate actions, namely causing any harmful soil change, water pollution, air pollution, harmful noise emission or excessive water consumption.[1378]

In other cases, certain rights enshrined in the ICESCR and ICCPR are covered by the prohibitions in the Act but their protection may nevertheless remain a dead letter in practice. This is because the Act references applicable national law instead of international human rights and labour rights standards as benchmarks for appropriate corporate action.[1379] However, the protection offered by national laws may either fall short of international human rights standards, not be implemented or enforced in practice or simply not exist.[1380] Two examples are particularly worth noting in this regard: First, the right to a fair wage that provides workers with a decent living for themselves and their families in accordance with the provisions of the ICESCR (art. 7(a)(ii) ICESCR). This means that remuneration must enable workers and their families to enjoy other Covenant rights such as the right to social security (art. 9), health care (art. 12 (1)), education (art. 13) and an adequate standard of living. The latter includes the right to food, water, sanitation, housing, and clothing (art. 11 (1)).[1381] Minimum wages are a means that help guarantee such a decent living.[1382] The ILO Minimum Wage Fixing Convention 1970 (No. 131), whose ratification

1377 CESCR, General Comment No. 19 (2008), para. 54. For more on the deliberations of UN treaty bodies on corporate activities and human rights, see Chapter 1 III 1.2.

1378 Cf. BRUNCK, Menschenrechtscompliance, 465.

1379 Ibid., 465 f.

1380 These three scenarios differ from situations in which host states have adopted legislation or practices that deliberately contradict international human rights standards. For a typology of common conflicts between domestic laws and international human rights standards and recommendations for companies on how to tackle them, see, e.g., SMIT/GRIFFITH/MCCORQUODALE, BIICL Report on Conflicts with IHR, 15 ff. See also, OHCHR, BHR in Challenging Contexts, 5 ff.

1381 CESCR General Comment No. 23 (2016), para. 18.

1382 Ibid., para. 19.

the CESCR calls for[1383], and the ILO Minimum Wage Fixing Recommendation 1970 (No. 135) offer guidance on defining minimum wages. Besides the vital needs of workers, their families and the cost of living, minimum wages should also take the general level of wages, the relative living standards of other social groups, and economic factors such as the overall level of economic development in the country into account.[1384] The ILO Convention No. 131, thus, incorporates considerations of essential needs and the relational or distributive element of fairness, taking into account the underlying economic conditions and regulatory framework of the country.[1385] Sec. 2(2) no. 8 SCDDA neither explicitly[1386] references art. 7(a)(ii) ICESCR nor ILO Convention No. 131 in its prohibition to withhold 'an adequate wage'. Instead, sec. 2(2) no. 8 SCDDA simply holds that an adequate wage at least amounts to the minimum wage laid down by the applicable law and the regulations of the place of employment.[1387] Second, the right to adequate housing in art. 11(1) ICESCR and the

1383 Committee on Economic, Social and Cultural Rights (CESCR), Concluding Observations on the Initial Report of Uruguay, UN Doc. E/C.12/1994/3 (30 May 1994), para. 17; CESCR, Concluding Observations on the Fourth Periodic Report of Sweden, UN Doc. E/C.12/1/Add.70 (30 November 2001), para. 33; CESCR, Concluding Observations on the Fifth Periodic Report of Sweden, UN Doc. E/C.12/SWE/CO/5 (1 December 2008), para. 31.

1384 Art. 3 ILO Convention No. 131; Minimum Wage Fixing Recommendation No. 135, II(3). In practice, different methodologies of calculating minimum living wages have been developed. An internationally wellestablished one is the so-called Anker-methodology (ANKER RICHARD / ANKER MARTHA, Living Wages Around the World, Manual for Measurement, Cheltenham/Northampton 2017, 17 ff.; International Labour Organization (ILO), 'General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135)', Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), ILC.103/III/1B (2015), para. 52. For more practical guidance on living wages and incomes, see further, Organisation for Economic Co-operation and Development (OECD), Handbook on Due Diligence for Enabling Living Incomes and Living Wages in Agriculture, Garment and Footwear Supply Chains (2024).

1385 SAUL BEN / KINLEY DAVID / MOBRAY JACQUELINE, The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials, Oxford 2014, 409.

1386 However, in the commentary to different versions of the draft law, reference was made to art. 7(a)(ii) ICESCR (Federal Council, SCDDA Draft 239/21, 37 f. and Federal Parliament, SCDDA Draft 19/28649, 38).

1387 Nonetheless, a number of scholars argue that the term 'adequate wage' must be interpreted in light of art. 7(a)(ii) ICESCR and the ILO Minimum Wage Fixing Convention 1970 (No. 131). According to these scholars, the primary objective of the SCDDA, i.e. the protection of human rights from corporate misconduct, warrants an interpretation of sec. 2(2) no. 8 SCDDA, whereby only a fair wage within the meaning of art. 7(a)(ii) ICESCR can be considered an adequate one. Thus, companies falling under the personal scope of the SCDDA must ensure that workers are paid more than the nationally applicable minimum wage if the minimum wage is not sufficient to enable a decent

prohibition of unlawful interference with the home in art. 17(1) ICCPR are theoretically both covered by the prohibition of unlawful eviction and taking of resources in sec. 2(2) no. 10 SCDDA. However, the term 'unlawfulness' refers to the relevant national law of the host state[1388], which may lag behind the standards of internationally recognised human rights. In such cases, unlawfulness according to host state standards would, again, be an unsuitable benchmark for corporate action.[1389] From the perspective of marginalised groups, such as indigenous peoples, women, ethnic and other minorities, and older persons, using the national law of host states as a benchmark for human rights abuses is particularly deplorable, as they are more vulnerable to unlawful evictions as well as land and water grabbing.[1390] To align themselves with the UNGPs, companies should thus observe the higher standard, whenever the level of protection offered by domestic legislation and international human rights standards differ.[1391]

Finally, sec. 2(2) no. 12 SCDDA contains a prohibition of all other breaches of due diligence obligations that are 'directly capable of impairing a protected legal position in a particularly serious manner' and 'obviously unlawful'. With this provision, lawmakers acknowledged that business activities can negatively impact virtually all human rights[1392] and expressed their intent to align

living for workers and their families (cf. EHMANN ERIK, Der Regierungsentwurf für das Lieferkettengesetz: Erläuterung und erste Hinweise zur Anwendung, Zeitschrift für Vertriebsrecht (ZVertriebsR) 2021, 141 ff., 144; KRAUSE RÜDIGER, Das Lieferkettensorgfaltspflichtengesetz als Baustein eines transnationalen Arbeitsrechts – Teil II, Recht der Arbeit (RdA) 2022, 327 ff., 334; FORNASIER/KALTENBORN, KKR SCDDA Commentary, sec. 2 margin n. 418 f.). In the official FAQ on the SCDDA, the involved ministries and the competent regulatory oversight authority seem to agree with this notion and hold that the local statutory minimum wage may not satisfy the requirement of an adequate wage under sec. 2(2) no. 8 SCDDA (BMAS/BMWK/BAFA, FAQ on the SCDDA, no. 5.3).

1388 Federal Council, SCDDA Draft 239/21, 38.

1389 Cf. BRUNCK, Menschenrechtscompliance, 466. Nonetheless, certain scholars contend that the purpose of the SCDDA, which is the protection of human rights, requires an interpretation of sec. 2(2) no. 10 SCDDA, whereby evictions and acquisitions of natural resources must be deemed unlawful if they violate international human rights standards, even if they are permitted under domestic law (SCHÖNFELDER, SCDDA Handbook, sec. 4 margin n. 48; SCHMALENBACH, KKR SCDDA Commentary, sec. 2 margin n. 583).

1390 Cf. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7 (1997): 'The right to adequate housing (art. 11.1 of the Covenant): Forced Evictions', UN doc. E/1998/22 (20 May 1997), para. 10; CERD, Concluding Observations on Australia (2010), para. 13. As seen in Chapter 2 II 2.2 b, the updated OECD Guidelines emphasise indigenous peoples as a group requiring particular attention when conducting due diligence (OECD Guidelines (2023), IV. Human Rights, para. 40).

1391 OHCHR Interpretive Guide, 77; OHCHR, BHR in Challenging Contexts, 6.

1392 Cf. Commentary to UNGP 12.

the Act more closely with the UNGPs.[1393] The introduction of sec. 2(2) no. 12 SCDDA is well-intentioned; however, the provision is unlikely to be applied in practice.[1394] This is due to the principle of legality enshrined in international human rights law[1395] and art. 103(2) of the German constitution[1396] whereby the degree to which the content of a norm must be specified increases with the degree of restriction imposed on the right-holder's freedom. While the protected legal positions covered by the prohibition may be deemed sufficiently clear thanks to the reference in sec. 2(1) SCDDA[1397], the problem lies in the lack of definition of the terms 'directly capable of', 'particularly serious', and 'obviously unlawful'. This issue is exacerbated by the fact that breaches of due diligence obligations can trigger administrative sanctions for companies, including hefty fines (sec. 24 SCDDA).[1398] The imposition of such sanctions would constitute an interference with the economic freedom of the affected company. In the absence of a clear definition of the used terms and in light of the high fines, sec. 2(2) no. 12 SCDDA will therefore likely be interpreted narrowly and rarely applied in practice.[1399]

Besides the aforementioned human rights treaties, the SCDDA also refers to three conventions on environmental protection and formulates concrete prohibitions related to environmental protection for corporate actors. The three conventions are namely the Minamata Convention on Mercury[1400],

1393 Similarly, WEHRMANN, DW SCDDA Commentary, sec. 2 margin n. 377; HEIN, KKR SCDDA Commentary, sec. 2 margin n. 624.

1394 BRUNCK, Menschenrechtscompliance, 466.

1395 As prescribed, for instance, in art. 7(1) ECHR. On the principle of legality in international human rights law, see, further, DE SCHUTTER, International Human Rights Law, 349 ff.

1396 Grundgesetz für die Bundesrepublik Deutschland vom 23.05.1949, BGBl. I, Nr. 1, 1 (*Grundgesetz*, GG). For more on the implications of principle of legality as enshrined in art. 103(2) GG in the context of interpreting corporate obligations related to respecting human rights, see, e.g., ZIMMERMANN/WEISS, AVR 2020, 440 ff.

1397 Cf. ZIMMERMANN/WEISS, AVR 2020, 442; HEIN, KKR SCDDA Commentary, sec. 2 margin n. 626 f. and 632. Opposing view: WAGNER ERIC / RUTTLOFF MARC, Das Lieferkettensorgfaltspflichtengesetz – Eine erste Einordnung, Neue Juristische Wochenschrift (NJW) 2021, 2145 ff., 2146; SPINDLER GERALD, Verantwortlichkeit und Haftung in Lieferantenketten – das Lieferkettensorgfaltspflichtengesetz aus nationaler und europäischer Perspektive (1/2), Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 2022, 67 ff., 78 f.; KOLB, FM SCDDA Commentary, sec. 2 margin n. 23.

1398 WAGNER/RUTTLOFF, NJW 2021, 2147; SPINDLER, ZHR 2022, 79; HEIN, KKR SCDDA Commentary, sec. 2 margin n. 626 f.; KOLB, FM SCDDA Commentary, sec. 2 margin n. 16 and 24. On possible sanctions, see further, Section II 5.1 of this Chapter.

1399 Similarly, BRUNCK, Menschenrechtscompliance, 466; HEIN, KKR SCDDA Commentary, sec. 2 margin n. 634.

1400 Minamata Convention on Mercury 3202 UNTS (adopted on 10 October 2013).

the Stockholm Convention on Persistent Organic Pollutants[1401], and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[1402].[1403] It remains unclear why these three conventions in particular were considered to be decisive for the environmental due diligence of companies. The commentary to the bill neither provides information on the background of the environment-related obligations nor on the reasoning behind limiting the content to these conventions.[1404] This seems not only arbitrary but, measured against the threat climate change poses to the enjoyment of human rights, also unambitious.[1405]

In sum, one of the most striking differences between the SCDDA and the Swiss due diligence provisions is the coverage of a wide(r) range of human rights and certain environmental standards, instead of an issue- and industry-specific approach. Nevertheless, sec. 2(2) in conjunction with 2(1) SCDDA is still only partially aligned with the UNGPs. The Act tackles some of the issues raised against the criticised vagueness of the UNGPs by providing contours to the human rights and international labour standards in the enumerated treaties. The Act does so by framing human rights and labour rights abuses in terms of concrete prohibitions for corporate actors. This enables the companies concerned to operate with more legal certainty,[1406] which is particularly important against the threat of fines in sec. 24 of the SCDDA.[1407] However, the Act only does so in a lacunary manner, as it protects the human rights enshrined in the treaties it lists selectively and only partly, and therefore falls short of its premise.

4.2 Covered Business Activities

The Act follows a graduated-tier logic when it comes to designating due diligence obligations: Companies that fall within the personal scope of the Act must conduct due diligence with regard to their own business activities and with regard to the activities of their direct suppliers (tier 1).[1408] A subsidiary

1401 Stockholm Convention on Persistent Organic Pollutants 2256 UNTS 119 (adopted on 22 May 2001).

1402 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1673 UNTS 57 (adopted on 22 March 1989).

1403 Cf. sec. 2(3) SCDDA and nos. 12-14 of the Annex.

1404 BRUNCK, Menschenrechtscompliance, 465.

1405 Similarly, KRAJEWSKI/TONSTAD/WOHLTMANN, BHRJ 2021, 554; BRUNCK, Menschenrechtscompliance, 465.

1406 Cf. HESELHAUS, URP 2024, 21.

1407 Cf. BRUNCK, Menschenrechtscompliance, 466.

1408 Cf. sec. 5(1) sentence 1 and sec. 7(1) sentence 2 SCDDA. See also, KRAJEWSKI/TONSTAD/WOHLTMANN, BHRJ 2021, 556; BRUNCK, Menschenrechtscompliance, 470.

is considered to be part of the supply chain if the parent company exercises a decisive influence over it or if the subsidiary supplies the parent company (sec. 2(6) SCDDA).[1409]

With regard to indirect suppliers (tier 2, tier 3 etc.), due diligence obligations arise in two situations for a company: First, if a company obtains factual information indicating the possibility of a breach of a human rights or environmental obligation ('substantiated knowledge') (sec. 9 (3) SCDDA). Second, if a company attempts to circumvent its due diligence obligations under the Act by wrongfully arranging its supplier relationships. In this case, an indirect supplier counts as a direct supplier (sec. 5(1) sentence 2 and sec. 7(1) sentence 2).[1410]

The Swiss due diligence provisions and the SCDDA differ considerably in this regard too, as the former oblige companies to carry out due diligence throughout their supply chain, which encompasses the activities of all upstream economic operators, whereas the latter establishes a focus on tier 1 suppliers.[1411] Overall, neither of the two laws is fully aligned with the UNGPs, which call on companies to conduct due diligence throughout their value chains.[1412] Nevertheless, the Swiss due diligence provisions are more aligned with the UNGPs in comparison to the SCDDA when it comes to covered business activities.[1413] The SCDDA's graduated-tier logic notably marks one of the Act's clearest departures from the UNGPs.

4.3 Content

According to sec. 3(1) SCDDA, companies must exercise due diligence in accordance with their obligations set out in the Act, with the aim of preventing and minimising human rights and environmental-related risks and ending violations of human rights or environmental-related obligations. Due diligence is understood as an ongoing, repetitive process that is comprised of certain steps that build on each other and are interrelated.[1414] These steps are described in sec. 3(1) nos. 1–9 SCDDA and can be summarised as follows: First, companies are required to submit a human rights policy statement.[1415] Second, they must

1409 For further elaborations on how to determine a decisive influence, see Section II 3 of this Chapter.

1410 See Section II 4.3 of this Chapter.

1411 See Section I 3.2 of this Chapter.

1412 Cf. Commentary to UNGP 13 and UNGP 17 (a).

1413 Noting that the graduated-tier logic of the SCDDA stands in stark opposition to the UNGPs: KRAJEWSKI/TONSTAD/WOHLTMANN, BHRJ 2021, 556; BRUNCK, Menschenrechtscompliance, 477.

1414 Federal Council, SCDDA Draft 239/21, 42.

1415 Sec. 3(1)(4) in conjunction with sec. 6(2) SCDDA.

set up a risk management system.[1416] Third, they are obliged to conduct risk analyses.[1417] Fourth, they must address identified risks and violations.[1418] Fifth, they are required to review the effectiveness of the steps taken.[1419] Lastly, they must document and publicly report on the identified risks and violations, the steps taken to address them and the effectiveness of these measures.[1420] The due diligence measures are then specified in sec. 4–10 SCDAA. Sec. 3(1) SCDDA thereby focuses on the implementation of certain procedural steps to comply with due diligence obligations under the Act, instead of formulating a corporate obligation to respect human rights and environmental concerns and then conceptualising due diligence as a means to achieve such respect.[1421]

In the SCDDA, due diligence is principally understood as an obligation of effort *(Bemühenspflicht),* rather than an obligation of result *(Erfolgspflicht).*[1422] Therefore, the violation of human rights-related or environmental prohibitions in sec. 2(2) SCDDA does not itself constitute a breach of obligations under the Act, if the company in question has taken 'appropriate' measures to prevent the occurrence of the violation.[1423] According to sec. 3(2) SCDDA, appropriateness is determined by four factors. These include the nature and scope of the company's business activities[1424] and the expected severity, reversibility, and probability of the human rights and environmental abuses in question[1425]. Furthermore, appropriateness will depend on the 'nature of the company's causal contribution'*(Art des Verursachungsbeitrags),* i.e. the type of

1416 Sec. 3(1)(1) in conjunction with sec. 4(1) SCDDA.

1417 Sec. 3(1)(3) in conjunction with sec. 5 SCDDA.

1418 Sec. 3(1)(5) and 3(1)(6) SCDDA.

1419 Sec. 3(1)(5) and 3(1)(6) in conjunction with sec. 6(5) and 7(4) SCDDA.

1420 Sec. 3(1)(9) in conjunction with sec. 10(1) and 10(2) SCDDA.

1421 Cf. GIHR, Statement to the SCDDA Bill, 8 f.

1422 Federal Council, SCDDA Draft 239/21, 2 and 42; Parliamentary Committee on Labour and Social Affairs, Proposed Resolution and Report, 38. See also, WAGNER/RUTTLOFF, NJW 2021, 2145 f.; BRUNCK, Menschenrechtscompliance, 473; NASSE LAURA, Loi de vigilance: Wirtschaft und Menschenrechte im französischen Privatrecht, doctoral thesis University of Heidelberg, Tübingen 2022, 281; RUTTLOFF/KAPPELER, WRW SCDDA Handbook, sec. 3 margin n. 466 ff.; HEIN/VOSSEN, KKR SCDDA Commentary, sec. 3 margin n. 49. For exceptions to this rule, see the following remarks on sec. 7(1).

1423 Cf. sec. 3(1) and sec. 3(3) SCDDA; Federal Council, SCDDA Draft 239/21, 42. See further, Federal Office of Economic Affairs and Export Control (BAFA), 'Appropriateness: Handout on the Principle of Appropriateness According to the Requirements of the Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations', First Edition (December 2022) (hereinafter: BAFA, Handout on Appropriateness), 5.

1424 Sec. 3(2)(1) SCDDA.

1425 Sec. 3(2)(3) SCDDA.

corporate involvement in the risk or abuses[1426].[1427] These criteria are largely in line with UNGP 17.[1428] Lastly, the appropriateness of measures taken is contingent on the company's ability to influence the direct perpetrator of a human rights risk or environmental risk or the violation of a human rights- or environment-related prohibition.[1429] According to the commentary to the bill, the key factor is proximity to the risk, i.e. where the risk arises and by whom it is directly perpetuated: the company itself, a contractual partner or an indirect supplier along the supply chain.[1430] This may be interpreted as an influence-based responsibility[1431]: the greater influence a company is able to exert, i.e. the closer the risk, the greater the efforts a company can be expected to make.[1432] While the concept of influence and proximity can also be found in UNGP 19, it is used to determine *how* to manage identified risks and abuses, and is not tied to responsibility.[1433] Under the UNGPs, a company should exercise its influence, i.e. leverage, to prevent or mitigate abuses. Furthermore, it should increase its influence, i.e. leverage, to effect change whenever possible.[1434] As a result of this discrepancy, RUGGIE expressed considerable criticism of the draft law in a letter to the federal ministries involved and called for a closer alignment of the draft law with the UNGPs in this respect.[1435] Nevertheless, the requirements of the UNGPs could also be taken into account by way of restrictively interpreting sec. 3(2) no. 2 SCDDA in alignment with the Commentary to UNGP 19.[1436] In any case, the formulation of the principle of appropriateness in sec. 3(2) SCDDA creates tension between the necessary

1426 In the words of the UNGPs, appropriate action under the SCDDA *inter alia* depends on whether the company caused, contributed or was directly linked to it.

1427 Sec. 3(2)(4) SCDDA.

1428 Similarly, BRUNCK, Menschenrechtscompliance, 466.

1429 Sec. 3(2)(4) SCDDA.

1430 Federal Council, SCDDA Draft 239/21, 43.

1431 RUGGIE JOHN GERARD, Letter from John Ruggie to German Ministers regarding alignment of draft supply chain law with the UNGPs (March 2021) (hereinafter: Ruggie, Letter to German Ministers), para. 4.

1432 Federal Council, SCDDA Draft 239/21, 43.

1433 Cf. UNGP 19 (b): 'In order to prevent and mitigate adverse human rights impacts, business enterprises should [...] take appropriate action. Appropriate action will vary according to: (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship; (ii) The extent of its leverage in addressing the adverse impact.'

1434 Commentary to UNGP 19.

1435 RUGGIE, Letter to German Ministers, para. 4.

1436 Similarly, BRUNCK, Menschenrechtscompliance, 468.

flexibility for companies to navigate their particular circumstances[1437] and the principle of legality which demands clarity regarding the conditions under which the breach of obligations under the Act may trigger sanctions.[1438] However, this tension should not pose a problem for the enforcement of due diligence obligations for several reasons. First, sec. 3(1) SCDDA lists the criteria by which appropriate action is determined conclusively. The UNGPs, the OHCHR Interpretative Guide, the OECD Guidelines, and the OECD Guidances provide further contours to these criteria.[1439] Second, the competent enforcement authority for the Act, the Federal Office for Economic Affairs and Export Control (BAFA)[1440], published an official guidance[1441] on the principle of appropriateness in the SCDDA.[1442] Third, the concept of appropriateness is a commonly used feature in German law[1443]: In constitutional law, appropriateness is an element of proportionality and refers to the balancing of competing interests in light of the concrete circumstances when fundamental rights are restricted.[1444] Under the German Money Laundering Act[1445], obliged entities must have effective risk management systems in place that are appropriate to the nature and size of their business in order to prevent money laundering.[1446] In the German Civil Code (BGB)[1447], the concept of appropriateness is also used, albeit referred to differently, to determine negligence: Pursuant to sec. 276(2) BGB, a person acted negligently if they did not exercise the appropriate care in view of the specific circumstances of the case. The conclusive

1437 Federal Parliament, SCDDA Draft 19/28649, 42; BAFA, Handout on Appropriateness, 5.

1438 Cf. WAGNER/RUTTLOFF, NJW 2021, 2145; RUTTLOFF/KAPPELER, WRW SCDDA Handbook, sec. 3 margin n. 473 ff.; BRACKMANN JULIUS, Freiheitskosten – Grundrechtskollisionen im Lieferkettensorgfaltspflichtengesetz, Zeitschrift für Vergleichende Rechtswissenschaft (ZvglRWiss) 2023, 107 ff., 119.

1439 HEIN/VOSSEN, KKR SCDDA Commentary, sec. 3 margin n. 86.

1440 Sec. 19(1) SCDDA.

1441 BAFA, Handout on Appropriateness.

1442 Pursuant to sec. 20 in conjunction with sec. 19(1) SCDDA, the BAFA is authorised to publish official guidances and recommendations on compliance with the SCDDA.

1443 ZIMMERMANN/WEISS, AVR 2020, 442; HEIN/VOSSEN, KKR SCDDA Commentary, sec. 3 margin n. 82.

1444 HEIN/VOSSEN, KKR SCDDA Commentary, sec. 3 margin n. 82.

1445 Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten (Geldwäschegesetz, GwG) vom 23.06.2017, BGBl. I, Nr. 39, 1822.

1446 Sec. 4(1) GwG. Entities that fall under the personal scope of the GwG are also obliged to take appropriate measures to manage and mitigate the risks of money laundering (sec. 6(1) GwG). Sec. 6(1) GwG defines appropriate measures as measures that correspond to the respective risk situation of the obligated entity and sufficiently cover it.

1447 Bürgerliches Gesetzbuch (BGB) in der Fassung der Bekanntmachung vom 02.01.2002, BGBl. I, Nr. 2, 42.

criteria listed in sec. 3(2) SCDDA, which are to be interpreted with the help of international standards (UNGPs, OECD Guidelines, OECD Guidances etc.), and the official BAFA guidance, thus provide a legislative framework within which companies can sufficiently determine the required extent of their efforts to comply with their due diligence obligations under the Act.[1448]

a) Human Rights Policy Statement

Pursuant to sec. 6(2) SCDDA, companies are required to provide a human rights policy statement. The policy statement is to be issued by the management and must describe the company's human rights strategy. This includes a description of its due diligence processes, its salient human rights and environmental risks, and its human rights and environment-related expectations towards its employees and suppliers in its supply chain. The wording of the provision and its placement within the Act would imply that a human rights policy statement only has to be issued once a concrete human right or environmental risk has been identified.[1449] However, without a fundamental understanding of its operating context, the nature of its business activities, and its business relationships, a company will hardly be able to properly assess its human rights and environment-related risks. Thus, companies, having gained an understanding and awareness of their salient human rights and environmental issues, should rather first establish their human rights strategy and issue a corresponding policy statement.[1450] Such an approach would also be more in line with UNGP 16 which frames the policy statement as the foundation for enshrining the responsibility to respect human rights.[1451]

b) Risk Management System

To comply with due diligence obligations under the Act, companies must then establish an appropriate and effective risk management system and anchor it in all relevant business processes (sec. 4(1) SCDDA). Effectiveness within the meaning of sec. 4(1) SCDDA refers to a system that enables companies to identify and mitigate human rights and environmental risks, and to prevent, end,

1448 HEIN/VOSSEN, KKR SCDDA Commentary, sec. 3 margin n. 86. See also, WALDEN, DW SCDDA Commentary, sec. 3 margin n. 40. Critical: WAGNER/RUTTLOFF, NJW 2021, 2146; SPINDLER, ZHR 2022, 81.

1449 WAGNER/RUTTLOFF, NJW 2021, 2147.

1450 Similarly, WAGNER/RUTTLOFF, NJW 2021, 2147. See also, GIHR, Statement to the SCDDA Bill, 14.

1451 UNGP 16: 'As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that [...]'.

or mitigate violations of the prohibitions stipulated in sec. 2(2) and 2(3) SCDDA that they have caused or contributed to in their supply chains.[1452] In establishing and implementing its risk management, the company must duly consider the interests of its employees, employees within its supply chain, and those who may otherwise be directly affected in a protected legal position by the business activities of the company or by the business activities of a company in its supply chain (sec. 4(4) SCDDA). The commentary to the bill states that such 'consideration' may take the form of direct consultation with potentially affected rights-holders or with their legitimate representatives. It also highlights the role of such consultation as an important participatory means of obtaining information on the interests of potentially affected rights-holders and the human rights situation in operating contexts. The commentary furthermore holds that consultation should promote transparency, understanding, and acceptance of the mutual concerns of (potentially) affected persons and the company. In order to facilitate consultations, the removal of linguistic and other barriers may be necessary. Particular attention should be paid to vulnerable persons, such as migrants or people with disabilities, whose rights are particularly at risk, the commentary states.[1453] With the integration of sec. 4(4) SCDDA, lawmakers recognised the fundamental role of stakeholder engagement in meaningful human rights and environmental due diligence which is also highlighted in the UNGPs.[1454] However, sec. 4(4) SCDDA unduly focuses on the concerns of workers.[1455] Furthermore, without explicitly enshrining the criteria for meaningful stakeholder engagement in sec. 4(4) SCDDA, companies are left with considerable discretion regarding the implementation of the provision.[1456]

To monitor their risk management system, companies are required to internally appoint a responsible person such as a human rights officer or a responsible department (sec. 4(3) sentence 1 SCDDA). Senior management shall inform itself regularly, i.e. at least once a year, about the work of the responsible person or department (sec. 4(3) sentence 2 SCDDA).

1452 Sec. 4(2) SCDDA.

1453 Federal Council, SCDDA Draft 239/21, 45.

1454 Cf. Commentary to UNGP 18.

1455 Similarly, RUGGIE, Letter to German Ministers, para. 6.

1456 Cf. Ruggie, Letter to German Ministers, para. 6. See also, WÜNDSCH MELANIE, 'Risikoanalyse der Lieferkette: Perspektiven aus dem Globalen Süden kommen zu kurz', German Institute for Human Rights (May 2022) (hereinafter: WÜNDSCH, Perspektiven aus dem Globalen Süden), 11.

c) Risk Assessment

As part of their risk management, companies must conduct appropriate risk assessments to identify human rights and environmental risks with respect to their own business activities as well as the activities of direct suppliers, i.e. tier 1 suppliers (sec. 5(1) SCDDA). Pursuant to sec. 5(2) SCDDA, companies must then prioritise the identified risks according to the criteria set out in sec. 3(2) SCDDA. Sec. 5(1) SCDDA does not elaborate on the steps risk assessments must cover. In practice, the SCDDA's focus on direct suppliers has unfortunately prompted in-scope companies to send out generic questionnaires to all their direct suppliers, irrespective of their risk profiles.[1457] In addition to imposing an unnecessary burden on both in-scope companies and low-risk suppliers to process large volumes of enquiries, including SMEs with limited resources, this approach to risk assessment is also hardly effective and clearly inconsistent with the BAFA's recommendations.[1458] The BAFA's guidance on risk analysis[1459] namely recommends that risk assessments should be conducted in two steps. First, there should be an abstract assessment of human rights-related and environmental risks. These risks include sector-specific risks, country- or region-specific risks, and product-specific risks.[1460] OECD sector-specific guidances and industry as well as multistakeholder initiatives can be a helpful source in this regard.[1461] Second, a plausibility check of the findings from the

1457 BRUNK BASTIAN, 'Bürokratiemonster Lieferkettengesetz? – Die Kettensäge braucht es nicht', Legal Tribune Online (30 October 2024).

1458 Cf. German Federal Office of Economic Affairs and Export Control (BAFA), 'Guidance: Collaboration in the Supply Chain Between Obliged Enterprises and their Suppliers', First Edition (August 2023) (hereinafter: BAFA, Guidance on Collaboration), 18 f.; German Federal Office of Economic Affairs and Export Control (BAFA), 'FAQ zum risikobasierten Vorgehen' (February 2025), available in German, 1 and 4. See further, MASOUD SARAH, 'Ahead of the Curve: Leveraging the German Supply Chain Act to Gain a Competitive Edge Ahead of EU Obligations', Verfassungsblog (12 December 2024) (hereinafter: MASOUD, Ahead of the Curve, Verfassungsblog).

1459 Federal Office of Economic Affairs and Export Control (BAFA), 'Identifying, Weighting and Prioritizing Risks: Guidance on Conducting a Risk Analysis as Required by the German Supply Chain Due Diligence Act "Lieferkettensorgfaltspflichtengesetz" or "LkSG"', First Edition (August 2022) (hereinafter: BAFA, Guidance on Risk Analysis).

1460 BAFA, Guidance on Risk Analysis, 12 ff. See further, OECD RBC Guidance, 25 and 62.

1461 Cf. BAFA, Guidance on Risk Analysis, 8 and Annex II; Federal Office of Economic Affairs and Export Control (BAFA), 'Standards, Audits und Zertifizierungen als Instrumente im Sorgfaltsprozess', First Edition (December 2024), available in German (hereinafter: BAFA, Guidance on Standards, Audits and Certifications), 11; Federal Office of Economic Affairs and Export Control (BAFA), 'Merkblatt zu Brancheninitiativen im Kontext des Lieferkettensorgfaltspflichtengesetzes', First Edition (April 2025), available in German, 2.

abstract risk assessment should follow and companies should identify, weigh, and prioritise risks in specific contexts, notably sites, facilities, and suppliers, according to the criteria outlined in sec. 3(2) SCDDA.[1462] To align themselves with the UNGPs, companies should consult local experts such as civil society organisations and proactively engage with potentially affected groups and other relevant stakeholders, as they are best placed to gauge human rights and environment-related risks in a particular context.[1463] The SCDDA does not place sufficient emphasis on the inclusion of these perspectives in risk assessments.[1464] Nevertheless, sec. 5(4) SCDDA at least acknowledges that the complaint mechanism as set out in sec. 8 SCDDA can provide important insights for the identification of risks and serve as an 'early warning system' in this respect.[1465]

According to sec. 8(1) sentence 1 SCDDA, companies are required to establish a complaints mechanism. This mechanism must enable (potentially) affected rights-holders and other interested people such as whistleblowers to report human rights and environmental risks as well as violations of human rights-related or environmental obligations (sec. 8(1) sentence 2 SCDDA). Covered risks and violations include the ones arising as a result of a company's own business activities and its direct suppliers (sec. 8(1) SCDDA) as well as the ones arising out of the activities of an indirect supplier (sec. 9(1) SCDDA). Receipt of the reported information must be confirmed to the person having reported it (sec. 8(1) sentence 3 SCDDA). The information brought to the attention of the company through the complaints mechanism must be discussed with the persons having reported it (sec. 8(1) sentence 4 SCDDA). The wording of the last two sentences of sec. 8(1) SCDDA is less clear: According to sec. 8(1) sentence 5 SCDDA, companies *may* offer a procedure for amicable settlement of the flagged issue as part of the complaints mechanism. Sec. 8(1) sentence 6 SCDDA then promulgates that companies *may instead* participate in an appropriate external complaints mechanism. On the one hand, these last two sentences of sec. 8(1) SCDDA could be interpreted in the sense that companies must offer a procedure for amicable settlement, but can choose between offering the procedure internally or externally, e.g. through a multistakeholder initiative. On the other hand, sec. 8(1) sentence 5 SCDDA could be interpreted

1462 BAFA, Guidance on Risk Analysis, 12 ff.

1463 Cf. UNGP 18; WÜNDSCH, Perspektiven aus dem Globalen Süden, 11.

1464 Cf. GIHR, Statement to the SCDDA Bill, 13; RUGGIE, Letter to German Ministers, para. 6.

1465 Cf. Federal Office of Economic Affairs and Export Control (BAFA), 'Organising, Implementing and Evaluating Complaints Procedures: Guidance on the Complaints Procedure under the German Supply Chain Due Diligence Act', First Edition (October 2022) (hereinafter: BAFA, Guidance on Complaints Procedure), 6.

as promulgating an amicable settlement to be entirely optional. In this case, sec. 8(1) sentence 6 SCDDA would refer to the complaints mechanism as a whole and not just the element of amicable settlement. According to the commentary to the bill, the latter interpretation is correct: Companies can either set up an internal complaints mechanism or participate in an external one. Moreover, it is within their discretion to offer a procedure for amicable settlement. They may do so to avoid reputational risks.[1466] However, such an interpretation of sec. 8 (1) SCDDA is not aligned with the UNGPs. Pursuant to the UNGPs, complaints mechanisms serve three main purposes: raising concerns for (potentially) affected people, i.e. assessing risks (UNGP 18), tracking the effectiveness of company responses (UNGP 20), and providing access to remediation for human rights abuses that have occurred (UNGP 22).[1467] In any case, sec. 8(2) to 8(4) SCDDA set out minimum requirements for internal and external complaint mechanisms. Overall, these requirements correspond to the requirements set out in UNGP 31 and include accessibility, transparency, and confidentiality regarding the identity of the complainant and the matters discussed.[1468] Nonetheless, sec. 8(2) to 8 (5) SCDDA do not sufficiently capture the importance of meaningful stakeholder engagement for the design of an effective complaint mechanism and the monitoring of its effective performance as compared to UNGP 31.[1469]

As opposed to direct suppliers, companies are only required to conduct risk assessments within the meaning of sec. 5 SCDDA for the activities of indirect suppliers in two situations: First, if a company obtains substantiated knowledge of a possible violation of a protected legal position or environmental obligation that arises with an indirect supplier (sec. 9(3)(1) SCDDA). Knowledge is substantiated if it is based on verifiable information that is to be taken seriously.[1470] Such information can particularly arise in connection with issues raised through the complaints mechanism pursuant to sec. 8 SCDDA.[1471] Substantiated knowledge does not have to relate to a specific supplier or a concrete human rights risk, but can also flow from reports regarding the poor

1466 Federal Council, SCDDA Draft 239/21, 52. This reading of sec. 8(1) SCDDA is backed by the BAFA's official guidance: BAFA, Guidance on Complaints Procedure, 10.

1467 Similarly, BRUNCK, Menschenrechtscompliance, 474; GIHR, Statement to the SCDDA Bill, 17.

1468 BRUNCK, Menschenrechtscompliance, 474.

1469 RUGGIE criticised that the bill did not sufficiently stipulate meaningful stakeholder engagement in general: RUGGIE, Letter to German Ministers, para. 6.

1470 Federal Council, SCDDA Draft 239/21, 53. See also, BRUNCK, Menschenrechtscompliance, 478.

1471 Cf. Sec. 9(1) SCDDA.

human rights situation in the production region, the fact that an indirect supplier belongs to an industry with particular human rights risks, and previous incidents occurring at the respective indirect supplier.[1472] Information issued as part of industry and multistakeholder initiatives can play an important role in this regard.[1473] Companies are not allowed to close themselves off to knowledge in order to avoid responsibility and cannot evade their responsibility on the grounds that they do not know their indirect suppliers at all. In fact, it is part of their obligation to conduct a risk analysis to obtain knowledge about the supply chain (so-called tracing).[1474] The second situation requiring a company to conduct risk assessments with regard to the activities of its indirect suppliers arises if it attempts to circumvent its due diligence obligations under the Act by wrongfully arranging its supplier relationships. In this case, an indirect supplier is treated as a direct supplier (sec. 5(1) sentence 2 SCDDA). As per the commentary to the bill, an indication of such a wrongful arrangement would, for instance, be if the third party acting between the company and the direct supplier does not engage in any significant economic activity of its own or fails to maintain a permanent presence in the form of business premises, staff, or equipment.[1475]

According to sec. 5(3) SCDDA, the company must ensure that the results of the risk analysis are passed on to all relevant decision-makers, such as the executive board and the relevant operational departments (e.g. the purchasing department). Sec. 5(4) SCDDA stipulates that the risk analysis must be carried out regularly, i.e. at least once a year, and on an *ad hoc* basis. Relevant occasions for an *ad hoc* assessment include the introduction of new products, the start of a new project or the development of a new business field. Findings obtained by the company through the complaints mechanism pursuant to sec. 8(1) SCDDA can also be a reason for an in-depth risk analysis (sec. 5(4) sentence 2 SCDDA).

d) Measures to Address Risks and Violations

Once human rights and environmental risks are identified, the company must take appropriate preventive measures in accordance with sec. 6 SCDDA. Sec. 6 SCDDA differentiates between measures to be implemented in a company's own operations (sec. 6(3) SCDDA) and measures related to its direct suppliers

1472 Federal Council, SCDDA Draft 239/21, 53.

1473 BAFA, Guidance on Collaboration, 8. See also, SAAGE-MAASS/SCHLIEMANN-RADBRUCH, KKR SCDDA Commentary, sec. 9 margin n. 32.

1474 Cf. BRUNCK, Menschenrechtscompliance, 468; SAAGE-MAASS/SCHLIEMANN-RADBRUCH, KKR SCDDA Commentary, sec. 9 margin n. 33.

1475 Federal Council, SCDDA Draft 239/21, 46.

(sec. 6(4) SCDDA). The preventive measures with regard to a company's own operations include, but are not limited to, the implementation of a company's human rights strategy in all relevant business processes, the education and training of employees in this regard, the development and implementation of appropriate procurement strategies and purchasing practices, and the implementation of measures to monitor compliance with the company's human rights strategy. With the inclusion of the development of appropriate procurement strategies and purchasing practices, the Act explicitly recognises the role of a buying company's own business model and practices in incentivising human rights and labour rights abuses further down the supply chain.[1476] There is mounting evidence that low prices, short production lead times, and short contract terms, can contribute to labour rights abuses such as unfair wages, excessive working hours, forced overtime, and poor operational safety and health measures at suppliers.[1477] The BAFA therefore recommends companies to assess whether their contracts and practices place a disproportionate burden on suppliers and potentially incentivise abuses. It specifically names pricing, lead times, contract duration, and termination rights as factors to consider.[1478]

Preventive measures to be taken vis-à-vis direct suppliers are listed in sec. 6(4) nos. 1-4 SCDDA. These measures include, but are not limited to, taking human rights and environmental concerns into account when selecting suppliers and having contractual assurances from suppliers regarding compliance with human rights and environmental expectations along the supply chain. To verify such compliance, companies must lay down appropriate control mechanisms. In the absence of specifications in the law, companies have considerable discretion in determining their approach to incorporating human rights and environmental considerations when selecting suppliers. One approach could be to draw on information from their risk assessments pursuant to sec. 5(1) SCDDA and use similar methods and tools (e.g. information from industry as well as multistakeholder initiatives, on-site visits, consultation of local experts and (potentially) affected stakeholders etc.).[1479] Companies

1476 Cf. Federal Council, SCDDA Draft 239/21, 49.

1477 Organisation for Economic Co-operation and Development (OECD), Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (2018) (hereinafter: OECD Guidance for Garment and Footwear Sector), 50 and 73. See further, ANNER/BAIR/BLASI, CLL & PJ, 8 ff; Human Rights Watch, Purchasing Practices and Labor Abuses, 2 ff.; Better Buying Institute, Purchasing Practices and Factory-Level Noncompliances, 3 ff.; Chapter 1 III 2.2.

1478 BAFA, Guidance on Collaboration, 24.

1479 AUGENSTEIN/WOHLTMANN, KKR SCDDA Commentary, sec. 6 margin n. 62.

relying on self-declarations of suppliers will normally not meet their obligation to select suppliers with appropriate care, unless they are part of a low-risk sector or source from low-risk countries and additionally check the declarations for credibility and plausibility through independent desk research.[1480]

Likewise, membership in industry and multistakeholder initiatives and awarded certifications should generally be one of various other factors, based upon which companies make their selection of suppliers.[1481] This is because initiatives may only tackle one specific human rights issue (e.g. fair labour), solely target certain parts of the supply chain, and overall not align with international due diligence standards.[1482] In addition, participation does not equate to effective implementation, as not all initiatives contain independent monitoring and enforcement mechanisms that verify whether adhering companies implement the initiative's standards and foresee corrective measures in case they do not.[1483] At the same time, there are certain initiatives that have developed into best practices and gained broad support within a certain sector or industry. In this case, non-participation and non-compliance with the standards of these initiatives should be treated as a warning sign, unless the company in question can demonstrate that it adheres to a higher due diligence standard than the one promoted by the initiative. This is especially true for enforceable brand agreements such as the International Accord, since they provide for an effective enforcement mechanism.[1484]

Similarly, certifications and social audits should only serve as auxiliary instruments for companies. Even though the BAFA has published guidance on the use of these tools in the meantime[1485], the lack of clarification in the SCDDA itself still creates a risk of overreliance by companies. Overreliance on these tools would constitute a tick-box approach to compliance with due diligence obligations whereby companies place an unduly focus on implementing the steps required under the Act without actual concern for the outcome,

1480 BMAS/BMWK/BAFA, FAQ on the SCDDA, no. 10.4; BAFA, Guidance on Collaboration, 16. See further, AUGENSTEIN/WOHLTMANN, KKR SCDDA Commentary, sec. 6 margin n. 61.

1481 Cf. BMAS/BMWK/BAFA, FAQ on the SCDDA, no. 10.3; BAFA, Guidance on Collaboration, 15.

1482 Cf. OECD, Sustainability Initiatives & HRDD, 9 and 18 f. See also, Section I 3.3 c of this Chapter.

1483 Cf. OECD, Sustainability Initiatives & HRDD, 13. See also, Section I 3.3 c of this Chapter.

1484 See Section II 5.1 of this Chapter on the BAFA complaint against IKEA and Amazon. See also, SAAGE-MAASS/SCHLIEMANN-RADBRUCH, KKR SCDDA Commentary, sec. 9 margin n. 51.

1485 BAFA, Guidance on Collaboration, 15 and 17; BAFA, Guidance on Standards, Audits and Certifications, 7 ff.

i.e. respecting human rights in practice.[1486] This means that due diligence would be conducted as an end in itself, instead of being used as a means to protect rights-holders from human rights abuses. To align themselves with international due diligence standards, companies should therefore understand the scope and methodology of the instruments they use to select suppliers, critically assess their credibility, and apply them in combination with other measures.[1487] In any case, the means employed to select suppliers should be commensurate with the severity, reversibility, and probability of the identified human rights and environmental risks.[1488]

With respect to contractual assurances, companies must enshrine their human rights and environmental expectations in supplier contracts and codes of conduct that are cascaded down the supply chain (sec. 6(4) no. 2 SCDDA). This can be achieved by means of so-called 'pass-on clauses' which contractually oblige suppliers to enforce the supplier code of conduct vis-à-vis their own contractual partners and foresee control measures for the lead company to exercise (e.g. on-site visits, audits, etc.).[1489] To align themselves with international due diligence standards and counteract overburdening suppliers, companies should not simply require suppliers to comply with their contractual obligations, but also support them in their implementation and share the costs of implementation and monitoring.[1490] Furthermore, suppliers will often have various customers with potentially different or even conflicting expectations. With this in mind, companies should consider addressing this challenge by aligning their requirements with industry-wide standards and participating in industry and multistakeholder initiatives. In collaborating with other companies and actors within the framework of industry and multistakeholder initiatives, leverage can be increased and widespread and recurring risk situations tackled more effectively. Supplier relationships should be based on the spirit of dialogue, cooperation, and mutual learning.[1491] In any case, companies cannot interpret sec. 6(4) no. 2 SCDDA to imply that they are able to shrift

1486 See Chapter 2 I 3.2 a. For more on the risk of tick-box approaches to compliance with mandatory due diligence legislation, see further, SMIT/BRIGHT/NEELY, BHRJ 2023, 10 ff.

1487 Cf. OECD, Sustainability Initiatives & HRDD, 11 and 17. For guidance on the limitations and need for critical assessment of these tools in general, see BAFA, Guidance on Standards, Audits and Certifications, 18 ff.

1488 Cf. Sec. 3(2)(3) SCDDA.

1489 Federal Council, SCDDA Draft 239/21, 50.

1490 OECD RBC Guidance, 30 f. and 80; BAFA, Guidance on Collaboration, 22 and 25.

1491 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 26; OECD RBC Guidance, 60; BAFA, Guidance on Collaboration, 18 f. See further, SCHELTEMA, in: Enneking/Giesen/Schaap et al.(eds.), Accountability, International Business Operations and the Law, 264 ff.

their responsibility to suppliers.[1492] Lastly, to verify supplier compliance, appropriate control mechanisms are to be put in place (sec. 6(4) no. 4 SCDDA). In this context as well, solely relying on written supplier statements, certifications, and audits will typically not suffice for companies to satisfy their obligation under sec. 6(4) no. 4 SCDDA. Rather, companies should employ a combination of methods and tools that are proportionate to identified risks to verify compliance.[1493]

Sec. 7 SCDDA describes the necessary measures in the event that human rights or environment-related obligations have been violated or violations are imminent. The Act again differentiates between actions to be taken for (imminent) violations related to a company's own business activities (sec. 7(1) SCDDA) on the one hand and (imminent) violations related to the activities of direct suppliers as well as indirect suppliers that are treated as direct suppliers pursuant to sec. 5(1) sentence 2 SCDDA on the other hand (sec. 7(2) SCDDA). With respect to violations related to the company's own business activities in Germany, sec. (7)(1) sentence 3 SCDDA requires that the measures taken must always bring the violation to an end. Here, companies have an obligation of result.[1494] This follows from the concept of appropriateness pursuant to sec. 3(2) SCDDA, according to which the closer the company is to the imminent or actual breach and the more it contributes to it, the greater its efforts must be to bring the breach to an end. With respect to its own business activities in Germany, the company is so closely associated with the risk that it can be expected to put an immediate end to the imminent or existing breach.[1495] In contrast, in the event of a violation occurring related to a company's own business activities abroad and related to business activities of affiliated companies that can be attributed to the parent company pursuant to sec. 2(6) sentence 3 SCDDA, measures taken must at least 'typically' lead to the end of the violation (sec. (7)(1) sentence 4 SCDDA). This means that the measures taken must be aimed at ending the breach of the duty. However, if due to actual or legal circumstances, putting an end to the breach is not possible, serious and proven efforts to do so may be sufficient.[1496] With regard to measures for breaches at suppliers, the principle of 'cooperation (e.g. though participation

1492 BAFA, Guidance on Collaboration, 14. See further, STREIBELT MICHAELA / SCHÖNFELDER DANIEL, 'Effective and Appropriate HRDD Requires a Shared Responsibility Approach, Responsible Contracting & Purchasing', Nova Centre on Business, Human Rights and the Environment Blog (8 November 2023).

1493 Cf. BAFA, Guidance on Collaboration, 16.

1494 BAFA, Handout on Appropriateness, 5. See also, HESELHAUS, URP 2024, 22.

1495 Federal Council, SCDDA Draft 239/21, 51.

1496 Cf. Parliamentary Committee on Labour and Social Affairs, Proposed Resolution and Report, 41; KRAJEWSKI/WOHLTMANN, KKR SCDDA Commentary, sec. 7 margin n. 30.

in industry and multistakeholder initiatives) before withdrawal' applies: only in cases of 'very severe breaches'[1497], where all attempts to end or minimise the breach have failed after the set time period has elapsed, no other milder means are available to the company, and an increase in influence offers no prospect of success, is the termination of the business relationship with the supplier required (sec. 7(3) sentence 1 SCDDA). The Act thus conceptualises the termination of a supplier relationship as a last resort.[1498] Conceptualising the termination of business relationships as a last resort is a crucial measure to help prevent companies from simply divesting from challenging contexts.[1499] This is because handling withdrawal lightly, instead of seeking to address human rights concerns collaboratively, may lead to the exclusion of SMEs based in developing states from global supply chains more broadly. This exclusion could not only have adverse impacts on workers and their families, but also ripple effects on the sustainable development of these countries. The importance of treating withdrawal as a last resort and carefully considering the ramifications of disengagement for rights-holders is also highlighted in international due diligence standards.[1500]

Interestingly, the Act clarifies that companies are not obliged to terminate a business relationship based on a host state's failure to ratify or implement any of the conventions listed in the Annex, unless foreign trade restrictions would necessitate the termination (sec. 7(3) sentence 2 SCDDA). Such restrictions may arise from German federal law, EU law, or international law and include economic sanctions imposed by the EU Council and the UN Security Council, for instance.[1501] However, the Act does not establish clear rules for companies to navigate systemic human rights issues where the national laws or policies of the host state deliberately conflict with human rights standards, but no trade restrictions have been imposed.[1502] The Act particularly fails to expressly

1497 The Act does not elaborate on the necessary threshold for the breach to be considered 'very severe'. However, the severity of the breach could arise from the type of violation (e.g. forced labour would be qualified as more severe than breaches related to occupational health and safety) and the scale of the breach, i.e. the number of affected rights-holders or the duration of the breach (KRAJEWSKI/WOHLTMANN, KKR SCDDA Commentary, sec. 7 margin n. 54).

1498 Federal Council, SCDDA Draft 239/21, 52; BAFA, Guidance on Collaboration, 25.

1499 BAFA, Guidance on Collaboration, 25.

1500 Commentary to UNGP 19; OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 25. See further, MASOUD, Ahead of the Curve, Verfassungsblog.

1501 Sec. 7(3) sentence 3 SCDDA. See further, KRAJEWSKI/WOHLTMANN, KKR SCDDA Commentary, sec. 7 margin n. 62.

1502 This situation is to be distinguished from domestic laws of hosts states falling short of human rights standards due to lack of ratification or insufficient implementation of relevant human rights treaties. As seen in Section 2.3 c of this Chapter, the Act explicitly holds that the non-ratification or non-implementation of a human rights or

establish a general obligation to disengage from contexts of systemic gross human rights abuses and thus recognise the limits of due diligence in achieving respect for human rights in certain settings.[1503] As a result, companies may legitimise entering certain markets or remaining in countries or regions, where gross human rights abuses are endemic, and potentially even state-backed, with the argument of having a due diligence process in place, despite the near inevitability of involvement in gross human rights abuses.[1504] The complaint submitted to BAFA regarding alleged involvement of Volkswagen, BMW, and Mercedes-Benz in forced Uyghur labour, which will be discussed in Section II 5.1 of this Chapter, illustrates this problem.

The imposition of trade restrictions takes time. A more flexible approach would have been to acknowledge the limits of due diligence in achieving respect for human rights in certain situations, define the criteria to determine these limits in the Act, and provide more guidance through the publication of relevant information by the BAFA pursuant to sec. 20 SCDDA, for instance.[1505] Relevant information could, for example, identify regions where the likelihood of involvement in gross systemic human rights violations is so overwhelming that it creates the rebuttable presumption that due diligence is ineffective. In any case, companies should consider the human rights risks that are potentially associated with withdrawal and disengage responsibly in order to be aligned with the UNGPs.[1506]

Lastly, with respect to indirect suppliers, a company must conduct a risk analysis, take measures to prevent, end or mitigate breaches, and, where applicable, adapt its policy statement, in the event that it has obtained substantiated knowledge of possible human rights or environment-related breaches at an indirect supplier (sec. 9(3) SCDDA). The choice of measures is at the company's discretion, but measures should be based on the requirements pursuant to sec. 6 and sec. 7 SCDDA and appropriate within the meaning of sec. 3(2) SCDDA.[1507] The choice of measures will above all depend on whether the indirect

environmental treaty does not lead to an obligation to end a business relationship (sec. 7(3) sentence 2 SCDDA). This is in line with international due diligence standards (see, OECD Guidelines, Chapter IV. Human Rights, paras. 42. and 43).

1503 Cf. KRAJEWSKI/WOHLTMANN, KKR SCDDA Commentary, sec. 7 margin n. 60.

1504 Cf. VAN HO, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 385 ff.; QUIJANO/LOPEZ, BHRJ 2021, 251 ff.; DEVA, LJIL 2023, 18. See further, Chapter 2 I 3.2 g.

1505 Cf. POLASCHEK, BHRJ 2021, 574.

1506 Commentary to UNGP 19. While the BAFA recognises that disengagement may 'lead to further deterioration of living and working conditions', it has not provided any guidance in this regard as of yet (BAFA, Guidance on Collaboration, 25).

1507 Federal Council, SCDDA Draft 239/21, 54.

supplier is contractually bound by the company's code of conduct through pass-on clauses. If this is the case, the company can – possibly indirectly through its direct suppliers – exercise its contractual rights and thereby effect change in the human rights and environmental situation at the indirect supplier.[1508] Otherwise, the company should endeavour to expand its possibilities of exerting influence in other ways, for instance through industry and multistakeholder initiatives (sec. 9(3) no. 2 SCDDA).[1509]

e) Monitoring

The SCDDA does not contain a separate section on effectiveness monitoring, but prescribes corresponding checks for each individual procedural step, namely in sec. 5(4), 6(5), 7(4), and 8(5) SCDDA. The aforementioned provisions stipulate that effectiveness monitoring is an iterative process that must be carried out at least once a year. In addition, *ad hoc* controls are required in the event of a significantly changed or expanded risk situation, such as the introduction of new products, or the entry in new markets. The involvement of a new supplier or the receipt of a complaint under the complaint mechanism pursuant to sec. 8 SCDDA may also necessitate an evaluation of the effectiveness of implemented due diligence measures on a case-by-case basis.[1510]

f) Documentation and Reporting

Companies must continuously document the fulfilment of their due diligence obligations under the Act (sec. 10(1) SCDDA). The documentation is primarily intended to provide an informational basis for the public enforcement of the Act.[1511] In this respect, it may serve companies as proof of compliance with their obligations vis-à-vis the competent supervisory authority, i.e. BAFA.[1512] Furthermore, companies must prepare an annual report on the fulfilment of their due diligence obligations in the previous financial year pursuant to sec. 10(2) SCDDA. The report must include any human rights or environmental risks or violations of human rights-related or environment-related prohibitions, the measures taken in accordance with sec. 4–9 SCDDA, how the effectiveness of these measures is assessed, and what conclusions can be drawn from this

1508 Federal Council, SCDDA Draft 239/21, 54. Critical: RUGGIE, Letter to German Ministers, para. 5.

1509 Cf. Federal Council, SCDDA Draft 239/21, 54. See also, BRUNCK, Menschenrechtscompliance, 478.

1510 Cf. Federal Council, SCDDA Draft 239/21, 47, 50, 52, and 53. See also, BRUNCK, Menschenrechtscompliance, 474.

1511 See Section 5.1 of this Chapter.

1512 Federal Council, SCDDA Draft 239/21, 55.

assessment for future measures (sec. 10(2) SCDDA). The obligation to report under the SCDDA exists independent of potential obligations to do so under the CSRD. Discussions around alleviating the regulatory burden associated with (duplicative) reporting obligations[1513] have ultimately contributed to the delayed transposition and implementation of the CSRD.[1514] In light of these developments, the BAFA issued a statement announcing that it will review the submission and publication of reports on 1 January 2026 for the first time. It also declared that it will not sanction companies for failing to adhere to the initial reporting deadline, if they submit their reports before 31 December 2025.[1515]

The report forms the basis of the official audit pursuant to sec. 12 ff. SCDDA.[1516] It must be made publicly available free of charge on the company's website for a period of seven years no later than four months after the end of the financial year, in accordance with sec. 10(2) SCDDA. If the company has not identified any human rights or environmental risks or violations of a human rights-related or environment-related prohibition under the Act, it must provide a plausible explanation for this circumstance in the report. In this case, no further details regarding the fulfilment of its due diligence obligations are required (sec. 10(3) SCDDA). In any event, the content of the report must be accurate and sufficiently detailed for third parties and the supervisory authority, i.e. BAFA, to comprehend and subject it to a plausibility check.[1517] The reporting obligation only extends to what is legally permissible and required (sec. 10(4) SCDDA). Thus, the anonymity of (potentially) affected rights-holders must be protected, as reporting must not increase the risk of human rights abuses (e.g. as a result of state repression).[1518] Moreover, companies must not disclose any information that is protected as trade and business secrets (sec. 10(4) SCDDA). These documentation and reporting obligations are largely in line with UNGP 21.[1519]

1513 Cf. Federal Ministry of Justice and Consumer Protection, 'Umsetzung der europäischen Vorgaben zur Nachhaltigkeitsberichterstattung von Unternehmen', Press Release (22 March 2024), available in German.

1514 Cf. European Commission, 'Commission Takes Action to Ensure Complete and Timely Transposition of EU Directives', Press Release (26 September 2024).

1515 German Federal Office of Economic Affairs and Export Control (BAFA), 'Berichtspflicht – Aktuelle Hinweise', available in German.

1516 See further, Section 5.1 of this Chapter.

1517 Federal Council, SCDDA Draft 239/21, 55.

1518 BRUNCK, Menschenrechtscompliance, 477.

1519 The Commentary to UNGP 21 states that business enterprises should 'know and show', including through the publication of reports, that they respect human rights in practice.

5. Enforcement

5.1 Public Enforcement

The Act is to be monitored and enforced by the BAFA which is supervised by the Federal Ministry for Economic Affairs and Energy (sec. 19(1) SCDDA). The BAFA will receive and assess submitted company reports (sec. 13 SCDDA) and is authorised to adopt necessary measures to detect, prevent, and end breaches of due diligence obligations under the Act (sec. 15(1) SCDDA). To do so, it may summon people, order companies to submit a corrective action plan, request information, and inspect the premises of companies (sec. 15–17 SCDDA).

The BAFA may take such measures *ex officio* or upon the request of rights-holders who have a substantiated claim that their protected legal positions have been violated or are at imminent risk of being violated due to a company's non-compliance with its due obligations under the Act (sec. 14(1) SCDDA). Natural persons, legal persons, and associations, particularly trade unions, are entitled to submit a complaint insofar as they fall within the personal scope of the protected legal position they assert to be at risk of violation or to have been violated.[1520] All complaints must be submitted via an online form provided by the BAFA, which is available in German, English, French, and Spanish.[1521] The administrative procedure was designed to take into account the major practical obstacles faced by the affected rights-holders when submitting a complaint, such as language barriers, the lack of access to information regarding the company's internal processes, and fear of retaliation.[1522] Hence, the prerequisites for a substantiated claim within the meaning of sec. 14 (1) no. 2 SCDDA should, in principle, not be interpreted exceedingly strict by the BAFA. It should normally be sufficient for rights-holders to give a plausible account of the circumstances of the case, free of contradictions, in order to substantiate the asserted (imminent) violation. The evidentiary threshold is not particularly high. A claim should, in principle, be regarded as sufficiently substantiated if the described circumstances make the asserted violation of the protected legal position as a result of a breach of a due diligence obligation appear 'at least possible'. Whether and which due diligence obligation was breached is subject to the investigation of the BAFA and thus does not have to be proven by rights-holders filing a complaint.[1523]

1520 Federal Council, SCDDA Draft 239/21, 58. See further, KREBS, KKR SCDDA Commentary, sec. 14 margin n. 51.

1521 The online form is available on the BAFA's official website.

1522 Federal Council, SCDDA Draft 239/21, 58.

1523 Ibid. See further, WAGNER/RUTTLOFF, NJW 2021, 2150 f.; KREBS, KKR SCDDA Commentary, sec. 14 margin n. 41 ff.

Depending on the obligation and whether it was breached intentionally or negligently, the BAFA may impose administrative fines of up to EUR 800,000 for natural persons and up to EUR 8,000,000 or up to 2% of the annual turnover for legal persons (sec. 24 SCDDA). Furthermore, companies that have been subject to such fines may be excluded from public procurement procedures for a maximum of three years (sec. 22 SCDDA).

Since the entry into force of the SCDDA on 1 January 2023, several complaints have already been submitted to the BAFA. Two raise particularly interesting questions. The first one being a complaint filed by garment workers from Bangladeshi factories that are part of IKEA's and Amazon's supply chains. In the complaint it is argued that IKEA and Amazon failed to exercise appropriate and effective due diligence as required under the SCDDA by refusing to sign the International Accord for Health and Safety in the Textile and Garment Industry (International Accord).[1524] The International Accord is a so-called enforceable brand agreement. While membership in the International Accord is voluntary, signatory companies enter a binding agreement with trade unions that aims to ensure the health and safety of workers in the textile and garment industry. To attain its goal, the International Accord establishes thorough and independent factory inspections to identify risks and assess safety measures, offers remediation, and provides safety training programs as well as a mechanism for workers to confidentially raise concerns.[1525] As such, the International Accord is considered to integrate best practices and effectively reduce health and safety risks for workers in the garment and textile industry.[1526]

In the complaint it is furthermore argued that IKEA and Amazon were made aware of the concrete human rights risks in their supply chains that arise from not signing the International Accord in a letter addressed to both companies in 2022. Finally, the argument is put forward that, based on this letter and well-documented human rights risks in the Bangladeshi textile sector, it is evident that Amazon and IKEA possess substantiated knowledge of human rights risks and are, consequently, obliged to take due diligence measures vis-à-vis their indirect suppliers in Bangladesh. The complaint raises the question of whether it is necessary to join well-established collective agreements applying internationally recognised standards, such as the International

1524 KRAJEWSKI MARKUS / DEY SHUVRA, 'Effective Human Rights Due Diligence Ten Years After Rana Plaza? Assessing the Complaint against IKEA and Amazon under the German Supply Chain Due Diligence Act', Verfassungsblog (10 May 2023) (hereinafter: KRAJEWSKI/DEY, Effective HRDD, Verfassungsblog).

1525 International Accord for Health and Safety in the Textile and Garment Industry.

1526 KRAJEWSKI/DEY, Effective HRDD, Verfassungsblog; SAAGE-MASS/SCHLIEMANN-RADBRUCH, KKR SCDDA Commentary, sec. 9 margin n. 51.

Accord, to meet due diligence obligations under the SCDDA. The answer to this question should depend on the adequacy and effectiveness of alternative measures. If companies can notably demonstrate that the alternative measures they implement are at least as adequate and effective as the relevant agreements in question, they should not be required to join such agreements in order to comply with due diligence obligations under the Act.[1527]

Approximately three months after the complaint was submitted, the BAFA informed the complainants that it would investigate their claims. After that, the complainants assert that the BAFA did not provide any further updates.[1528] In its accountability report for the year 2023, the BAFA did not allude to any ongoing or finalised investigations on this matter either.[1529] Upon enquiry by the complainants, Ikea stated that on-site audits had been carried out in co-operation with the BAFA, which purportedly did not reveal any breaches of the Act. Moreover, Ikea held that it had nevertheless defined and implemented concrete measures to improve occupational health and safety. However, the company maintained that it did not intend to join the Bangladesh Accord and prefers to continue to rely on its own code of conduct instead.[1530] With regard to Amazon, the complainants assert that the company has not responded to their claims, but issued a general statement emphasising respect for human rights.[1531]

Another particularly interesting complaint is the complaint filed against VW, BMW, and Mercedes Benz for allegedly using forced labour in their supply chains.[1532] The complainants assert that Germany's automotive industry is heavily dependent on materials and components manufactured in the Xinjiang region, thereby placing it at significant risk of being involved in Uyghur forced labour.[1533] Furthermore, the extensive media coverage of the human rights

1527 KRAJEWSKI/DEY, Effective HRDD, Verfassungsblog.

1528 European Center for Constitutional and Human Rights (ECCHR) / Brot für die Welt / Miserior, 'Zwei Jahre Lieferkettengesetz: Ein Erfahrungsbericht', Study (May 2025) (hereinafter: ECCHR/BfdW/Miserior, SCDDA Effectiveness Report), 38.

1529 Cf. Federal Office of Economic Affairs and Export Control (BAFA), 'Rechenschaftsbericht 2023 nach dem Lieferkettensorgfaltspflichtengesetz' (hereinafter: BAFA, Accountability Report 2023), 11 ff.

1530 ECCHR/BfdW/Miserior, SCDDA Effectiveness Report, 37.

1531 Ibid., 38.

1532 European Centre for Consitutional and Human Rights (ECCHR), 'German Economic Engine Roars Thanks to Forced Labor: Complaint Filed against VW, BMW and Mercedes Benz', Questions & Answers (June 2023) (hereinafter: ECCHR, Complaint against VW, BMW and Mercedes Benz), 1.

1533 ECCHR, Complaint against VW, BMW and Mercedes Benz, 1. On the alleged involvement of the automotive industry in Uyghur forced labour, see further SALCITO KENDYL,

situation in the Uyghur region, coupled with issued warnings from international civil society to Volkswagen, BMW, and Mercedes-Benz regarding risks of involvement in forced labour, is argued to have led to the companies having substantiated knowledge of the risks within the meaning of sec. 9(3) SCDDA.[1534]

The complainants claim that the measures outlined by Volkswagen, BMW, and Mercedes-Benz in their public documentation on human rights due diligence are inappropriate to identify, prevent, and minimise the known risks of Uyghur forced labour in the companies' supply chains. This is because these companies rely on audits, contractual assurances, and participation in multistakeholder initiatives to verify compliance with human rights standards in their supply chains. The complainants contend that in light of the scale and severity of human rights abuses, these measures cannot be deemed sufficient to satisfy the companies' due diligence obligations under the Act.[1535] Lastly, the complainants assert that the specific context of state-sponsored forced labour and political repression in Xinjiang, enforced through government surveillance and coercion, renders it virtually impossible to vet working conditions in facilities in the region.[1536] The complaint therefore raises the question of whether there is an obligation for companies under the Act to withdraw from certain regions, such as Xinjiang, due to systemic and severe human rights abuses. In contexts of such gross endemic human rights abuses that are even state-backed, an obligation to disengage should clearly be affirmed. This is because involvement in human rights abuses is nearly inevitable in such contexts – even with due diligence measures in place.[1537]

After having garnered considerable media attention and criticism, it appears that at least Volkswagen recognised the risks of maintaining its operations and business relationships in Xinjiang and eventually announced its withdrawal from the region end of November 2024.[1538] In its annual SCDDA report published in December 2024, Mercedes Benz holds that it had carried out an incident-related risk analysis in response to published research on the

Automotive Supply Chain Links to the Uyghur Genocide: Reversing a Growing Crisis, Business and Human Rights Journal (BHRJ) 2023, 265 ff.

1534 ECCHR, Complaint against VW, BMW and Mercedes Benz, 3. For an analysis of the human rights situation in the Xinjiang region, see Chapter 2 I 3.2 g.

1535 ECCHR, Complaint against VW, BMW and Mercedes Benz, 1 and 3.

1536 Ibid., 3.

1537 An expert report issued by the Research Services of the German Parliament appears to affirm this view: The report suggests that disengagement from business relationships with suppliers from the Xinjiang 'seems almost inevitable' in order for German companies to comply with their obligations under the SCDDA (German Federal Parliament, Report on the Situation of Uyghurs in Xinjiang, 80).

1538 Reuters News article, 'VW Buckles After Years of Pressure to Sell up in Xinjiang' (27 November 2024).

use of forced Uyghur labour in automotive supply chains. Mercedes Benz affirms that its assessment did not reveal any evidence of breaches.[1539] BMW simply commented that it requires its suppliers to comply with social and environmental standards in response to the complaint.[1540] The BAFA states in its 2023 accountability report that, based on research undertaken by various NGOs on human rights violations in Xinjiang, it had opened investigations into several companies falling under the personal scope of the SCDDA, which were still ongoing at the time of publication in October 2024.[1541]

In contrast to the Swiss due diligence provisions whose violation is neither sanctioned by administrative nor criminal law[1542], the SCDDA established the BAFA as the competent oversight authority with extensive powers to investigate breaches and impose high administrative sanctions.[1543] Due to resource constraints, it is likely that the BAFA will review compliance with due diligence obligations by conducting plausibility checks and comparing reports from companies within the same industry, rather than systematically assessing the effectiveness of implemented measures.[1544] Nevertheless, complaints submitted pursuant to sec. 14(1) no. 2 SCDDA can prompt investigations, corrective action plans, and sanctions, and thereby help the BAFA in effectively enforcing due diligence obligations under the Act. The public enforcement mechanism under the SCDDA is therefore much more robust than the one under the Swiss provisions and one of the Act's clearest advantages.

5.2 Private Enforcement

Contrary to the bill, the adopted version of the SCDDA does not foresee any civil liability due to breaches of due diligence obligations under the Act and explicitly states so in sec. 3(3) SCDDA. However, sec. 3(3) SCDDA does not preclude rights-holders from bringing liability claims based on general tort law (e.g. sec. 823(1) BGB).[1545] Moreover, sec. 11 SCDDA even introduces the possibility of a special form of representative action *(besondere Prozessstandschaft)*. This provision enables affected rights-holders to authorise German

1539 Mercedes Benz, 'Bericht zum LkSG (Lieferkettensorgfaltspflichtengesetz)' (13 December 2024), 15.

1540 ECCHR/BfdW/Miserior, SCDDA Effectiveness Report, 44.

1541 BAFA, Accountability Report 2023, 17.

1542 As seen in Chapter 3 I 4.1, sanctions can only be imposed related to breaches of reporting obligations under the Swiss provisions.

1543 Cf. WAGNER/RUTTLOFF, NJW 2021, 2151.

1544 BRUNCK, Menschenrechtscompliance, 481 f.; ENGEL/SCHÖNFELDER, SCDDA Handbook, sec. 6 margin n. 10; RÜHMKORF, KKR SCDDA Commentary, sec. 13 margin n. 16.

1545 Parliamentary Committee on Labour and Social Affairs, Proposed Resolution and Report, 39.

NGOs or trade unions to sue in their own name but on behalf of affected rights-holders before German courts. Sec. 11 SCDDA is intended to facilitate access to German courts for affected rights-holders by reducing procedural hurdles such as linguistic barriers and help preserve the anonymity of rights-holders who may fear reprisals.[1546] Sec. 11 can thus alleviate some of the power imbalances between large German companies and rights-holders seeking damages for abuses of their human rights.[1547] Nevertheless, major challenges regarding access to remedy before German courts persist for rights-holders. These include the principle of separate legal personality and limited liability, the burden of proof, and the applicability of foreign law in the majority of cases which may have lower standards for the protection of affected rights.[1548] This clearly diminishes the deterring effect of potential civil liability claims on companies. Overall, the SCDDA falls short of UNGP 26 in terms of access to remedy.

Submitting a complaint to the German NCP, after a company has been sanctioned by the BAFA for breaches of due diligence obligations under the Act, may serve as a complementary, faster, and less cost-intensive avenue for rights-holders to access remedy.[1549] The public attention generated following the imposition of sanctions by the BAFA may incentivise companies to be more cooperative during NCP proceedings and agree to pay damages and/or provide remediation.

6. Concluding Remarks

As demonstrated, the SCDDA is not completely aligned with the UNGPs. First, this is true regarding the Act's personal scope, which sets thresholds based on company size for the Act to apply instead of following a risk-based approach.[1550] Second, the Act only covers the human rights enshrined in the treaties it lists in the Annex selectively and offers an incomplete scope of protection.[1551] Third, due diligence obligations are focused on a company's own business activities and its direct suppliers. This is especially problematic in light of the fact that the most severe human rights and environmental risks

1546 HENSEL/KOCHER, KKR SCDDA Commentary, sec. 11 margin n. 3.

1547 DEVA, LJIL 2023, 23.

1548 BACHMANN/BRUNCK, KKR SCDDA Commentary, sec. 3 margin n. 147 ff. and 233. For an in-depth analysis of typical challenges, see, e.g., WESCHE/SAAGE-MASS, HRLR 2016, 373 ff.; VOSS WIEBKE, Human Rights Litigation vor deutschen Gerichten, Zeitschrift für Vergleichende Rechtswissenschaft (ZvglRWiss) 2023, 172 ff.

1549 See Chapter 2 II 3.

1550 See Section II 3 of this Chapter.

1551 See Section II 4.1 of this Chapter.

will typically be concentrated in the lower tiers of the supply chain.[1552] Moreover, in practice, it has led to unnecessarily burdensome and ineffective risk assessments, whereby companies have sent generic questionnaires to suppliers indiscriminately to inquire about human rights and environmental risks.[1553] Fourth, the complaint mechanism pursuant to sec. 8 SCDDA does not require remediation of identified harm.[1554] Fifth, the SCDDA insufficiently clarifies the role of industry and multistakeholder initiatives in effective due diligence and creates the potential for overreliance on contractual assurances, certifications, and social audits.[1555] Sixth, the SCDDA does not adequately capture the importance of companies considering the perspectives of rights-holders and human rights experts in host countries. The Act solely expressly mandates stakeholder engagement with regard to establishing and implementing the company's risk management system (sec. 4(4) SCDDA) and the complaints mechanism (sec. 8 and sec. 9(1) SCDDA). Thus, the need to ensure meaningful stakeholder engagement throughout all steps of the due diligence process is not reflected in the Act.[1556] This diminishes its legitimacy from a critical decolonial perspective described in Chapter 1 III 2.1 b. Seventh, the SCDDA insufficiently delineates the criteria for company withdrawal and does not define requirements for responsible disengagement.[1557] Lastly, the Act fails to substantially change the *status quo* for rights-holders to access justice before German courts.[1558]

Overall, the Act contains elements that help foster effective due diligence, such as the obligation for companies to review their procurement and purchasing practices (sec. 6(3) SCDDA) and elements that create the risk of a tick-box approach to compliance, such as the absence of prescribed meaningful stakeholder engagement at all stages of the due diligence process. The effectiveness of the Act in preventing human rights and environmental abuses will largely depend on the BAFA's interpretation of due diligence obligations under the Act and the authority's dedication to its enforcement.

Since June 2024, calls to scrap or drastically reduce the personal scope of the SCDDA have garnered attention.[1559] During government elections in 2025,

1552 RUGGIE, Letter to German Ministers, para. 1; Section II 4.2 of this Chapter.

1553 See Section II 4.3 c of this Chapter.

1554 See Section II 4.3 c of this Chapter.

1555 See Section II 4.3 d of this Chapter.

1556 See Section II 4.3 b–d of this Chapter.

1557 See Section II 4.3 d of this Chapter.

1558 See Section II 5.2 of this Chapter.

1559 German Federal Government, 'Initiative zur Aufhebung des Lieferkettengesetzes beraten' (13 June 2024); Euractiv, 'German Plans to Downsize National Supply Chain

the question of repealing or reducing the SCDDA's scope played a prominent role in campaigns. Advocates for the repeal of the SCDDA contended that the Act imposes an excessive regulatory burden on German companies, particularly on SMEs, resulting in competitive disadvantages.[1560] While compliance with human rights and environmental expectations set out in the SCDDA undoubtedly comes at a certain cost, some of the generated burdens can be explained through misinterpretation and ineffective implementation rather than the due diligence obligations themselves.[1561] As seen, instead of following a risk-based approach to due diligence, in-scope companies have, for instance, indiscriminately sent out generic questionnaires to their suppliers, irrespective of the latter's risk profiles. Having to process large numbers of enquiries, this approach to risk assessment has created unnecessarily high compliance costs for in-scope companies as well as SMEs with low-risk profiles, is largely ineffective, and inconsistent with the BAFA's recommendations.[1562] In spite of these implementation issues and the Act's limitations, there is evidence that the Act has improved the situation of rights-holders in practice, even after only having been in force for two years.[1563] Furthermore, a 2024 study based on a representative survey of 2,000 decision-makers in German companies demonstrated that solely 7% of companies in Germany object to mandatory supply chain due diligence.[1564] One third of respondents even recognised business opportunities arising from compliance with human rights and environmental due diligence obligations under the Act, including reputational benefits, improved quality of components for manufacturing, and enhanced resilience in the supply chain.[1565]

After the elections in 2025, the conservative CDU/CSU and the centre-left SPD signed a coalition agreement to form a new government in May of the

Rules at Odds with EU Law, Experts Warn' (12 July 2024). See further, KRAJEWSKI MARKUS, 'Weder Rückschritt noch Frustration: Europa- und völkerrechtliche Grenzen einer Änderung des Lieferkettengesetzes', Verfassungsblog (21 March 2025) (hereinafter: KRAJEWSKI, Weder Rückschritt noch Frustration, Verfassungsblog).

1560 CDU/CSU, 'Politikwechsel für Deutschland', electoral programme CDU/CSU, 15.

1561 Cf. SCHÖNFELDER DANIEL, 'Lieferkettengesetz: Weniger Aufwand, mehr Wirkung. Vorschläge aus der Praxis', legal opinion (14 March 2025) (hereinafter: SCHÖNFELDER, Legal Opinion SCDDA), 2.

1562 See Chapter 4 II 4.3 c.

1563 ECCHR/BfdW/Miserior, SCDDA Effectiveness Report, 3 and 49; Inkota, '2 Jahre Deutsches Lieferkettengesetz: Wirkungen in Lieferketten für Kleidung und Schuhe', study (November 2024), 36; SCHÖNFELDER, Legal Opinion SCDDA, 5 f.

1564 HAUPT SABINE / MAY FRANK CHISTIAN, 'Sorgfaltspflichten in der Lieferkette. Wo steht die deutsche Wirtschaft?', Study conducted by Handelsblatt Research Institute and commissioned by Creditreform (April 2024), 8.

1565 Ibid., 17.

same year, in which the parties commit to Germany's obligation under EU law to transpose the CSDDD and vow to replace the SCDDA with the CSDDD transposition law. For the period until obligations under the CSDDD transposition law apply, the Coalition Agreements proposes suspending sanctions for breaches of due diligence obligations under the Act, except for 'gross human rights abuses' *(massive Menschenrechtsverletzungen)* and completely scrap reporting obligations under the SCDDA.[1566] While the Coalition Agreement cannot suspend due diligence obligations or scrap reporting obligations under the SCDDA without the adoption of a corresponding law,[1567] this backsliding on the commitment to promote responsible business conduct sets a concerning precedent that may affect the support for and future of the CSDDD. If indeed adopted, a law suspending sanctions for most breaches of due diligence obligations would render the SCDDA largely ineffective in practice and hardly be compatible with Germany's obligations under international human rights law. It would most likely violate the principle of non-retrogression under the ICESCR, according to which states must not deliberately take measures weakening existing protections without 'the most careful consideration' and full justification[1568].[1569]

Instead of pushing for the suspension of the Act's enforcement, thereby creating significant legal uncertainty[1570], the German government thus ought to advise companies to conduct due diligence more effectively, including by prioritising risks in accordance with the BAFA's recommendations[1571] as well as collaborating in industry and multistakeholder initiatives to pool resources and reduce compliance costs[1572].

1566 CDU/CSU/SPD, 'Verantwortung für Deutschland', Coalition Agreement, 21. Legislative period, 60.

1567 BOLOGNESI VALENTINA, 'What's Next for the LkSG and CSDDD? Making Sense of the German Coalition's Announcement', amfori interview with Michaela Streibelt and Daniel Schönfelder (20 May 2025).

1568 Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3 (1990), 'The Nature of State Parties' Obligations (art. 2, para. 1 of the Covenant)', UN Doc. E/1991/23 (14 December 1990), para. 9.

1569 German Institute for Human Rights (GIHR), 'Schutzniveau des Lieferkettengesetzes erhalten: Zum Rückschrittsverbot des UN-Sozialpaktes' (November 2024) (hereinafter: GIHR, SCDDA and the Prohibition of Retrogression), 6 f.; KRAJEWSKI, Weder Rückschritt noch Frustration, Verfassungsblog. See also, SIMANOVSKI SIMON, 'Ein Schritt vorwärts, keiner zurück: Zur Rolle des Lieferkettengesetzes nach Inkrafttreten der Corporate Sustainability Due Diligence Directive', Verfassungsblog (13 June 2024) (hereinafter: SIMANOVSKI, Ein Schritt vorwärts, keiner zurück, Verfassungsblog).

1570 FILLMANN ANDREAS, 'Germany's Supply Chain Law at a Crossroads: the Implications of the Proposed Shift to the CSDDD', Sustainability in Business Blog (17 April 2025).

1571 BAFA, Guidance on Risk Analysis, 10 ff.; BAFA, FAQ Risk-Based Approach, 1 ff.

1572 Cf. BAFA, Factsheet Industry and Multistakeholder Initiatives, 1 f.

III. Summary

The Swiss provisions and the SCDDA share similarities, but stand for overall very different approaches to due diligence. Both laws exclude the downstream supply chain from their obligations and conceptualise due diligence as an iterative process comprised of five steps. These steps essentially include (1) issuing a policy statement, (2) establishing an appropriate and effective risk management system, (3) conducting appropriate and effective risk analyses, (4) taking appropriate and effective measures to address identified risks and breaches, (5) and documenting and reporting the measures taken. Moreover, both laws frame due diligence obligations first and foremost as obligations of effort rather than result. The SCDDA only foresees obligations of result, i.e. the termination of business relationships, in very specific circumstances. In addition, both laws do not sufficiently emphasise the need for meaningful stakeholder engagement throughout the due diligence process, which reduces their legitimacy, and do not define any red lines or delineate the criteria for responsible disengagement. Furthermore, both laws are susceptible to a tick-box exercise, even though the SCDDA incorporates elements that have the potential to counterbalance such a formalistic approach to compliance. Lastly, neither of the laws substantially challenge the *status quo* for rights-holders that seek remedy before national courts.

The most striking difference between the laws lies in their scope, reach, and public enforcement mechanism: While the Swiss legislation reflects a very narrow approach to due diligence in terms of covered issues and industries, the obligations extend to the whole upstream supply chain. In comparison, due diligence obligations under the SCDDA cover a broader spectrum of human rights and environmental matters, but primarily extend to a company's own business activities as well as the activities of its direct suppliers, and only exceptionally arise with regard to indirect suppliers. The latter marks the SCDDA's greatest weakness. Lastly, public enforcement under the SCDDA is more robust than under the Swiss legislation. With the BAFA's extensive powers to investigate breaches and impose high administrative sanctions, the SCDDA notably establishes a strong public enforcement mechanism that enables the prevention of human rights and environmental abuses. Overall, the Act aligns with the UNGPs to a much greater extent.

Chapter 5: Mandatory Due Diligence Laws with Liability Provisions

This Chapter focuses on the analysis of the French Duty of Vigilance Act 2017 (*loi de vigilance,* LdV)[1573] (Section I) and the EU's CSDDD (Section II). Both pieces of legislation represent the third type of mandatory HRDD law, i.e. laws that in addition to due diligence obligations contain civil liability provisions for corporate misconduct.[1574] The aim of this Chapter is fivefold. First, it is to evaluate the alignment of these laws with international due diligence standards. Second, it is to analyse the potential and limitations of these laws with regard to the protection of rights-holders from transnational corporate misconduct. Third, it is to explore the complementary role the soft law and voluntary instruments analysed in Chapter 2 could play in informing effective human rights due diligence in the application of these laws. Fourth, it is to compare the CSDDD with the LdV and the SCDDA, and provide recommendations on the transposition and implementation of the Directive in EU Member States in general, and France and Germany in particular, with a view to rendering it more effective. Fifth, it is to demonstrate how the CSDDD may directly and indirectly affect non-EU companies, such as Swiss companies, and provide recommendations on how the Swiss due diligence provisions could be improved from a human rights perspective and in light of the legislative trend in Europe.

The choice of the French Act and the CSDDD is based on two reasons. First, the French Act is a trailblazing law that inspired the adoption of other due diligence laws in Europe, notably the German SCDDA and the CSDDD. As the first Act to establish due diligence obligations beyond a specific industry or issue that also includes a civil liability provision, the experience with the French LdV offers valuable lessons for the transposition and implementation of the CSDDD. Second, the regulatory landscape with regard to the promotion of responsible business conduct in the EU is complex. There are notably various pieces of legislation that tackle the regulation of transnational corporate

1573 Loi n°2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Journal officiel de la République Française n°0074, 28 Mars 2017.

1574 See Introduction III.

conduct with regard to human rights and the environment, such as the EU Conflict Minerals Regulation, the EU Batteries Regulation, and the EU Deforestation Regulation[1575].[1576] However, the adoption of the CSDDD marks a historic step in the business and human rights movement insofar that it stipulates comprehensive cross-sectoral human rights and environmental due diligence obligations for both EU companies as well as non-EU companies.[1577]

I. The French Duty of Vigilance Act 2017

1. Context

The French LdV is the result of a four-year arduous process that involved civil society organisations joining forces with members of parliament to push for an ambitious law promoting corporate accountability for human rights abuses.[1578] The collapse of the Rana Plaza building in Bangladesh in 2013 is cited to be one of the tragic events that particularly inspired the bill.[1579] Rana Plaza was an eight-story building housing several garment factories that supplied international clothing companies. The collapse killed 1,134 people and left thousands more injured. The magnitude of the disaster sent shockwaves through the international community and intensified calls for binding measures to hold companies to account for human rights abuses.[1580] The declared objective of

1575 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ 9.6.2023, L 150/206.

1576 For an overview of regulatory initiatives related to business and human rights in the EU, see, e.g., HOLLY / ANDREASEN LYSGAARD / BLOCH VEIBERG et al., EU Regulatory Initiatives, 14 ff.

1577 Cf. HOLLY / ANDREASEN LYSGAARD / BLOCH VEIBERG et al., EU Regulatory Initiatives, 19; BERNAZ NADIA / BIANCHINI FLAVIANO / BRIGHT CLAIRE et al., 'Can the Compromised EU Corporate Sustainability Due Diligence Directive still be Effective?', Rebalance Project Blog (24 April 2024) (hereinafter: BERNAZ/BIANCHINI/BRIGHT et al., Effectiveness of the Compromised CSDDD, Rebalance Project Blog).

1578 COSSART SANDRA / CHAPLIER JÉRÔME / BEAU DE LOMENIE TIPHAINE, The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All, Business and Human Rights Journal (BHRJ) 2017, 317 ff., 317.

1579 National Assembly, 'Proposition de Loi nº1519 du 6 novembre 2013 relative au devoir de vigilance des entreprises donneuses d'ordre' (hereinafter: National Assembly, Explanatory Memorandum to the Draft no. 1519), 2; National Assembly, 'Proposition de Loi nº2578 du 11 février 2015 relative au devoir de vigilance des entreprises donneuses d'ordre' (hereinafter: National Assembly, Explanatory Memorandum to the Draft no. 2578), 4.

1580 Human Rights Watch, Purchasing Practices and Labor Abuses, 47; COSSART SANDRA / MAMLOUK ROULA, '10 Years on From Rana Plaza: Is France's Duty of Vigilance Law

the law is to hold companies accountable for human rights abuses and environmental damage abroad in line with the UNGPs and OECD Guidelines.[1581] In the parliamentary debates, the bill was considered to be in line with 'the tradition of the French Revolution and Enlightenment' and referred to as a 'law for the whole world'[1582]. The law was also framed as an opportunity for France to 'once again be at the forefront for the protection of human rights and that of the environment'.[1583] Some scholars argue that such a framing hails France as the 'generous liberator' of the less-fortunate people and communities in the Global South and thus perpetuates a saviour narrative that inevitably carries colonial undertones.[1584] While some statements made during parliamentary debates may reflect a paternalistic perspective, it is true that the adoption of the LdV secured France a forerunner status in legislating responsible business conduct; the LdV was notably the first legislation in Europe to establish due diligence obligations beyond a specific industry or issue that contained a civil liability provision.[1585] Moreover, the enactment of the LdV inspired the adoption of the SCCDA in Germany[1586] and the CSDDD of the EU[1587].

Living up to its Promise?', Cambridge Core Blog (6 June 2023) (hereinafter: COSSART/MAMLOUK, 10 Years on from Rana Plaza, Cambridge Core Blog). The Rana Plaza tragedy is also discussed in connection with a lodged complaint before the German NCP, see Chapter 2 II 2.1 b.

1581 National Assembly, Explanatory Memorandum to the Draft no. 1519, 2; National Assembly, Explanatory Memorandum to the Draft no. 2578, 4.

1582 National Assembly, 'Rapport fait au nom de la commission des lois constitutionelles, de la législation et de ladministration générale de la République sur la proposition de loi nº 3239, rejetée par le Sénat en première lecture, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', Nº 3582 (16 March 2016) (hereinafter: National Assembly, Report No. 3582), 17.

1583 National Assembly, 'Avis fait au nom de la commission du développement durable et de l'aménagement du territoire de la proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', Nº 2578 (11 March 2015), 9.

1584 BOSE, BHRJ 2023, 38 f. See also, LICHUMA, Centering Europe and Othering the Rest, Völkerrechtsblog. On the concern of neo-colonialism in relation to home state laws, see further Chapter 1 III 2.1 b.

1585 COSSART / CHAPLIER / BEAU DE LOMENIE, BHRJ 2017, 317; BEAU DE LOMÉNIE TIPHAINE / COSSART SANDRA / MORROW PAIGE, From Human Rights Due Diligence to Duty of Vigilance Taking the French Example to the EU Level, in: Bonfanti (ed.), Business and Human Rights in Europe: International Law Challenges, New York 2018, 133-144, 133 and 135; SAVOUREY ELSA / BRABANT STÉPHANE, The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption, Business and Human Rights Journal (BHRJ) 2021, 141 ff., 141; SCHILLING-VACAFLOR ALMUT, Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?, Human Rights Review (HRR) 2021, 109 ff., 116.

1586 See Chapter 4 II 1.

1587 See Section II 1. of this Chapter.

The initial proposal presented by French civil society organisations was intended to apply to all companies based in France and establish a novel liability framework for human rights abuses and shift the burden of proof from the victims to companies. However, during the debates between the National Assembly and Senate, the bill was considerably weakened in order for a compromise to be reached.[1588] On 21 February 2017, the LdV was finally adopted. Following its adoption, the political opponents of the Act initiated a procedure to assess the constitutionality of the Act by the French Constitutional Council *(Conseil constitutionnel, C. C.).*[1589] The latter's decision on 23 March 2017[1590] deemed most of the Act's provisions to be constitutional. The sole exception were provisions related to the imposition of a fine in case of non-compliance with the Act. The Constitutional Council held that these provisions violated the principle of legality, as they introduced a sanction of punitive character, i.e. a civil fine *(amende civile),* for a breach of the duty of vigilance, which was insufficiently clear and defined.[1591] After the necessary amendments to the Act were made,[1592] the LdV was promulgated on 27 March 2017. Notwithstanding the amendments made to the initial adopted text, the promulgation of the LdV was hailed as a historic step forward in the protection of human rights from transnational corporate misconduct.[1593]

The provisions of the LdV amend French company law by inserting art. L. 225-102-1[1594] and art. L. 225-102-2[1595] in the French Commercial Code (C. com.).

In contrast to the German SCDDA, the LdV only consists of few provisions and does not contain any definitions of the terms and concepts used therein.

1588 COSSART / CHAPLIER / BEAU DE LOMENIE, BHRJ 2017, 317; SCHILLING-VACAFLOR, HRR 2021, 115.

1589 COSSART / CHAPLIER / BEAU DE LOMENIE, BHRJ 2017, 317 f.

1590 C. C., décision nº 2017-750 DC du 23 mars 2017.

1591 C. C., décision nº 2017-750 DC du 23 mars 2017, para. 14. See further, Section I 4.1 of this Chapter.

1592 I.e. the removal of art. 1 II subpara. 3 LdV as well as art. 2 para. 2 and art. 3 LdV (cf. C. C., décision nº 2017-750 DC du 23 mars 2017, para. 14).

1593 Cf. COSSART / CHAPLIER / BEAU DE LOMENIE, BHRJ 2017, 317; SAVOUREY/BRABANT, BHRJ 2021, 141; LAVITE CANELLE, 'The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence', Verfassungsblog (16 June 2020).

1594 Art. 1 LdV, amended by ordonnance nº 2023-1142 of 6 December 2023 art. 4, entered into force on 1 January 2025.

1595 Art. 2 LdV, amended by ordonnance nº 2023-1142 of 6 December 2023 art. 4, entered into force on 1 January 2025.

2. Personal Scope

According to art. L. 225-102-1 I para. 1 C. com., due diligence obligations apply to companies incorporated or registered in France which, at the end of two consecutive financial years,

(1) employ at least 5,000 employees within their company and subsidiaries *(filiales)* with registered offices in France, or
(2) employ at least 10,000 employees within their company and through their subsidiaries with registered offices both in France and abroad.[1596]

The LdV neither provides a definition for the term subsidiaries *(filiales)* nor does it reference any relevant norm. Nevertheless, in the preparatory works reference was made to art. L. 233-1 C. com.[1597] Pursuant to art. L. 233-1 C. com., a company is considered a subsidiary *(filiale)* if another company owns more than half of its capital.[1598] Contrary to the wording of the provision and the reference made in the preparatory works, some commentators contend that the personal scope of the LdV should be interpreted as broadly as possible and that the term *filiales* should be understood as controlled companies within the meaning of art. L. 233-3 C. com.[1599] In contrast to the concept of *filiale,* control within the meaning of art. L. 233-3 C. com. results from a majority of voting rights and is not based on a rigid capital threshold. According to art. L. 233-3 I C. com., a company controls another if (1) it directly or indirectly holds a share of capital in a company that gives it a majority of the voting rights at the general meetings *(assemblées générales)* of this company, (2) it alone holds the majority of voting rights in this company on the basis of an agreement with

1596 The French Constitutional Council had to clarify the personal scope of the Act with regard to the location of the registered offices, as the wording of the provision is ambiguous: C. C., décision nº 2017-750 DC du 23 mars 2017, para. 3. See further, BRABANT STÉPHANE / SAVOUREY ELSA, Scope of the Corporate Duty of Vigilance Law: Companies Subject to the Vigilance Obligations, Revue Internationale de la Compliance et de l'Ethique des Affaires (RICEA) 92 December 2017, original version published in French, English translation, 1 ff., 2.

1597 National Assembly, 'Rapport fait au nom de la commission des lois constitutionelles, de la législation et de ladministration générale de la République sur la proposition de loi (nº 2578) relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', Nº 2628 (11 March 2015) (hereinafter: National Assembly, Report no. 2628), 64. See also, REYGROBELLET ARNAUD, Devoir de vigilance ou risque d'insomnies?, Revue Lamy Droit des Affaires (RLDA) 2017, 35 ff., margin n. 7.

1598 See further, FAUCHON ANNE / MERLE PHILIPPE, Droit commercial: Sociétés commerciales 2023-2024, édition 27, Paris 2023, margin n. 765.

1599 HANNOUN CHARLEY, Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, Droit Social 2017, 806 ff., 813; BRABANT/ SAVOUREY, RICEA 92 Dec. 2017, 6.

other partners or shareholders, (3) it effectively determines the decisions of the general meeting of that company by virtue of its voting rights, or (4) if it is a partner or shareholder in that company and has the right to appoint or dismiss the majority of the members of the company's administrative, management or supervisory bodies.[1600] If a company holds more than 40% of the voting rights, the exercise of such control is presumed, provided that no one holds a higher share.[1601] An interpretation of the term *filiale* in light of art. L. 233-3 C. com. would lead to more companies falling under the personal scope of the LdV. Commentators in favour of such an extensive interpretation argue that this would be more in line with international due diligence standards.[1602] From a human rights perspective, such an extensive interpretation would be desirable. However, it is unlikely to be applied by courts in view of the subsequent paragraph, i.e. art. L. 225-102-1 I para. 2 C. com, which provides exemptions from the Act's personal scope. Pursuant to art. L. 225-102-1 I para. 2 C. com., subsidiaries *(filiales)* or controlled companies *(sociétés contrôlées)*, which fulfil the criteria in paragraph 1, are notably exempted from due diligence obligations, if the company that exercises control over them within the meaning of art. L. 233-3 C. com. has drawn up and implements a vigilance plan that covers both its own activities and the activities of its subsidiaries or companies it controls. The fact that lawmakers, unlike in para. 2, decided to solely use the term *filiale* in para. 1 indicates that the term is indeed to be interpreted narrowly, i.e. within the meaning of art. L. 233-1 C. com, as indicated in the preparatory works.[1603]

The interpretation of art. L. 225-102-1 I para. 1 C. com. has also been subject to debate in the literature in terms of the corporate forms that fall under the personal scope of the Act.[1604] This is because art. L. 225-102-1 I para. 1 C. com. does not specify the corporate forms covered. Instead, this element has to be deducted from the positioning of the provision in the Commercial Code.[1605] While the corporate forms SA *(société anonyme)*, SCA *(société en commandite par actions)*, SE *(société européenne)* are undisputedly covered, there was a

1600 See further, FAUCHON/ MERLE, Droit commercial: 2023-2024, margin n. 765.

1601 Art. L. 233-3 II. C. com. See further, FAUCHON/ MERLE, Droit commercial: 2023-2024, margin n. 765.

1602 HANNOUN CHARLEY, Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, Droit Social 2017, 806 ff., 813; BRABANT/ SAVOUREY, RICEA 92 Dec. 2017, 6.

1603 Cf. NASSE, Loi de vigilance, 74 f.

1604 For a summary of these discussions with further references, see BRABANT/SAVOUREY, RICEA 92 Dec. 2017, 2 ff.

1605 REYGROBELLET, RLDA 2017, margin n. 10; BRABANT/SAVOUREY, RICEA 92 Dec. 2017, 3.

debate on whether the SAS *(société par actions simplifiées)* is a corporate form that falls under the personal scope of the Act.[1606] However, the overwhelming majority of commentators have held that the SAS was included in the personal scope of the Act.[1607] This interpretation is also endorsed by the French Government[1608] and the General Council of Economy[1609]. As a result, the debate on this question has ceased; nevertheless, it is possible that it will resurface once a SAS is sued for breaches of its due diligence obligations under the Act.[1610]

Overall, the LdV, similarly to the German SCDDA, bases its personal scope on company size, and excludes SMEs from due diligence obligations, instead of taking a risk-based approach. However, the personal scope of the LdV is narrower in comparison, due to the required higher employee threshold and the fact that the SCDDA covers companies irrespective of their legal form.[1611]

In practice, the identification of companies falling under the LdV's personal scope proved to be a major challenge in the implementation of the Act. This is because information on a company's employee thresholds is not systematically publicly available. Additionally, the evolution of corporate entities and groups as a result of events such as mergers and acquisitions renders the identification of relevant companies even more difficult. However, the identification of relevant companies is pivotal to the enforcement of the Act.[1612] As a result, numerous civil society organisations, along with certain members of Parliament, repeatedly requested the Ministry of Economy and Finance to disclose a list of companies that fall under the scope of the Law, arguing that

1606 BRABANT/SAVOUREY, RICEA 92 Dec. 2017, 3; SAVOUREY ELSA, 'France Country Report', in: EU Due Diligence Study: Country Reports, 61; SAVOUREY/BRABANT, BHRJ 2021, 144.

1607 For an overview of this debate, see HANNOUN, Droit Social 2017, 811 f. See also, BRABANT/SAVOUREY, RICEA 92 Dec. 2017, 3 ff.; MOUGEOLLE PAUL, Sur la conformité constitutionnelle de la proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, La Revue des Droits de l'Homme (RDH) 2017 [online], margin n. 57; REYGROBELLET, RLDA 2017, margin n. 10 ff.

1608 French Government, 'Observations du Gouvernement sur la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses dordre', JORF nº0074 du 28 mars 2017, Texte nº 5 (hereinafter: French Government, Observations on the LdV), 1.A.

1609 French General Council of Economy, 'Rapport à Monsieur le Ministre de l'économie et des finances, Évaluation de la mise en œuvre de la loi no. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre' (January 2020) (hereinafter: GCE Report 2020), 17.

1610 SAVOUREY/BRABANT, BHRJ 2021, 144.

1611 Cf. QUERENET-HAHN BÉNÉDICTE / BABST LEONIE, Sorgfaltspflichten für Unternehmen in Deutschland und Frankreich, Compliance Berater (CB) 2022, 351 ff., 351. See further, Chapter 4 II 3.

1612 SAVOUREY/BRABANT, BHRJ 2021, 142.

the Ministry ought to possess the necessary information to compile such a list. In May 2019, the General Council of Economy, a body attached to the Ministry of Economy and Finance, was tasked with establishing this list and evaluate the implementation of the LdV.[1613] The subsequent report, which was issued in February 2020, states that it was impossible to put forward a reliable list of the companies concerned. In the report it is estimated that the Act applies to approximately 200 to 250 companies.[1614] Unsurprisingly, this response was deemed unsatisfactory by civil society organisations.[1615]

Eventually, a number of civil society organisations took it upon themselves to create a list of companies that fall under the personal scope of the LdV. Using open data resources, these civil society organisations were able to identify numerous companies and subsequently published the companies' names and their available vigilance plans on a web platform called the 'duty of vigilance radar'. The information on this platform is updated regularly.[1616]

3. Material Scope

3.1 Covered Human Rights and other Protected Grounds

Pursuant to art. L. 225-102-1 I para. 3 C. com., due diligence measures must cover '[...] severe impacts on human rights and fundamental freedoms, the health and safety of persons, and the environment [...]'. The Act neither provides any definitions for these terms nor does it reference any norms that would aid in delineating the concepts reflected therein. During the drafting process in parliamentary debates, it was decided that further clarifications by means of a decree were not necessary, as France's international commitments in this area were considered to be 'sufficiently precise and complete'.[1617] Furthermore, it was considered that the human rights treaties ratified by France would take precedence over national laws pursuant to art. 55 of the French

1613 SAVOUREY/BRABANT, BHRJ 2021, 143.

1614 GCE Report 2020, 20.

1615 CCFD Terre Solidaire / Sherpa, 'Le radar du devoir de vigilance, identifier les entreprises soumises à la loi' (June 2020) (hereinafter: CCFD Terre Solidaire / Sherpa, Le radar du devoir de vigilance (June 2020)), 5.

1616 CCFD Terre Solidaire / Sherpa, Le radar du devoir de vigilance (June 2020), 5. The Duty of Vigilance Radar is also available in English.

1617 See, National Assembly, 'Rapport fait au nom de la commission des lois constitutionnelles, de la législation et de ladministration générale de la République sur la proposition de loi modifiée par le Sénat en deuxième lecture (nº 4133) relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', Nº 4242 (23 November 2016), 11.

Constitution[1618] and would therefore be applicable without having to be explicitly mentioned by the LdV.[1619]

Some commentators recognise advantages in the lack of a concrete, exhaustive catalogue of covered protected grounds, as this allows the constant development in human rights and other concepts to be taken into account and a greater number of risks to be covered.[1620] The decision of the Constitutional Council, however, reflects a different view: the open-ended and thus indeterminate description of the grounds of protection in the LdV is one of the reasons why the Constitutional Council declared the fine of up to EUR 10,000,000 for a breach of the duty of vigilance to be unconstitutional.[1621] The Constitutional Council held that due to the broad reference to 'human rights' *(droits humains)* and 'fundamental freedoms' *(libertés fondamentales),* the breach that would have resulted in a fine was not sufficiently clearly and precisely defined; it concluded that the provisions related to the imposition of the fine violated the principle of legality, namely the principle of criminal legality and legality of offences[1622].[1623]

Although the terms 'human rights' and 'fundamental freedoms' are too vague to warrant the imposition of a sanction for violations, they are not obscure.[1624] In the literature, it is generally agreed that the vigilance plan must at least cover the rights enshrined in the ECHR.[1625] This is because the ECHR plays a pivotal role in the protection of human rights in France thanks to its

1618 According to art. 55 of the French Constitution, international treaties and agreements enjoy precedence over domestic legislation under three conditions: First, the treaty or agreement in question must have been duly ratified or approved, so that they can be incorporated into national law. Second, the treaty or agreement must have been formally published. This introduces the international commitments into domestic law and renders them binding and enforceable. Publication is normally effected by insertion in the Official Journal *(Journal officiel de la Republique française).* Third, the treaty or agreement must be applied by the other signatory states as well. This condition thus relates to reciproxity (MÉLIN-SOUCRAMANIEN FERDINAND / PACTET PIERRE, Droit constitutionnel, 42ème édition, Paris 2024, 631 ff. See further, FAVOREU LOUIS / GAÏA PATRICK / MESTRE JEAN-LOUIS et al., Droit constitutionnel, 26ème édition, Paris 2023, 202 ff.).

1619 National Assembly, Report no. 2628, 31 fn. 2.

1620 BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 6; MOUGEOLLE, RDH 2017, margin n. 19.

1621 C. C. Décision nº 2017-750 DC, 23.3.2017, para. 13.

1622 Art. 8 of the French Human Rights and Citizens Declaration of 1789.

1623 C. C. Décision no 2017-750 DC, 23.3.2017, para. 13. Differing opinion: MOUGEOLLE, RDH 2017, margin n. 30.

1624 C. C. Décision no 2017-750 DC, 23.3.2017, para. 13.

1625 Cf. LAFARGUE MARIE, Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre: l'entrée dans une nouvelle ère ?, La Semaine Juridique Social (JCP S) 2017, doctr. 1169, margin n. 23 ; MALECKI CATHERINE, Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre: était-ce bien raisonnable?, Bulletin

individual application procedure[1626], enjoys precedence over national laws as a ratified international treaty pursuant to art. 55 of the French Constitution, and is also explicitly mentioned in the preparatory works of the LdV.[1627] In addition, commentators have rightfully argued that art. L. 225-102-1 I para. 3 C. com. should be interpreted in light of the UNGPs and France's other international human rights obligations.[1628] As previously mentioned, UNGP 12 requires companies to at least cover the rights enshrined in the UDHR, the ICCPR, the ICESCR, and the ILO Core Labour Standards. Such an interpretation would also be consistent with the intentions expressed during parliamentary debates and in the commentary to the bill, where reference is made to the UNGPs and France's international commitments in the field of human rights.[1629] Such an interpretation would make sense, as the ICCPR[1630] and the ICESCR[1631] are considered to rank above national legislation pursuant to art. 55 of the French Convention.[1632] Furthermore, France has ratified ten out of eleven of the ILO Core Labour Standards;[1633] the sole non-ratified convention being the Occupational Safety and Health Convention, 1981 (No. 155), which was only added to the ILO Core Labour Standards in 2022, i.e. after the adoption of the LdV.[1634]

Joly Sociétés (Bull. Joly Soc.) 2017, 298 ff., 299 ; SCHILLER, JCP E 2017, 1193, margin n. 6. See also, BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 6 fn. 51.

1626 Art. 34 ECHR.

1627 National Assembly, Report no 2628, 66.

1628 BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 6 f. While this may lead to conflicts regarding the scope and level of protection between the ECHR and UN human rights instruments, companies could navigate this issue by adhering to the higher standard (cf. SMIT/GRIFFITH/MCCORQUODALE, BIICL Report on Conflicts with IHR, 23 f.).

1629 National Assembly, Report no. 2628, 66; National Assembly, Explanatory Memorandum to the Draft no. 2578, 4.

1630 The ICCPR was ratified by France following law no. 83.461 (*loi n° 83.461*) of 25 June 1980, published in the Official Journal by decree no. 81-76 of 29 January 1981, and entered into force on 4 February 1981.

1631 The ICESCR was ratified by France following law no. 83.461 (*loi n° 83.461*) of 25 June 1980, published in the Official Journal by decree no. 81-77 of 29 January 1981, and entered into force on 4 February 1981.

1632 Cf. National Assembly, Report no. 2628, 31 fn. 2. The same cannot be said of the UDHR, which, due to its soft law nature and its lack of enforceability, cannot be invoked before French courts (cf. Conseil d'Etat (CE), 18 April 1951, *Élections Commune de Nolay*, 189). However, the UDHR is recognised as a foundational document of international human rights protection and the rights enshrined therein have served as a basis for the codification of the rights contained in the ICCPR and the ICESCR (DE SCHUTTER, International Human Rights Law, 18).

1633 See, ILO's Information System on International Labour Standards, Ratifications of fundamental instruments by country.

1634 ILO Declaration on Fundamental Principles and Rights at Work (2022), 2.

Beyond this minimal consensus, it remains unclear whether other international conventions should also be taken into account, and if so, which ones.[1635] Even the UNGPs are ambiguous in this regard.[1636] To answer this question, it may be useful to consult art. L. 113-1 of the French Consumer Code (C. consom.),[1637] which establishes a right to information for consumers regarding the conditions under which a specific product, which is marketed in France, has been manufactured. More specifically, consumers can request information from the manufacturer, producer or distributor of a good on whether it has been manufactured respecting 'human rights and fundamental freedoms'.[1638] Art. D. 113-1 C. consom. then lists the relevant UN human rights treaties and ILO Labour Standards. In addition to the ICCPR and the ICESCR, art. D. 113-1 C. consom. also lists the CEDAW, the CRC, and the CRPD. In terms of labour standards, art. D. 113-1 C. consom. lists all of the ILO conventions that were considered to be part of the four ILO Core Labour Standards before the addition of the standard regarding a safe and healthy working environment, i.e. ILO Conventions Nos. 155 and 187, in 2022.[1639] While manufacturers, producers, and distributors outside the LdV's personal scope are not required to draw up a vigilance plan to answer consumers' information requests based on art. L. 113-1 C. consom, doing so would help equip them with more accurate insights on the conditions under which their products are manufactured, including respect for the human rights and fundamental freedoms enshrined in the listed treaties. Moreover, it would appear coherent to interpret the expression 'human rights and fundamental freedoms' in art. L. 113-1 para. 1 C. consom. the same way for the LdV, and consequently require companies to not only consider the rights enshrined in the ICCPR and the ICESCR in their vigilance plans, but also the ones stipulated in the CEDAW, the CRC, and the CRPD as well as the ILO conventions listed in art. D. 113-1 C. consom.[1640] Critically, this interpretation would also be more in line with UN

1635 Cf. BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 7.

1636 See Chapter 2 I 3.1 b.

1637 Cf. NASSE, Loi de vigilance, 105 f. and 118 f.

1638 Art. L. 113-1 para. 1 C. consom.

1639 These are namely the ILO Convention on Forced Labour, 1930 (No. 29), ILO Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87), the ILO Convention on the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the ILO Convention on Equal Remuneration, 1951 (No. 100), the ILO Convention on the Abolition of Forced Labour, 1957 (No. 105), the ILO Convention on Discrimination in Employment and Occupation, 1958 (No. 111), the ILO Convention on Minimum Age, 1973 (No. 138), and ILO Convention on the Worst Forms of Child Labour, 1999 (No. 182).

1640 Cf. NASSE, Loi de vigilance, 118 f.

treaty monitoring bodies' observations on Member States' extraterritorial human rights obligations.[1641]

It is curious that art. L. 225-102-1 I para. 3 C. com. mentions the 'health and safety of persons' in addition to human rights and fundamental freedoms, as the latter include provisions to respect the former (e.g. the right to life (art. 6(1) ICCPR), health (art. 12 ICESCR), and safe and healthy working conditions (art. 7(b) ICESCR)). Adding health and safety can thus be interpreted as a form of emphasis.[1642] This emphasis can be understood in light of one of the main events that prompted the adoption of the LdV, i.e. the Rana Plaza disaster.[1643]

With respect to the environment, commentators have suggested interpreting art. L. 225-102-1 I para. 3 C. com. in light of art. 1247 of the French Civil Code (C. civ.) and in view of the obligation to prevent environmental damage under the French Environmental Code (C. envir.).[1644] Art. 1247 C. civ. defines ecological damage as non-negligible harm *(une atteinte non négligeable)* to the components or functions of ecosystems or to the collective benefits derived from the environment. In comparison, art. L. 161-1 I C. envir. offers a more tangible definition. Pursuant to art. L. 161-1 I C. envir., environmental damage can manifest itself in four different ways. First, in the measurable deterioration of the environment that gives rise to the risk of severe harm *(atteinte gave)* to human health as a result of soil contamination.[1645] Second, in the measurable deterioration of the environment that severely *(gravement)* impairs the ecological, chemical or quantitative status or the ecological potential of water bodies.[1646] Third, in the measurable deterioration of the environment that severely *(gravement)* impairs the maintenance or restoration of a favourable status of certain species and habitats.[1647] Fourth, in the measurable deterioration of the environment that affects the ecological functions of soil, water, and certain species and habitats.[1648] The definitions of environmental damage in

1641 CEDAW, General Recommendation No. 28 (2010), para. 36; CRC, General Comment No. 16 (2013), para. 43. See further, Chapter 1 III 1.2.

1642 SCHILLER, JCP E 2017, 1193, margin n. 6.

1643 National Assembly, Explanatory Memorandum to the Draft no. 1519, 2; National Assembly, Explanatory Memorandum to the Draft no. 2578, 4. See further, Section I 1. of this Chapter.

1644 SCHILLER, JCP E 2017, 1193, margin n. 6. With regard to art. 1247 CC, see Sherpa, Vigilance Plans Reference Guidance, first ed. (2019) (hereinafter: Sherpa, Vigilance Plans Guidance), 39.

1645 Art. L. 161-1 I no. 1 C. envir.

1646 Art. L. 161-1 I no. 2 C. envir.

1647 Art. L. 161-1 I no. 3 C. envir.

1648 Art. L. 161-1 I no. 4 C. envir.

art. 1247 C. civ. and art. L. 161-1 I C. envir. differ. Nevertheless, interpreting the LdV in light of these provisions and the corresponding case law may at least provide a reference point for companies to navigate the LdV. Furthermore, both definitions require a certain level of severity for the damage in question to be deemed relevant. Such a requirement is also found in art. L. 225-102-1 I para. 3 C. com. and applies to harm related to human rights and fundamental freedoms, health and security, and the environment.

Beyond these aspects of environmental protection, the question arises whether and to which extent climate concerns are covered by the LdV.[1649] Two lawsuits filed against the French oil company Total are particularly interesting in this regard. In the first case, which was also the very first lawsuit filed under the LdV, the claimants accused Total of not having sufficiently taken into account the human rights and environmental implications of the Tilenga and EACOP oil projects in Uganda. The claimants alleged, *inter alia*, that risks related to the expropriation of land, including the infringement of property rights and the right to an adequate standard of living as well as climate-related risks, namely greenhouse gas emissions in numerous production steps and their consequences for a healthy environment, were not appropriately considered in the company's the vigilance plan.[1650] After a judicial odyssey, the case was eventually dismissed on procedural grounds by the *Tribunal Judiciare de Paris*.[1651] The reasons for its dismissal will be discussed in Section I 4.2 a of this Chapter in more detail.

The second lawsuit against Total explicitly tackles the company's alleged impact on climate change. The claimants argue that Total's vigilance plan does not provide for appropriate measures to reduce its greenhouse gas emissions. The claimants contend that global warming, to which Total allegedly contributes, poses a risk to the environment, human rights and fundamental freedoms, and the health and safety of people. As a result, they demand Total to undertake appropriate actions to ensure that the company's activities align with the climate objectives of the Paris Agreement.[1652] After the *Tribunal Judiciare de Paris* had dismissed the case on procedural grounds, the

1649 MOUGEOLLE, RDH 2017, margin n. 18.

1650 Les Amis de la Terre France / Survie, 'Manquements graves à la loi sur le devoir de vigilance, Le cas Total en Ouganda', Report (June 2019), 8 ff. and 36 f. See further, JEHL MARCELLIN, 'Corporate Responsibility in Practice: The Struggle Against TotalEnergies' Projects in Uganda and Tanzania', Business and Human Rights Journal Blog (16 December 2024).

1651 Tribunal Judiciaire de Paris, jugement rendu en état de référé le 28 février 2023, Nº RG 22/53942, 24.

1652 Tribunal Judiciaire de Paris, ordonnance du juge de la mise en état rendue le 6 juillet 2023, Nº RG 22/03403, 5 ff. For more on the case, see Section I 4.2 a of this Chapter.

claimants brought it before the Paris Court of Appeal *(Cour d'Appel de Paris)*.[1653] On 18 June 2024, the Paris Court of Appeal deemed the lawsuit admissible[1654] and thus cleared the way for the judicial review of the case's merits.[1655] The Court of Appeal's decision will be discussed in Section I 4.2 a of this Chapter in more detail.

According to art. L. 225-102-1 I para. 3 C. com., companies must identify risks and prevent 'severe impacts' *(atteintes graves)* of human rights, fundamental freedoms, health and safety, and the environment. However, this notion of severity is neither defined in the Act nor do the parliamentary debates offer any clarification.[1656] In the literature, it is suggested to interpret the notion of severity in light of the UNGPs and the OHCHR Interpretative Guide.[1657] MOUGOULLE, for instance, refers to the OHCHR Interpretative Guide's deliberations on gross human rights abuses.[1658] The Interpretative Guide recognises that there is no single definition for gross human rights abuses in international law. But it considers that practices such as genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination, would normally constitute such gross abuses. According to the Interpretative Guide, other kinds of abuses, including abuses related to economic, social and cultural rights, may also be considered gross, if they are 'grave and systematic', for instance, because they occur in large numbers or target particular groups of people.[1659] The severity of human rights abuses is also considered in the UNGPs themselves.[1660] Under the UNGPs, enterprises have a responsibility to prevent all human rights abuses, irrespective of their severity. However, the UNGPs allow enterprises to prioritise the prevention and mitigation of impacts that

1653 Sherpa / Notre Affaire à tous / France Nature Environnement et al., 'Procès climatique contre TotalEnergies: l'action judiciaire continue devant la cour d'appel', Press Release (10 November 2023) (hereinafter: Sherpa / Notre Affaire à tous / France Nature Environnement et al., Press Release: Appeal in Total Climate Case).

1654 Cour d'Appel de Paris, ârret du 18 juin 2024, RG nº 23/14348, 42 ff.

1655 Sherpa / Notre Affaire à tous / France Nature Environnement et al., 'Victoire d'étape dans le procès climatique contre TotalEnergies', Press Release (18 June 2024) (hereinafter: Sherpa / Notre Affaire à tous / France Nature Environnement et al., Press Release: Paris Court of Appeal's Decision in Total Climate Case).

1656 In the debates, the necessity to further specify the degree of severity is just noted, see National Assembly, Report no. 2628, 66. See also, BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 7.

1657 BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 7; MOUGEOLLE, RDH 2017, margin n. 13 ff.

1658 MOUGEOLLE, RDH 2017, margin n. 13.

1659 OHCHR Interpretative Guide, 6.

1660 UNGPs 14, 17 (b), 19, 21, and 24. See also, OHCHR Interpretative Guide, 83 f.

are particularly severe, if all impacts cannot be addressed at the same time.[1661] Under the UNGPs, the severity of impacts is assessed based on their scale, scope, and remediability.[1662] Moreover, severity is not considered in absolute terms, but as relative to other identified human rights impacts.[1663] This is because the hierarchisation of human rights would violate the principle of interdependence, indivisibility and interrelatedness of all human rights.[1664]

While the UNGPs and the OHCHR Guide provide indications for the range of abuses that may be considered severe under the LdV, they do not define the minimum threshold that must be reached. For instance, slavery and slavery-like practices would undisputedly constitute severe abuses. However, the question whether systemic abuses of the right to a fair wage pursuant to art. 7(a)(ii) ICESCR in a factory employing hundreds of workers would be more contentious, even though the abuse of the latter has a ripple effect on the enjoyment of other human rights (e.g. the right to social security (art. 9 ICESCR), health (art. 12 (1) ICESCR), and an adequate standard of living (art. 11 (1) ICESCR)), and increases the risk of parents relying on child labour.[1665]

In the literature, the proposed thresholds differ considerably. They range from impacts that 'are not simply minor', a notion used in French labour law, and 'non-negligible' within the meaning of art. 1247 C. civ. for environmental impacts[1666], to impacts comparable to the ones linked to the Rana Plaza disaster, i.e. one of the main events that prompted the adoption of the LdV[16671668]. This lack of clarification leads to substantial legal uncertainty for companies falling under the personal scope of the LdV and leaves victims of human rights abuses with outcomes that are difficult to predict when pursuing litigation. In any case, the requirement of severity is not entirely aligned with the UNGPs: While the prioritisation of the prevention and mitigation of the most severe and irremediable adverse human rights impacts is allowed under the UNGPs, the responsibility to respect human rights extends to all adverse human rights impacts.[1669]

1661 UNGP 24 and Commentary thereto.

1662 Commentary to UNGP 14.

1663 Commentary to UNGP 24. See also, OHCHR Interpretative Guide, 84.

1664 The Vienna Declaration and Programme of Action 1993, para. 5.

1665 Cf. CESCR General Comment No. 23 (2016), para. 18. See also, Chapter 4 I Section 3.1 b and II Section 4.1.

1666 Sherpa, Vigilance Plans Guidance, 39 with reference to art. L. 4131-1, L. 4133-1 or L. 4614-2 of the French Labour Code.

1667 National Assembly, Explanatory Memorandum to the Draft no. 2578, 4.

1668 Cf. NASSE, Loi de vigilance, 130.

1669 UNGP 24 and Commentary thereto.

In sum, one of the most striking differences between the LdV and the SCDDA is the lack of definition of protected legal grounds and the introduction of the severity criterion in the former; the SCDDA not only lists the relevant international treaties, but also frames human rights, labour rights, and environmental abuses in terms of concrete prohibitions. This provides companies with much more legal certainty. However, neither of the Acts are fully aligned with the UNGPs regarding the range of covered human rights and labour rights abuses.[1670]

3.2 Covered Business Activities

According to art. L. 225-102-1 I para. 3 C. com., due diligence measures must cover the business activities of the company itself and the activities of companies it directly or indirectly controls within the meaning of art. L. 233-16 II C. com. Art. L. 233-16 II C. com. relates to the exclusive control in terms of decision-making power of a company over others. Control within the meaning of art. L. 233-16 II C. com. can arise in three situations. First, if a company directly or indirectly holds the majority of voting rights (legal control). Second, if a company appoints the majority of the members of the administrative, management or supervisory body during two consecutive financial years (*de facto* control). This is assumed to be the case if the controlling company directly or indirectly held more than 40% of the voting rights during this period and no other shareholder directly or indirectly held a larger share of the voting rights. Third, if a company exercises a controlling influence over another based on rights granted by contract or statutory clauses, where the applicable law so permits (contractual control).[1671] Unlike the notion of control within the meaning of art. 233-3 C. com., exclusive control within the meaning of art. L. 233-16 II C. com. may not only arise from the majority of voting rights, but also through contractual control irrespective of capital shares.[1672] The concept of exclusive control within the meaning of art. L. 233-16 II C. com. includes subsidiaries that are directly and indirectly controlled, thereby encompassing both first tier subsidiaries and lower tier subsidiaries over which a company exercises decision-making power.[1673]

1670 Similarly, NASSE, Loi de vigilance, 281.

1671 FAUCHON/MERLE, Droit commercial: 2023-2024, margin n. 797; BRABANT STÉPHANE/MICHON CHARLOTTE/SAVOUREY ELSA, The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance for Parent and Instructing companies (RICEA) 93 December 2017, original version published in French, English translation, 1 ff., 2; BUENO/BRIGHT, ICLQ 2020, 802.

1672 Cf. Section I 2. of this Chapter.

1673 SCHILLER SOPHIE, Exégèse de la loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre, La Semaine Juridique – Entreprise et Affaires (JCP E)

In addition, due diligence measures must cover the business activities of 'subcontractors *(sous-traitants)* and suppliers *(fournisseurs)*'[1674] with which there is 'an established commercial relationship' within the meaning of art. L. 442-1 II C. com, if these business activities are linked to that commercial relationship.[1675] Art. L. 442-1 II C. com. holds business partners liable for the abrupt termination *(rupture brutale)* of an established commercial relationship. The notion of an established commercial relationship has been concretised in extensive case law and thus considered sufficiently clear in light of the principle of legality by the Constitutional Council.[1676] According to a formula of the *Cour de Cassation* (French Supreme Court), the commercial relationship between the parties prior to the termination must be of a continuous, stable and regular nature, and concern a certain volume of business, so that the party affected by the termination could reasonably rely on a certain continuity of the commercial relationship with its business partner in the future.[1677] These criteria are primarily assessed in economic rather than legal terms.[1678] The relationship between the parties therefore does not necessarily have to be based on a contract.[1679] Normally, liability only arises for the business partner that abruptly terminates an established commercial relationship with its subcontractor or supplier. Exceptionally, liability may arise in constellations with third parties as well.[1680] For instance, in a commercial dispute, the *Court de Cassation* has previously held the parent company of a subsidiary liable, which abruptly

2017, 1193; BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 2; BUENO/BRIGHT, ICLQ 2020, 802.

1674 The term subcontractor, like other terms, in not defined in the LdV. However, in parliamentary deliberations, reference was made to the definition of subcontracting provided in art. 1 of the Subcontracting Act 1975 (loi nº 75-1334 du 31 décembre 1975 relative à la sous-traitance) (National Assembly, Report no. 2628, 65). Pursuant to art. 1 of the Subcontracting Act 1975, subcontracting is the operation by which a contractor, entrusts another person, i.e. the subcontractor *(sous-traitant)*, with the performance of all or part of a service contract entered into with the principal *(maître de l'ouvrage)* under the contractor's responsibility. However, the term *fournisseur* is less normatively prescriptive and covers a broader range of constellations than *sous-traitant*. The term *fournisseur* namely encompasses any natural or legal person that provides goods or services (see, REYGROBELLET, RLDA 2017, margin n. 19; BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 3).

1675 Cf. National Assembly, Report no. 2628, 71; GCE Report 2020, 18.

1676 C. C. Décision nº 2017-750 DC, 23.3.2017, para. 22.

1677 Cf. Cour de cassation, chambre commerciale, 15 septembre 2009, pourvoi nº 08-19.200; Cour de cassation, chambre commerciale, 20 mars 2012, pourvoi nº 10-26.220.

1678 Cour de Cassation, chambre commerciale, 16 décembre 2008, pourvoi nº 07-15.589, publié au bulletin 2008, IV, nº 207. See also, HANNOUN, Droit Social 2017, 810.

1679 Cour de Cassation, chambre commerciale, 9 mars 2010, pourvoi nº 09-10.216.

1680 NASSE, Loi de vigilance, 99.

terminated an established commercial relationship with a supplier. While the established commercial relationship only existed between the subsidiary and the supplier, the parent company acted as the sole decision-maker for its wholly-owned (100%) subsidiary. The subsidiary thus had no autonomy in the decision to terminate the commercial relationship, and the parent company was held liable as a consequence.[1681]

Certain commentators argue that the case law on the *rupture brutale* delineated the concept of an established commercial relationship in a different context and with different objectives from the LdV. These commentators note that the case law has namely been developed with the objective of safeguarding commercial parties in the event of a sudden termination of an established commercial relationship, and thus question whether it ought to be transposed to the LdV, which aims to protect rights-holders from human rights and labour rights abuses as well as environmental damage.[1682] HANNOUN concludes that while the concept of an established commercial relationship should be based on the case law adopted in relation to the *rupture brutale,* its interpretation should be tailored to the specific objectives of the LdV.[1683]

Whether the criterion of an established commercial relationship will be interpreted in light of art. L. 442-1 II C. com. will determine how deep due diligence obligations will reach into the supply chain. As per the interpretation of an established commercial relationship within the meaning of art. L. 442-1 II C. com., the obliged company would, for instance, have to have an established commercial relationship with an indirect supplier (tier 2) for the due diligence obligations to encompass the activities of the indirect supplier.[1684] Such an interpretation of art. L. 225-102-1 I para. 3 C. comm. would, however, be contrary to the legislative objective of the Act, i.e. the prevention of disasters such as the collapse of the Rana Plaza building that involved indirect suppliers from lower tiers.[1685] Furthermore, a focus on direct relationships would disregard human rights risks where they are most severe, i.e. at lower tiers of the supply chain and at subcontractors and suppliers that do not have a stable business

1681 Cour de Cassation, chambre commerciale, 9 juillet 2016, pourvoi nº 14-27.030.

1682 HANNOUN, Droit Social 2017, 810; REYGROBELLET, RLDA 2017, margin n. 20. See also, Sherpa, Vigilance Plans Guidance, 33.

1683 HANNOUN, Droit Social 2017, 810. See also, Sherpa, Vigilance Plans Guidance, 33.

1684 Cf. NASSE, Loi de vigilance, 100.

1685 Cf. National Assembly, 'Rapport d'information sur l'évaluation de la loi du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre', Nº 5124 (24 February 2022), 38. See also, HANNOUN, Droit Social 2017, 807; Sherpa, Vigilance Plans Guidance, 33; NASSE, Loi de vigilance, 101; FRANÇOIS BÉNÉDICTE, Un devoir de vigilance: enjeux et perspectives, Revue des Sociétés (RdS) 2023, 582 ff., margin n. 9.

relationship with the company.[1686] In addition, it would not be aligned with the UNGPs which require due diligence to be conducted throughout the value chain.[1687] Some commentators thus argue in favour of an interpretation of the LdV in light of the UNGPs, according to which the notion of an established commercial relationship should be understood beyond a direct or first tier contractual relationship.[1688] However, they do not propose a more concrete alternative to delimit the responsibility of the obliged company.

Art. L. 225-102-1 I para. 3 C. com. is also unclear as to whether an obliged company must solely include the activities of its subcontractors and suppliers in its vigilance plan, or if it also has to include the activities of the subcontractors and suppliers of the companies it controls.[1689] The various versions of the draft law and the parliamentary debates would indicate that both subcontractors and suppliers of the obliged company and those of the companies which it controls have to be included.[1690] This understanding is echoed in a government statement on the LdV.[1691] On the other hand, the case law on the *rupture brutale* would suggest a more restrictive interpretation whereby due diligence obligations normally only extend to subcontractors and suppliers to whom the parent company itself has an established commercial relationship. Such a restrictive interpretation also seems more appropriate in view of the fact that the Constitutional Council confirms the constitutionality of the LdV precisely

1686 Cf. TRIPONEL ANNA / SHERMAN JOHN, 'Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law', International Bar Association (17 May 2017).

1687 Cf. Commentary to UNGP 13 and UNGP 17 (a).

1688 BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 5 f.; Sherpa, Vigilance Plans Guidance, 33; FRANÇOIS, RdS 2023, margin n. 9. See also, QUERENET-HAHN/BABST, CB 2022, 353. In contrast, NASSE argues that, for the sake of legal certainty, it must be assumed that due diligence obligations only extend to subcontractors and suppliers with whom the obliged company has a direct established commercial relationship, until a court rules otherwise (NASSE, Loi de vigilance, 103). See also, DANIS-FATÔME ANNE / VINEY GENEVIÈVE, La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Recueil Dalloz (RD) 2017, 1610 ff., 1613; SCHILLER, JCP E 2017, 1193, margin n. 5.

1689 BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 3; SAVOUREY, in: EU Due Diligence Study: Country Reports, 67.

1690 National Assembly, 'Proposition de Loi n°708 du 23 mars 2016 relative au devoir de vigilance des entreprises donneuses d'ordre', 2; National Assembly, Explanatory Memorandum to the Draft no. 2578, 14. In the parliamentary debates it was highlighted that the 'theirs' (*leurs*) in art. 1 of the draft clearly referred to both the subcontractors and suppliers of the controlled companies and to those of the parent company (National Assembly, Report No. 3582, 29). See also, BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 3.

1691 French Government, Observations on the LdV, 1 B. Agreeing with this interpretation: Sherpa, Vigilance Plans Guidance, 32.

because the concept of an 'established commercial relationship' is well defined in commercial law.[1692]

With all the ambiguity surrounding the business activities covered by the LdV, it is unsurprising that some civil society organisations called on companies to publish a list of entities covered by their vigilance plans.[1693] The absence of such publicly accessible lists has rendered monitoring compliance with the LdV rather challenging for these civil society organisations.[1694] However, in the recently published ruling SUD PTT v. la Poste, the *Tribunal Judiciaire de Paris* holds that companies falling under the personal scope of the LdV were in fact not obliged to make such a list of subcontractors and suppliers publicly available.[1695] The court rejected the claim that such disclosure was necessary to assess the effective implementation of vigilance plans and alluded to the fact that requiring la Poste to publish such a list, potentially enumerating thousands of companies, could amount to a violation of art. L. 151-1 C. com. This provision protects companies from disclosing sensitive commercial information that could put them at a competitive disadvantage.[1696] In the case, SUD PTT, a French trade union, had alleged the usage of undocumented workers by la Poste's subcontractors and, *inter alia,* called on the Tribunal to order la Poste to improve its vigilance plan which it considered to be imprecise and inadequate.[1697]

In sum, the LdV, similarly to the SCDDA, only covers the upstream supply chain.[1698] In contrast to the SCDDA, the LdV is rather ambiguous in terms of covered business activities. It will consequently be up to courts to delineate the reach of due diligence obligations into the supply chain more precisely.[1699] Besides its ambiguity in terms of depth, the concept in the context of the LdV may also incentivise companies to increasingly rely on more temporary arrangements to avoid such established business relationships and aggravate precarious working conditions at suppliers and subcontractors, and thus inevitably human rights risks.[1700]

1692 C. C. Décision nº 2017-750 DC, 23.3.2017, para. 22. In support of a more restrictive interpretation: SCHILLER, JCP E 2017, 1193, margin n. 6; NASSE, Loi de vigilance, 102.

1693 Sherpa, Vigilance Plans Guidance, 14, 26, and 32.

1694 Cf. SAVOUREY/BRABANT, BHRJ 2021, 144.

1695 Tribunal Judiciaire de Paris, jugement du 5 décembre 2023, Nº RG 21/15827, 17.

1696 Ibid.

1697 Ibid., 4 f.

1698 Cf. BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 5. See further, Chapter 4 II 4.2.

1699 Cf. DANIS-FATÔME/VINEY, RD 2017, 1613; NASSE, Loi de vigilance, 102.

1700 Cf. Office of the High Commissioner for Human Rights (OHCHR), 'Feedback on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence' (23 May 2022) (hereinafter: OHCHR: Feedback CSDDD EU Commission Proposal), 3 f.

3.3 Content

Pursuant to art. L. 225-102-1 I para. 1 C. com., companies falling under the personal scope of the Act must establish and effectively implement a vigilance plan *(plan de vigilance)*. The plan consists of reasonable measures *(mesures de vigilance raisonnable)* that allow for the identification of risks and the prevention of serious abuses of human rights and fundamental freedoms, health and safety, and the environment (art. L. 225-102-1 I para. 3 C. com.). The plan must include the following measures: First, obliged companies are required to 'map' potential risks, i.e. identify, analyse, and rank risks. This includes establishing a complaints mechanism. Second, companies must implement a procedure to manage the risk situation at subsidiaries, subcontractors, and suppliers in line with the aforementioned risk mapping. Third, companies must take reasonable measures to mitigate risks and prevent severe harm. Fourth, companies must monitor the implementation of these measures and assess their effectiveness.[1701] These measures set out the steps that a company must go through when drawing up and implementing its vigilance plan[1702] and are comparable to the due diligence process outlined in the UNGPs[1703]. The measures may be specified by a decree of the Council of State pursuant to Art. L. 225-102-1 I para. 8 C. com. However, so far, no such decree has been issued and there is no indication that this will be the case anytime soon.[1704] As a result of this lack of official guidance, Sherpa, a French NGO, has stepped in and published its comprehensive interpretation of the Act.[1705]

The establishment and implementation of the vigilance plan is to be understood as a dynamic iterative process.[1706] The vigilance plan and the report regarding its implementation must be made public and added to the company's sustainability reporting pursuant to art. L. 225-100 para. 2 C. com.[1707] While the obligation to establish and publish a vigilance plan with the enumerated measures is an obligation of result *(obligation de résultat)*[1708], the obligation to

1701 Art. L. 225-102-1 I para. 6 nos. 1-5 C. com.

1702 Cf. SCHILLER, JCP E 2017, 1193, margin n. 7.

1703 DEVA, LJIL 2023, 19.

1704 Cf. SAVOUREY/BRABANT, BHRJ 2021, 147.

1705 See, Sherpa, Vigilance Plans Guidance.

1706 Cf. BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 9; Sherpa, Vigilance Plans Guidance, 42.

1707 Art. L. 225-102-1 I para. 7 C. com.

1708 DANIS-FATÔME/VINEY, RD 2017, 1613; MARAIN GAËTAN, Le devoir de vigilance: approche notionnelle, in: Schiller (ed.), Le devoir de vigilance, Paris 2019, 69-81, 79 margin n. 24.

prevent severe abuses of human rights and environmental freedoms, health and safety, and environmental damage, is an obligation of effort *(obligation de moyen)*[1709].

Art. L. 225-102-1 I para. 6 C. com. encourages, but does not oblige, companies to draw up their vigilance plans in consultation with relevant stakeholders *(parties prenantes),* for instance, through participation in industry and multistakeholder initiatives.[1710] The provision was criticised because it does not provide a definition of the term stakeholder, a term considered to be 'elastic' and consequently difficult to delineate.[1711] However, the Constitutional Council did not find the provision to be problematic in view of the principle of legality, as the consultation of stakeholders is not mandatory, but simply encouraged.[1712] As illustrated in previous Chapters, meaningful stakeholder engagement throughout all due diligence steps is absolutely fundamental for the credibility and effectiveness of the process.[1713] From the perspective of (potentially) affected rights-holders, the discretionary nature of stakeholder engagement in the LdV is particularly regrettable. This is because taking into account the concerns and experiences of (potentially) affected rights-holders and communities is the best way to gauge human rights and environment-related risks and evaluate the effectiveness of company responses.[1714] By failing to prescribe meaningful stakeholder engagement, the LdV decentres the perspectives of the very people in host states it aims to protect, instead of empowering them, and undervalues the expertise of local human rights experts that would be best equipped to speak on the challenges rights-holders face in a particular context.[1715] This negatively impacts the legitimacy of the LdV from a critical decolonial perspective described in Chapter 1 III 2.1 b and in

1709 National Assembly, Report no. 2628, 78 f.; National Assembly, Report No. 3582, 14; MARAIN, in: Schiller (ed.), Le devoir de vigilance, 79 margin n. 24. See also, Sherpa, Vigilance Plans Guidance, 42.

1710 An exception is the complaints mechanism pursuant to art. L. 225-102-1 I para. 6 no. 4 C. com. which must be drawn up in cooperation with representative trade unions, see Section I 3.3. a of this Chapter.

1711 BEAU DE LOMÉNIE TIPHAINE / COSSART SANDRA, Stakeholders and the Duty of Vigilance, Revue Internationale de la Compliance et de l'Ethique des Affaires (RICEA) 94 December 2017, 1 ff., 2; Sherpa, Vigilance Plans Guidance, 44.

1712 C. C. Décision nº 2017-750 DC, 23.3.2017, para. 22.

1713 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 49 f.; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 14. For an illustrative case on the importance of meaningful stakeholder engagement, see also Chapter 2 II 2.2 b.

1714 Cf. UNGP 18 and 20 (b). See also, WILKS/BLANKENBACH, Beyond Social Auditing, 4.

1715 Cf. BOSE, BHRJ 2023, 35.

conjunction with the latent 'saviour narrative' reflected in some of the comments made to the bill, leaves a bitter aftertaste.[1716]

a) Risk Mapping

According to art. L. 225-102-1 I para. 6 no. 1 C. com., companies falling under the personal scope of the LdV must first identify all risks related to human rights and fundamental freedoms, the health and safety of people, and environmental damage, irrespective of their severity, and should involve stakeholders in this process.[1717] OECD sector-specific guidance and industry and multistakeholder initiatives could provide helpful information to support companies in identifying risks in this regard.[1718] Furthermore, the complaints mechanism, mentioned separately as a mandatory element of the vigilance plan in art. L. 225-102-1 I para. 6 no. 4 C. com., could alert companies to relevant risks.

The complaints mechanism pursuant to art. L. 225-102-1 I para. 6 no. 4 C. com. must be drawn up in cooperation with representative trade unions within the company. In the previously mentioned case SUD PTT v. la Poste, the *Tribunal Judiciaire de Paris* emphasises that cooperation is to be understood as collaborating on the development of the mechanism together, rather than solely consulting trade unions regarding their perspective on the finalised mechanism.[1719] Thus, even though limited to one type of stakeholder, this provision is the exception to the otherwise discretionary stakeholder engagement. In any case, the complaints mechanism shall be designed to support companies in identifying risks and take reasonable measures to prevent risks from materialising or impacts from worsening.[1720] It can also provide valuable information regarding the effectiveness of implemented due diligence measures.[1721] Art. L. 225-102-1 I para. 6 no. 4 C. com. does not set out any minimal requirements for the mechanism, besides the mandatory involvement of trade unions in its design. However, for it to be as effective as possible, it should not only enable internal stakeholders (e.g. workers) to raise concerns and report violations, but all (potentially) affected rights-holders and communities as

1716 BOSE, BHRJ 2023, 36 ff. with reference to comments in particular made in National Assembly, Report No. 3582, 9 and 17. On the issue of neo-colonialism in connection with home state laws, see further Chapter 1 III 2.1 b.

1717 Sherpa, Vigilance Plans Guidance, 52.

1718 Ibid.

1719 Tribunal Judiciaire de Paris, jugement du 5 décembre 2023, Nº RG 21/15827, 19.

1720 BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 12.

1721 Pursuant to the UNGPs, complaints mechanisms serve three main purposes: raising concerns for (potentially) affected people, i.e. assessing risks (UNGP 18), tracking the effectiveness of company responses (UNGP 20), and providing access to remediation for human rights abuses that have occurred (UNGP 22).

well as NGOs.[1722] Furthermore, the mechanism should be accessible, protect the complainants from repercussions and overall guarantee a predictable, equitable, and transparent process.[1723] Art. L. 225-102-1 I para. 6 no. 4 C. com. does not clarify whether the complaints mechanism must include a remediation procedure.[1724] However, to align with international due diligence standards, companies should incorporate such a process.[1725] This would be consistent with the LdV's legislative purpose of providing an avenue for remedy for human rights abuses and violations of other protected grounds, and open an alternative to judicial procedures.

In a subsequent step, companies must analyse and rank identified risks according to their severity and the probability of their materialisation. To align with international due diligence standards, companies should consider the severity of risks in relative, not absolute terms. This means that companies should prioritise risks that are severe compared to other identified risks and not solely include risks related to gross human rights abuses and other gross violations of protected grounds in their mapping.[1726] The resulting 'risk map' must illustrate risks with enough precision and depth. In particular, it must enable the public and stakeholders to understand the type of risk (e.g. by referencing relevant human rights norms), which business activity it is linked to, and where it arises (in the corporate group or at the level of a subcontractor or supplier).[1727] However, the level of detail and transparency of the risk map is to be balanced against a company's business and trade secrets. Therefore, companies are, as previously stated, for instance, not obliged to publish a list of all of their business partners with which they have an established commercial relationship.[1728]

In any case, the mapping of the risks forms the basis for all further steps and thus impacts the effectiveness of the vigilance plan as a whole. As such, it is of fundamental importance and warrants special attention.[1729] Further-

1722 Cf. BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 12; SAVOUREY, in: EU Due Diligence Study: Country Reports, 69; NASSE, Loi de vigilance, 144.

1723 Cf. UNGP 31. See also, BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 12.

1724 Cf. SAVOUREY, in: EU Due Diligence Study: Country Reports, 71.

1725 UNGP 22.

1726 Cf. UNGP 24; Sherpa, Vigilance Plans Guidance, 54.

1727 Cf. Tribunal Judiciaire de Paris, jugement du 5 décembre 2023, N° RG 21/15827, 9 and 15 f. See also, Sherpa, Vigilance Plans Guidance, 51.

1728 Tribunal Judiciaire de Paris, jugement du 5 décembre 2023, N° RG 21/15827, 17. See also Section I. 3.2 of this Chapter.

1729 BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 10; SCHILLER, JCP E 2017, 1193, margin n. 7. See also, Tribunal Judiciaire de Paris, jugement du 5 décembre 2023, N° RG 21/15827, 9.

more, it should be evaluated on a regular basis and adapted to new circumstances if necessary. The Act does not contain any indication of how often this should take place. Companies should therefore regularly evaluate their risk mapping in line with UNGP 18, i.e. prior to significant decisions or changes in operations such as market entry and product launches, and as a reaction to or in expectation of contextual changes such as rising social tensions, and periodically throughout the life of an activity or relationship.

b) Procedure for Risk Management Related to the Activities of the Corporate Group and Beyond

According to art. L. 225-102-1 I para. 6 no. 2 C. com., companies must, based on their risk mapping, establish a procedure for risk management related to the situation of subsidiaries, subcontractors, and suppliers. The wording of the provision is unclear regarding the assessment related to the business activities of corporate groups because it refers to subsidiaries and not 'controlled companies' as in art. L. 225-102-1 I para. 3 C. com. To ensure coherence with the reach of the LdV prescribed in art. L. 225-102-1 I para. 3 C. com., the procedure would also have to apply to controlled companies within the meaning of art. L. 233-16.[1730]

The LdV does not specify the methodology and implementation of these procedures. According to SHERPA's Guidance, announced and unannounced social audits, on-site visits, questionnaires, and self-assessments of controlled companies, subcontractors, and suppliers are potential tools.[1731] In the case SUD PTT v. la Poste, the *Tribunal Judiciaire de Paris* considered social audits to be 'potentially effective assessment tools'.[1732] However, to align themselves with international due diligence standards companies should carefully consider the credibility and limitations of social audits, certifications, etc., and only employ them in combination.[1733] In any case, the procedure for risk management should be regularly reviewed and adapted where necessary, and should be informed by meaningful engagement with stakeholders.[1734]

1730 REYGROBELLET, RLDA 2017, margin n. 16; NASSE, Loi de vigilance, 135. See also, Sherpa, Vigilance Plans Guidance, 56, referring to the definition of the 'organisational perimeter' of the LdV in art. L. 225-102-1 I para. 3 C. com.

1731 Sherpa, Vigilance Plans Guidance, 57.

1732 Tribunal Judiciaire de Paris, jugement du 5 décembre 2023, Nº RG 21/15827, 19.

1733 OECD RBC Guidance, 18, 50, and 66 f.; OECD, Sustainability Initiatives & HRDD, 11 ff. and 17. For a discussion of the reliance on social audits for evidence of compliance in recent case law in the French context, see BOURGEOIS LAURA, Le risque d'extension illégitime de la force probante des audits en matière de respect des droits humains, Revue Lamy Droit des Affaires (RLDA) 2024, 35 ff.

1734 Sherpa, Vigilance Plans Guidance, 57. See also, OECD RBC Guidance, 18, 50, and 66 f.

c) Appropriate Measures for Risk Mitigation and Prevention of Serious Abuses

Companies must then outline and implement appropriate measures *(actions adaptées)* to prevent and mitigate risks and severe human rights abuses and violations of other protected grounds, based on their risk mapping and risk management in the previous steps (art. L. 225-102-1 I para. 6 no. 3 C. com.). Again, the LdV neither elaborates on these measures nor does it define the factors to determine their appropriateness. Companies should therefore interpret this provision in line with international due diligence standards.[1735] Accordingly, appropriate measures will depend on the type of risk and should be proportionate to its severity. Furthermore, the scope and complexity of the measures may vary according to the company's business sector, operating environment, etc.[1736] To help companies tailor their measures to their specific risk profile and circumstances, companies should follow OECD sector-specific guidance, participate in industry and multistakeholder initiatives, and join enforceable brand agreements, such as the International Accord. Industry and multistakeholder initiatives and enforceable brand agreements can provide a platform to jointly address risks. As highlighted in previous Chapters, mere participation in the former should, however, never be conflated with effective due diligence.[1737] In any case, the development, implementation, and evaluation of appropriate preventative measures should always involve meaningful stakeholder engagement.[1738]

More problematic is the fact that the LdV fails to expressly recognise the need to terminate business relationships under certain circumstances and define the limits of due diligence in achieving respect for human rights in particular settings.[1739] An interpretation of the LdV in light of the UNGPs would not offer much guidance either, as the UNGPs themselves are rather vague in this regard.[1740] As a result, companies may legitimise entering certain markets

1735 Cf. BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 11; Sherpa, Vigilance Plans Guidance, 60.

1736 UNGP 14.

1737 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 12; OECD, Sustainability Initiatives & HRDD, 12. For a case illustrating this issue, see Chapter 2 II 2.1 c.

1738 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 50.

1739 DEVA, LJIL 2023, 19.

1740 DEVA, in: Deva/Bilchitz (eds.), Human Rights Obligations of Business, 87; VAN HO, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 379; QUIJANO/LOPEZ, BHRJ 2021, 251 ff.; POLASCHEK, BHRJ 2021, 573 f. See further, Chapter 2 I 3.2 g.

or remaining in countries or regions, where gross human rights abuses are endemic, and potentially even state-backed, with the argument of having a due diligence process in place, despite the near inevitability of involvement in gross human rights abuses.[1741]

Since the LdV does not outline situations in which disengagement from business relationships is necessary, it also does not define the criteria for responsible disengagement.[1742] As previously outlined in the preceding Chapter, responsible disengagement would entail that companies carefully consider and mitigate the potential adverse impacts disengagement would have on rights-holders, such as job loss for workers.[1743]

d) Monitoring

Pursuant to art. L. 225-102-1 I para. 6 no. 5 C. com., the vigilance plan must lastly include a system to monitor the measures taken and evaluate their effective implementation. This provision, again, reflects the fact that the obligation to draw up a vigilance plan must be understood as a dynamic process requiring regular review and adaptation to changing circumstances. The evaluation therefore includes all previous steps – from risk mapping and risk management in the corporate group and beyond to preventive measures.[1744] To monitor effectiveness, companies should particularly pay attention to points raised through their engagement with stakeholders, for instance, through the complaints mechanism.[1745]

e) Publication of the Vigilance Plan and Reporting

Lastly, companies must publish their vigilance plans and report on the latter's implementation pursuant to art. L. 225-102-1 I para. 7 C. com. The report must also be publicly accessible and, together with the vigilance plan, attached to the company's annual management report.[1746] The publication of the vigilance plan and its effective implementation is primarily intended to enable civil society organisations and other stakeholders to verify its existence and

1741 Cf. VAN HO, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 385 ff.; QUIJANO/LOPEZ, BHRJ 2021, 251 ff.; DEVA, LJIL 2023, 18. See further, Chapter 2 I 3.2 g.

1742 Cf. DEVA, LJIL 2023, 19.

1743 Cf. Commentary to UNGP 19; OECD Guidelines 2023, II. General Policies, Commentary on Chapter II: General Policies, para. 25. See further, Chapter 2 I 3.2 g.

1744 BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 12.

1745 UNGP 20 (b).

1746 Art. L. 225-102-1 I para. 7 in conjunction with art. L. 225-100 I para. 2 and art. L. 225-102 C. com.

assess its quality.[1747] It may also prompt consumers to exercise their right under art. L. 113-1 C. consom. to request information on the conditions under which a specific product has been manufactured, including respect for human rights.[1748]

4. Enforcement

4.1 Public Enforcement

The LdV does not establish a regulatory oversight body to enforce compliance with the Act. Thus, civil society organisations and other stakeholders bear the burden of monitoring compliance alone. It is primarily incumbent upon them to ascertain whether covered companies have drawn up, implemented, and published an appropriate vigilance plan in accordance with the LdV, and initiate court proceedings in the event of any such failures.[1749] This resource-intensive task is complicated by the government's reluctance[1750] to provide a list of companies falling under the personal scope of the LdV.[1751]

This is one of the most striking differences between the LdV and the SCDDA, as the latter established the BAFA as the competent oversight authority with extensive powers to investigate breaches and impose high administrative sanctions.[1752] The establishment of a robust public oversight mechanism is one of the SCDDA's greatest strengths. This is because the SCDDA enables the prevention of human rights abuses without relying on claimants initiating costly and potentially lengthy civil proceedings with uncertain outcomes.

4.2 Private Enforcement

a) Complaint to Comply with Obligations under the LdV

After having given an unsuccessful three months' formal notice *(mise en demeure)* requesting a non-compliant company to establish, implement, and

1747 BRABANT/MICHON/SAVOUREY, RICEA 93 Dec. 2017, 13.

1748 Cf. PORDZIK PHILIPP CHRISTIAN, Transsubjektive Deliktsverantwortlichkeit. Verortung und Reichweitenbestimmung menschenrechtlicher Sorgfaltspflichten, doctoral thesis, Albert Ludwig University Freiburg, Tübingen 2022, Chapter 3, 33. See also, Section I 3.1 of this Chapter.

1749 CHAMBERS/YILMAZ VASTARDIS, ChiJIntL 2021, 357; NASSE, Loi de vigilance, 148.

1750 See Section I 2. of this Chapter.

1751 CCFD Terre Solidaire / Sherpa, Le radar du devoir de vigilance (June 2020), 5; CHAMBERS / YILMAZ VASTARDIS, ChiJIntL 2021, 336; COSSART/MAMLOUK, 10 Years on from Rana Plaza, Cambridge Core Blog. See also, ROUAS VIRGINIE, Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries, doctoral thesis, University of London, London 2022, 304 f.

1752 Cf. QUERENET-HAHN/BABST, CB 2022, 355. See further, Chapter 4 II 5.1.

publish a vigilance plan, anyone with a standing, i.e. victims or civil society organisations, may file a complaint with the competent French court to order the company to fulfil its obligations under the LdV *(injonction)*.[1753] The *injonction* is a preventive mechanism. Unlike a liability claim, which presupposes damage[1754], the *injonction* is directed solely at the question of conformity of the company's vigilance plan with the obligations set forth in the Act and allows for necessary amendments to be enforced before harm occurs (e.g. human rights abuses).[1755] The enforcement of the court order can be connected with periodic penalty payments *(astreintes)* until the company follows up with its obligation.[1756] Prior to the Constitutional Council's decision, the bill had also enabled judges to impose a fine of up to EUR 10 million.[1757]

NGOs have played a significant role in the enforcement of the LdV by delivering formal notices to companies and filing complaints to the competent courts.[1758] Until fairly recently, it was unclear whether civil courts or commercial courts were competent to order companies to fulfil their due diligence obligations under the Act.[1759] NGOs had questioned the suitability of commercial courts. This is because the judges of the commercial court are composed of laypersons with a background in business and trade. NGOs had expressed concern that commercial courts may judge the question of compliance with the LdV in a more business-friendly manner than civil courts.[1760]

1753 Art. L. 225-102-1 II C. com.

1754 See the following Section on civil liability.

1755 BRABANT STÉPHANE / SAVOUREY ELSA, 'All Eyes on France – French Vigilance Law First Enforcement Cases (1/2) Current Cases and Trends', Business and Human Rights Journal Blog (24 January 2020); NASSE, Loi de vigilance, 160. See also, COSSART SANDRA / SILVESTRE MATHILDE, Four Years Later – the Impact and Potential of the French Law on the Duty of Vigilance, Zeitschrift für Menschenrechte (ZfMR) 2021, 81 ff., 89 f.

1756 Art. L. 225-102-1 II C. com. See further, BRABANT STÉPHANE / SAVOUREY ELSA, A Closer Look at the Penalties Faced by Companies, Revue Internationale de la Compliance et de l'Ethique des Affaires (RICEA) December 2017, original version published in French, English translation, 1 ff., 4; COSSART / CHAPLIER / BEAU DE LOMENIE, BHRJ 2017, 321; SAVOUREY/BRABANT, BHRJ 2021, 149

1757 COSSART / CHAPLIER / BEAU DE LOMENIE, BHRJ 2017, 321; FRANÇOIS, RdS 2023, margin n. 23. See further, Section I 1. of this Chapter.

1758 For an overview on cases, see, e.g., Sherpa / CCFD Terre Solidaire / Business & Human Rights Resource Centre, Duty of Vigilance Radar, Ongoing cases.

1759 Since the 'reform for confidence in the judiciary' (loi nº 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire), art. L. 211-21 of the French Judicial Code (*Code de l'organisation judiciaire*, COJ) declares the *Tribunal Judiciare de Paris* to have exclusive jurisdiction to hear disputes over the LdV.

1760 Friends of the Earth International, 'Total abuses in Uganda: French High Court of Justice declares itself incompetent in favour of the Commercial Court' (30 January 2020). For an in-depth analysis of the question of jurisdiction before the legal reform, see NASSE, Loi de vigilance, 167 ff.

The issue of jurisdiction prominently featured in the previously mentioned Total cases.[1761] In the case against Total for its activities in Uganda, the Nanterre Civil Court referred the case to the commercial court.[1762] This decision was upheld by the Versailles Court of Appeal in December 2020.[1763] The Versailles Court of Appeal considered that the development and implementation of a vigilance plan were directly related to the management of a company and would thus constitute a commercial act *(acte commercial),* not a mixed act *(acte mixte).* The latter would have enabled claimants to choose to bring the matter either before a civil court or a commercial court.[1764]

The Nanterre Civil Court, which is the same court that heard the case against Total for its activities in Uganda, reached a different conclusion in the climate-related Total case. The judge ruled that the claimants in fact have the option to choose between the civil court and the commercial court. In order to arrive at that conclusion, the judge relied on the absence of provisions in the LdV regarding the exclusive jurisdiction of the commercial court and the non-trader status of the claimants. The judge held that, while the vigilance plan is undoubtedly linked to Total's commercial activities, its purpose and the risks it seeks to prevent transcend the commercial aspect and fall under the purview of the company's 'corporate social responsibility'. The judge thus concluded that the exclusive jurisdiction of the commercial court was not justified.[1765]

In December 2021, this issue of conflicting rulings was settled in two steps: Firstly, through a decision rendered on 15 December 2021 by the *Court de Cassation* in the Uganda case: The court held that the elaboration and implementation of the vigilance plan does not constitute a commercial act and that the claimants, as non-traders, have the choice to bring their case either before a civil court or before a commercial court.[1766] Secondly, through the adoption of a new law that introduced art. L. 211-21 into the French Judicial Code according to which the *Tribunal Judiciare de Paris,* i.e. the civil court in Paris, hears cases brought under the LdV.[1767] Within the *Tribunal Judiciare*

1761 See Section I 3.1 of this Chapter.

1762 Tribunal judiciaire de Nanterre, ordonnance de référé rendue le 30 janvier 2020, nº R.G. 19/02833, 10.

1763 Court d'appel de Versailles, 10 décembre 2020, nº R.G. 20/01692, 20.

1764 Ibid., 17.

1765 Tribunal judiciaire de Nanterre, 11 février 2021, nº R.G. 20/00915, 11.

1766 Cour de Cassation, chambre commerciale, 15 décembre 2021, pourvoi nº 21-11.882, para. 6.

1767 Loi nº 2021-1729 du 22 décembre 2021 pour la confiance dans l'institution judiciaire, Journal officiel de la République Française nº 0298 du 23 décembre 2021.

de Paris, a new chamber specialising in disputes arising from the LdV and similar social, economic, and environmental matters was even created.[1768] The creation of this specialised chamber is a welcome development, as it recognises the distinct nature of these high-stakes proceedings, and demonstrates a commitment to addressing the complexities of disputes related to human rights and environmental due diligence.[1769]

After this odyssey through multiple judicial instances, the *Tribunal Judiciare de Paris* dismissed the case regarding Total's activities in Uganda for formal reasons.[1770] The court held that the accounts the claimants had initially submitted when filing their formal notice back in 2019 differed substantially from the claims presented to the court.[1771] Furthermore, it emphasised that the primary objective of the formal notice was to initiate a compulsory phase of dialogue and amicable exchange between the parties, during which the company could respond to the criticism levelled against its vigilance plan and consider amendments. The court deemed this dialogue to be crucial because the LdV neither prescribes a precise methodology for the development of the vigilance plan nor does it reference the relevant norms to be respected.[1772] In addition, the court ruled that in these summary proceedings, it could only examine whether a company had drawn up a vigilance plan, which the defendant did in the present case, and whether the vigilance plan manifestly breached the requirements under the LdV. According to the court, the assessment of the reasonableness of the measures adopted in the vigilance plan required an in-depth examination of the facts of the case in ordinary proceedings.[1773]

1768 Tribunal judiciaire de Paris, 'Communiqué de presse relatif à la création de la 34ème chambre, intitulée chambre de la régulation sociale, économique et environnementale', Press Release (17 September 2024), available in French.

1769 AKIN SENIHA IREM, 'Implications of the French Vigilance Law for the EU: A Comparison with the CSDDD', Business and Human Rights Journal Blog (19 December 2024) (hereinafter: AKIN, Implications of the LdV for the EU, BHRJ Blog). See also, DE PINIEUX MARIE, 'Toward a Better Enforcement of the French "Vigilance" Law by the Courts?', Business and Human Rights Journal Blog (12 December 2024 (hereinafter: DE PINIEUX, Toward Better Enforcement of the LdV, BHRJ Blog).

1770 Tribunal Judiciaire de Paris, jugement rendu en état de référé le 28 février 2023, Nº RG 22/53942, 24.

1771 Ibid., 23.

1772 Ibid., 19.

1773 Ibid., 21. For a brief discussion of these procedural issues, see also ROUAS VIRGINIE, 'Is Mandatory Human Rights and Environmental Due Diligence a Paper Tiger? Lessons from the French Experience (Part II)', Oxford Human Rights Hub (19 December 2023).

In the climate-related Total case, the *Tribunal Judiciare de Paris* declared the legal action inadmissible for similar reasons.[1774] After several years of litigation, it is unsurprising that these rulings left the claimants and other civil society actors questioning the effectiveness of the *injonction* procedure.[1775] However, in the climate-related Total case, the claimants appealed the *Tribunal Judiciare de Paris*'s decision.[1776] On 18 June 2024, the Paris Court of Appeal deemed the climate-related Total case admissible[1777], thereby clearing the way for the judicial review of the case's merits.[1778] With this ruling, the Paris Court of Appeal provided important clarifications regarding the *injonction* procedure. First, the Paris Court of Appeal held that the claims presented to the court and the claims set out in the formal notice do not have to be strictly identical; it suffices if the claims made in the formal notice and the claims presented before the court refer to the same categories of risk, harm, and obligations to be complied with. According to the Paris Court of Appeal, the LdV does not require the claims made in the formal notice and the claims presented to the court to relate to the same vigilance plan in terms of date. This is because the company in question may have amended its vigilance plan, while still breaching its due diligence obligations under the Act as outlined in the formal notice. It will then be up to the judge to determine whether the company has indeed breached its obligations under the Act.[1779] Second, the Paris Court of Appeal recognised the right of any person with an interest in bringing a complaint before a court after a formal notice has been issued, regardless of whether that person was a signatory party to the formal notice.[1780] Third, with regard to the legal standing of local authorities such as the city of Paris, the Paris Court of Appeal held that it was necessary to demonstrate a local public

1774 Tribunal Judiciaire de Paris, ordonnance du juge de la mise en état rendue le 6 juillet 2023, Nº RG 22/03403, 17, 19, and 23. For a bief discussion of both cases, see BRÉMOND ZÉRAH, 'Corporate Duty of Vigilance and Environment, Some Lessons Drawn from the EDF and the TotalEnergies Cases', Verfassungsblog (6 April 2023).

1775 Cf. Notre Affaire à Nous, 'Climate Change Trial Against TotalEnergies: A Worrying Ruling That the Action Brought by Associations and Local Authorities is Inadmissible', Press Release (6 July 2023). See also, CCFD Terre Solidaire / ECCHR / ProDESC, 'From Rights to Reality: Ensuring a Rights-Holder-Centred Application of the French Duty of Vigilance Law', Report (May 2023) (hereinafter: CCFD Terre Solidaire / ECCHR / ProDESC, From Rights to Reality), 34.

1776 Sherpa / Notre Affaire à tous / France Nature Environnement et al., Press Release: Appeal in Total Climate Case.

1777 Cour d'Appel de Paris, ârret du 18 juin 2024, RG nº 23/14348, 42 ff.

1778 Sherpa / Notre Affaire à tous / France Nature Environnement et al., Press Release: Paris Court of Appeal's Decision in Total Climate Case.

1779 Cour d'Appel de Paris, ârret du 18 juin 2024, RG nº 23/14348, 22.

1780 Ibid., 24.

interest in bringing the complaint. For the present case, this meant that local authorities had to demonstrate a specific threat or a particular impact of climate change to their territory; the general harmful impact of global warming on their territory was ruled to be insufficient to establish their legal standing by the Court. Consequently, the Paris Court of Appeal rejected the legal standing of some of the intervening authorities in the case.[1781] By clarifying the former two points, this ruling reduces procedural hurdles for claimants seeking to obtain *injonctions* and takes a stand against an overly restrictive interpretation of the Act.[1782]

In the previously mentioned case SUD PTT v. la Poste the claimants were also able to attain a partial success: the *Tribunal Judiciaire de Paris* not only declared the case admissible, but also ruled in favour of several of the claimants' demands. The court namely considered la Poste's risk mapping to be too generic and superficial and thus in breach of art. L. 225-102-1 I para. 6 no. 1 C. com.[1783] As a consequence, the court held that the procedure for risk management pursuant to art. L. 225-102-1 I para. 6 no. 2 C. com. was also deficient.[1784] In addition, the Tribunal noted that the defendant was not able to demonstrate that it had established the complaints mechanism pursuant to art. L. 225-102-1 I para. 6 no. 4 C. com. in cooperation with representative trade unions.[1785] Lastly, the court considered the defendant's monitoring system pursuant to art. L. 225-102-1 I para. 6 no. 5 C. com. to be inadequate.[1786] As a result, the court ordered the defendant to improve the due diligence measures in question and update its vigilance plan accordingly.[1787] This groundbreaking decision marked the first time a court ruled on the merits of a case and assessed a company's compliance with the requirements of the LdV.[1788] It

1781 Cour d'Appel de Paris, ârret du 18 juin 2024, RG nº 23/14348, 26 f.

1782 Cf. DE PINIEUX, Toward Better Enforcement of the LdV, BHRJ Blog; KILIMCIOĞLU BEGÜM, 'The French Loi sur le devoir de Vigilance: The Main Procedural Issues Faced by Plaintiffs so far', Business and Human Rights Journal Blog (12 December 2024) (hereinafter: KILIMCIOĞLU, The LdV: Main Procedural Issues, BHRJ Blog).

1783 Tribunal Judiciaire de Paris, jugement du 5 décembre 2023, Nº RG 21/15827, 16.

1784 Ibid., 18 f.

1785 Ibid., 20.

1786 Ibid., 27.

1787 Ibid., 28.

1788 DE PINIEUX, Toward Better Enforcement of the LdV, BHRJ Blog; KILIMCIOĞLU, The LdV: Main Procedural Issues, BHRJ Blog; PIETROPAOLI IRENE / ELLIOTT JASMINE / GONZALEZ DE AGUINAGA SOFIA, 'Towards New Human Rights and Environment Due Diligence Laws: Reflections on Changes in Corporate Practice', British Institute of International and Comparative Law (BIICL), Report (15 October 2024) (hereinafter: PIETROPAOLI/ELLIOTT/GONZALEZ DE AGUINAGA, Towards New HREDD Laws), 6.

demonstrates that the *injonction* procedure has the potential to be an effective preventative instrument to force companies to comply with their obligations under the LdV; nevertheless, its effectiveness will largely depend on the interpretation of courts.

b) Civil Liability

Pursuant to art. L. 225-102-2 para. 1 C. com., the non-fulfilment of the obligations set out in Art. L. 225-102-1 C. com. gives rise to civil liability within the meaning of art. 1240 and art. 1241 C. civ. According to art. 1240 C. civ., anyone who causes damage to another person through their misconduct is obliged to compensate them. While this initially only refers to wilful misconduct, art. 1241 C. civ. clarifies that negligence can also give rise to liability. Art. L. 1240 and art. 1241 C. civ. establish a fault-based liability, which is ultimately based on three conditions: a breach, damage, and causation between the two.[1789] A company falling under the personal scope of the LdV would notably not be liable for the fault of its subsidiary, supplier or subcontractor, which led to the damage. Indeed, the company would be liable for its own fault, i.e. its failure to comply with its due diligence obligations under the LdV, if this non-compliance resulted in damage that the fulfilment of due diligence obligations could have prevented.[1790]

The enforcement of due diligence obligations under the LdV through fault liability raises at least two questions that courts will have to address.[1791] The first question arises as to what constitutes a breach of the obligation to effectively implement a vigilance plan in practice. This obligation is an obligation of effort, whereby companies are expected to take all reasonable steps to achieve a certain result, rather than to guarantee the actual achievement of that result, i.e. the prevention of severe violations of human rights and fundamental

1789 BRABANT/SAVOUREY, RICEA Dec. 2017, 2; BUENO/BRIGHT, ICLQ 2020, 803.

1790 C. C. Décision nº 2017-750 DC, 23.3.2017, para. 27; SAVOUREY, in: EU Due Diligence Study: Country Reports, 68.

1791 These questions presuppose that the LdV would be applicable in a transnational claim in the first place. Normally, the applicable law would be the law of the host state in which the damage has occurred (cf. MALECKI who refers to this private international law issue as the 'Achilles heel' of the LdV, MALECKI, Bull. Joly Soc. 2017, 302). Nevertheless, several potential solutions to this issue have been discussed in depth in the literature, see PATAUT ETIENNE, Le devoir de vigilance – Aspects de droit international privé, Droit Social 2017, 833 ff.; MUIR WATT HORATIA, Devoir de vigilance et droit international privé – Le symbole et le procédé de la loi du 27 mars 2017, Revue Internationale de la Compliance et de l'Ethique des Affaires (RICEA) December 2017, 48 ff.; SINOPOLI LAURENCE, Ancrer la 'RSE' des multinationales – Pistes sur le terrain des conflits de lois, Cahiers de droit de l'entreprise nº5, Septembre-Octobre 2017, 38 ff.; NASSE, Loi de vigilance, 220 ff. See also, BOSKOVIC OLIVERA, Quelle extraterritorialité pour le devoir de vigilance?, Revue des Sociétés (RdS) 2023, 590 ff., margin n. 13 f.

freedoms, health and safety, and environmental damage.[1792] The claimant will be required to prove that the company has breached this obligation of effort, which will likely be challenging in practice, as the evidence will regularly be held by the company. The second question concerns causation. The claimant will have to demonstrate that the damage occurred as a result of a breach of due diligence obligations under the LdV and that there is a direct causal link between the breach and the resulting damage.[1793] This is challenging as it is, but becomes even more intricate when a subsidiary or a business partner with whom the company has an established commercial relationship is involved in the harm.[1794] For instance, victims of the Rana Plaza disaster would have to prove that the collapse of the factory building and the resulting damage could have been prevented if the French instructing company had drawn up and effectively implemented a vigilance plan. In addition to the lack of insight into the internal policies and processes of the instructing company, the difficulty in proving a breach and its causality for the damage suffered also stems from the vagueness of due diligence obligations under the LdV.[1795]

So far, only few civil liability claims have been brought and none has been decided on the merits yet. One of these civil liability suits is the Envol Vert et al. v. Casino case. In this lawsuit, several NGOs accuse the supermarket chain Casino of selling beef in its Brazilian and Colombian shops that comes from cattle raised on deforested land in South America. The NGOs argue that the occurrence of fires in the Amazon, resulting from excessive deforestation, pollutes the air and poses significant health hazards for the inhabitants of the region. Furthermore, they allege that the expansion of grazing land into the territories of indigenous peoples violates their rights and destroys numerous species and ecosystems. In addition, they claim that the destruction of forests, which bind large amounts of CO2, contributes significantly to global warming.[1796] The NGOs contend that Casino had not taken reasonable and effective measures to exclude beef linked to deforestation and the appropriation of

1792 BRABANT/SAVOUREY, RICEA Dec. 2017, 2; COSSART / CHAPLIER / BEAU DE LOMENIE, BHRJ 2017, 321; BUENO/BRIGHT, ICLQ 2020, 803. See also, ROUAS, Achieving Access to Justice, 307.

1793 COSSART / CHAPLIER / BEAU DE LOMENIE, BHRJ 2017, 321; BUENO/BRIGHT, ICLQ 2020, 803. See also, SCHILLING-VACAFLOR, HRR 2021, 113 f. and 115.

1794 BUENO/BRIGHT, ICLQ 2020, 803. See further, CCFD Terre Solidaire / ECCHR / ProDESC, From Rights to Reality, 31.

1795 NASSE LAURA, Devoir de vigilance, Die neue Sorgfaltspflicht zur Menschenrechtsverantwortung für Großunternehmen in Frankreich, Zeitschrift für Europäisches Privatrecht (ZeuP) 2019, 774 ff., 796.

1796 Assignation devant le Tribunal judiciaire de SaintÉtienne, Envol Vert et al. v. Casino S.A. (3 March 2021), 10 ff.

indigenous land from its supply chain in Brazil and Colombia.[1797] The NGO coalition is claiming damages totalling EUR 3,360,000.[1798] The case is currently pending before the *Tribunal Judiciaire de Paris*. No decision has been published on the merits yet.[1799]

In contrast to the German SCDDA, the LdV does not contain any provisions intended to facilitate access to French courts by allowing representative actions, whereby a third party, such as an NGO or trade union, could sue companies on behalf of rights-holders.[1800] Furthermore, the French Constitutional Council observed that the general rules of civil liability could not be interpreted in a way that permits such representative actions, as only victims possess standing.[1801] Besides reinforcing practical hurdles, such as linguistic barriers and litigation costs, and massive power imbalances between rights-holders and large French companies, this also means that rights-holders may be more exposed to reprisals.[1802] Thus, art. L. 225-102-2 para. 1 C. com. falls short of UNGP 26, which calls for the reduction of legal, practical, and other relevant barriers to access to remedy.[1803]

In the absence of a reversal of the burden of proof, the possibility of representative action, and other accompanying procedural measures facilitating access to remedy, the LdV fails to fundamentally challenge the *status quo* for victims seeking access to remedy.[1804] This clearly diminishes the deterring effect of potential civil liability claims and enhances the likelihood of companies engaging in a tick-box approach to due diligence obligations under the LdV. Despite its inclusion of a civil liability provision for breaches of due diligence obligations, the LdV thus does not provide significantly greater prospects of accessing remedy for rights-holders in comparison to the SCDDA.[1805] Consequently, initiating procedures before the French NCP may still offer a

1797 Assignation devant le Tribunal judiciaire de SaintÉtienne, Envol Vert et al. v. Casino S.A. (3 March 2021), 41 ff.

1798 Ibid., 82 f.

1799 For an overview on the trajectory of the case, see Sherpa, 'Casino Case in Brazil and Colombia'.

1800 See Chapter 4 II 5.2.

1801 C. C. Décision nº 2017-750 DC, 23.3.2017, para. 28.

1802 Cf. DEVA, LJIL 2023, 19. See also, CCFD Terre Solidaire / ECCHR / ProDESC, From Rights to Reality, 31.

1803 The Commentary to UNGP 26 *inter alia* names the lack of options for aggregating claims or enabling representative proceedings as an example for such barriers.

1804 Cf. ROUAS, Achieving Access to Justice, 309. See also, FRIEDLICH NICOLAS, Tempered Vigilance: Realizing Effective Remedy for Rightsholders Under the French Duty of Vigilance Law, Virginia Journal of International Law (VJIL) 2024, 609 ff., 638.

1805 Cf. DEVA, LJIL 2023, 24. See further, Chapter 4 II 5.2.

complementary, faster, less technical, and more cost-effective avenue for rights-holders to access remedy.[1806]

5. Concluding Remarks

The obligations under the LdV are broadly comparable to the HRDD process under the UNGPs. However, they are not fully aligned with the UNGPs. First, the LdV bases the applicability of its obligations on company size, instead of taking a risk-based approach.[1807] Second, human rights abuses and violations of other protected grounds are only covered if they are 'severe'. It is possible to interpret the requirement of severity in light of the UNGPs. According to such an interpretation, severity would be considered relative to other identified risks and not in the sense of an absolute threshold. However, in view of the LdV's legislative purpose of preventing tragedies similar to the Rana Plaza disaster from reoccurring, a restrictive interpretation of the term by courts cannot be ruled out. Such a restrictive interpretation would clearly fall short of the UNGPs.[1808] Third, obligations under the LdV solely extend to subcontractors and suppliers with which there is an 'established commercial relationship'. A strict interpretation of this concept in line with the case law developed in the context of the *rupture brutale,* i.e. where this notion stems from, would be contrary to the UNGPs.[1809] Fourth, multistakeholder engagement is discretionary, with the exception of the complaints mechanism, which has to be established in cooperation with trade unions.[1810] This negatively impacts the legitimacy of the LdV from a critical decolonial perspective.[1811] Fifth, the LdV fails to expressly recognise the need to terminate business relationships under certain conditions and define the limits of due diligence in achieving respect for human rights in particular settings. It also fails to delineate any criteria for responsible disengagement.[1812]

Overall, the provisions in the LdV lack specificity. This lack of specificity affords companies with the flexibility to navigate their particular circumstances. Furthermore, it offers an opportunity to interpret the obligations under the LdV in line with international due diligence standards, especially the UNGPs, the latter of which the National Assembly referred to as 'the ideal and

1806 See Chapter 2 II 3.

1807 See Section I 2. of this Chapter.

1808 See Section I 3.1 of this Chapter.

1809 See Section I 3.2 of this Chapter.

1810 See Section I 3.3 a of this Chapter.

1811 Cf. SECK, OHLJ 2008, 568 and 601. See further, Chapter 1 III 2.1 b.

1812 See Section I 3.3 c of this Chapter.

internationally recognized foundation for the design of a vigilance plan'[1813]. Nevertheless, the vagueness of the due diligence obligations under the LdV also means that the role of industry and multistakeholder initiatives in effective due diligence is not clarified. In addition, the Act's vagueness increases the risk of companies and courts treating social audits and certifications, in particular, as evidence of compliance with obligations under the Act.[1814] In any case, the vagueness of the provisions creates significant legal uncertainty, which has not only led to abolition of the civil fine, but also considerable challenges in the implementation and private enforcement of the Act. These enforcement challenges are exacerbated by the lack of regulatory oversight regarding compliance with the LdV. The effectiveness of the Act thus largely depends on the interpretation of the provisions by courts.

Despite its limitations, the LdV is undeniably a trailblazing law that inspired other comprehensive mandatory human rights and environmental due diligence legislation in Europe.

II. EU Corporate Sustainability Due Diligence Directive

1. Context

The purpose of the CSDDD is to ensure that EU companies play their part in the creation of a sustainable society and economy.[1815] To this effect, the Directive explicitly recognises the UNGPs[1816] and the OECD Guidelines[1817] as international standards on responsible business conduct in its recitals and holds that '[a]ll businesses have a responsibility to respect human rights, which are universal, indivisible, interdependent and interrelated'[1818].[1819] In light of the emergence of due diligence legislation in several Member States, the Directive also

1813 National Assembly, Report no. 2628, 11.

1814 With respect to social audits, cf. BOURGEOIS, RLDA 2024, 38.

1815 Cf. Recital 16 and 31 CSDDD.

1816 Recital 5 CSDDD.

1817 Recital 6 CSDDD.

1818 Recital 7 CSDDD.

1819 Whilst not legally binding, recitals are important sources to interpret the substantive provisions in EU legislation, clarifying their purpose and intents. Therefore, the CSDDD recognises the UNGPs and OECD Guidelines as critical reference points for the interpretation of due diligence obligations described therein (cf. HOLLY GABRIELLE / DICALOU MATHILDE, 'Transposition of the Corporate Sustainability Due Diligence Directive: A Practical Guide for National Human Rights Institutions' (16 September 2024), Danish Institute for Human Rights (DIHR) (hereinafter: HOLLY/DICALOU, CSDDD Practical Guide for NHRI), 14.

aims to provide a common EU framework for responsible business conduct, thereby avoiding fragmentation, and creating a level playing field for companies to navigate the internal market with more legal certainty.[1820] Besides the internal market, the CSDDD additionally aims to indirectly affect how business is conducted extraterritorially. This is because in order to establish and expand their business relationships with EU companies falling under the personal scope of the Directive, non-EU companies will have to adhere to the human rights and environmental standards set out in the CSDDD.[1821] These intended extraterritorial effects are reflected in recital 1 of the Directive. Recital 1 CSDDD notably discusses how EU values and the universality of human rights ought to guide the Union's actions on the international stage, including fostering the sustainable economic, social, and environmental development of developing countries.' However, this 'value-exporting approach' has been met with criticism, especially since the consultation of voices from states in the Global South has not been prioritised in the drafting process of the CSDDD, even though the adoption of the Directive is meant to foster sustainable development in these states precisely.[1822] The EU Deforestation Regulation, a mandatory due diligence law aiming to ensure that only deforestation-free products are sold in and from the EU, may serve as a cautionary tale in this regard: After various developing countries voiced criticism over their lack of consultation in the drafting process of the Regulation and expressed concern that the requirements of the Regulation may create trade barriers, particularly for SMEs based in these countries,[1823] the implementation of the Regulation was pushed back for one year[1824].

1820 Cf. Recital 31 CSDDD.

1821 Cf. HOLLY GABRIELLE, 'The EU Corporate Sustainability Due Diligence Directive: Maximising Impact Through Transposition and Implementation' (24 April 2024), Danish Institute for Human Rights (DIHR) (hereinafter: HOLLY, EU CSDDD: Maximising Impact), 10. See further, Section II 4.3 of this Chapter.

1822 Cf. LICHUMA, Centering Europe and Othering the Rest, Völkerrechtsblog; OMARI LICHUMA CAROLINE, 'The EU Corporate Sustainability Due Diligence Directive and its Implications for the Meaningful Engagement Provisions of Member States with a Due Diligence Law', Verfassungsblog (25 May 2024) (hereinafter: LICHUMA, The CSDDD and its Implications for Meaningful Engagement, Verfassungsblog); CANTÚ RIVERA HUMBERTO, 'The Corporate Sustainability Due Diligence Directive beyond Europe: Initial Thoughts on its Effects across Global Value Chains', Verfassungsblog (14 June 2024) (hereinafter: CANTÚ RIVERA, the CSDDD Beyond Europe, Verfassungsblog); BUENO NICOLAS / BERNAZ NADIA / HOLLY GABRIELLE et al., The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise, Business and Human Rights Journal (BHRJ) 2024, 294 ff., 298. For a discussion of the relationship between unilateral due diligence laws and neo-colonialism, see Chapter 1 III 2.1 b.

1823 CANTÚ RIVERA, the CSDDD Beyond Europe, Verfassungsblog.

1824 Council of the European Union, 'EU Deforestation Law: Council Formally Adopts its One-Year Postponement', Press Release (18 December 2024).

The final text of the CSDDD is a political compromise, which brings a lengthy legislative process to an end.[1825] This lengthy process was triggered by the European Parliament adopting a resolution on 10 March 2021 requesting the European Commission to submit a legislative proposal on mandatory corporate human rights due diligence.[1826] The European Commission put forward its proposal in February 2022.[1827] The Council of the European Union (Council) and the European Parliament subsequently endorsed their respective positions in December 2022[1828] and June 2023[1829]. Trilogue negotiations began on 6 June 2023, and a political agreement was concluded on 14 December 2023 (the December Agreement).[1830] However, following reports that Germany would opt out of confirming the December Agreement in a Coreper meeting initially scheduled for 9 February 2024, several other Member States also indicated that they may choose to refrain from voting or vote against the deal. This led to a new round of negotiations among Member States to seek to obtain a qualified majority so as to allow the CSDDD to proceed through the remaining steps of the legislative process. On 15 March 2024, a new proposal was agreed upon by the Council in a Coreper meeting held on that date and later confirmed by the European Parliament Committee on Legal Affairs on 19 March 2024 (the March Agreement).[1831]

The March Agreement differs from the December Agreement in various aspects. Most significantly, it has a markedly narrowed personal scope, which means that the CSDDD will only apply to very large companies.[1832] The March

1825 HOLLY, EU CSDDD: Maximising Impact, 7.

1826 European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), OJ 24.11.2021, C 474/11, para. 32.

1827 EC, CSDDD Proposal.

1828 Council of the European Union, 'Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach', 15024/1/22 REV 1 (30 November 2022) (hereinafter: EU Council, CSDDD Proposal).

1829 European Parliament, 'Amendments adopted by the European Parliament on 1 June 2023 on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937', COM(2022)0071 – C9-0050/2022 – 2022/0051(COD) (1 June 2023).

1830 Council of the European Union, 'Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights', Press Release (14 December 2024) (hereinafter: EU Council, December Agreement, Press Release).

1831 BERNAZ/BIANCHINI/BRIGHT et al., Effectiveness of the Compromised CSDDD, Rebalance Project Blog; HOLLY, EU CSDDD: Maximising Impact, 7.

1832 BERNAZ/BIANCHINI/BRIGHT et al., Effectiveness of the Compromised CSDDD, Rebalance Project Blog. See further, Section II 2. of this Chapter.

Agreement was formally adopted on 24 May 2024[1833] and published in the Official Journal on 5 July 2024. It entered into force on 25 July 2024.[1834] Initially, Member States had to transpose the CSDDD into national law until 26 July 2026.[1835] However, as seen in Chapter 3 II, in February 2025, the European Commission adopted the so-called 'Omnibus Package', to amend EU rules on sustainability reporting and human rights and environmental due diligence requirements in an attempt to reduce perceived regulatory burdens and costs for companies.[1836] These proposed amendments include changes to the CSDDD, particularly regarding the transposition deadline and the first phase of the application of due diligence obligations.[1837] On 14 April 2025, the so-called Stop-the-Clock Directive was adopted. This Directive postpones the transposition deadline by one year, i.e. to 26 July 2027, and the first phase of application of due diligence obligations to 2028.[1838]

The adoption of the CSDDD has been recognised as a milestone in the protection of human rights from transnational corporate misconduct, despite it being the result of major political compromises. This is because the CSDDD is the first EU due diligence legislation to apply beyond specific industries and issues.[1839] Existing EU mandatory due diligence legislation that stipulates more specific obligations, such as the EU Conflict Minerals Regulation or the EU Batteries Regulation, shall however still prevail over the application of the CSDDD pursuant to art. 1(3) CSDDD.

The CSDDD largely establishes minimum standards with regard to the protection of human rights, social rights, employment rights, the environment, and the climate.[1840] Exceptions apply to art. 8(1) and 8(2) CSDDD as well as art. 10(1) and art. 11(1) CSDDD, where the national laws of Member States must not diverge; these due diligence obligations have to be fully harmonised.[1841]

1833 Council of the European Union, 'Corporate Sustainability Due Diligence: Council Gives its Final Approval', Press Release (24 May 2024).

1834 Art. 38 CSDDD.

1835 Art. 37(1) CSDDD. See also, European Commission, 'Directive on Corporate Sustainability Due Diligence: Frequently Asked Questions', (25 July 2024) (hereinafter: EC, CSDDD: FAQ), 5.

1836 EC, Omnibus Package Press Release; EC, Omnibus Package Q&A, Q7. For a commentary on the proposed amendments to the CSRD, see Chapter 3 II.

1837 EC, Omnibus Proposal: CSRD and CSDDD, 17 ff. For a commentary on other proposed amendments to the CSDDD, see Section II 6. of this Chapter.

1838 Art. 2 Stop-the-Clock Directive. See further, Section II 3. of this Chapter.

1839 Cf. BERNAZ/BIANCHINI/BRIGHT et al., Effectiveness of the Compromised CSDDD, Rebalance Project Blog; HOLLY, EU CSDDD: Maximising Impact, 7.

1840 Art. 4(2) CSDDD.

1841 Art. 4(1) CSDDD.

Members States are thus generally allowed to set higher levels of protection in their national legislation.[1842] Whenever a Member State has introduced national laws that offer a higher level of protection prior to the adoption of the CSDDD, the Member State in question is required to uphold this higher standard.[1843]

2. Definitions

In contrast to the LdV, but similarly to the SCDDA, the Directive contains definitions of key terminology used.

2.1 Adverse Human Rights Impact

Pursuant to art. 3(1)(c) CSDDD, adverse human rights impacts are impacts on rights-holders that result from (1) the abuse of one of the human rights enlisted in the Annex to the Directive or (2) the abuse of a right that is not enumerated in the Annex, but nevertheless enshrined in the human rights instruments listed in the Annex I to the Directive. However, for the latter abuse to be considered relevant for the purpose of the Directive, three conditions have to be met (art. 3(1)(c)(ii) CSDDD). First, the human right in question must be a right that can be abused by a company. Second, the abuse must directly impair a legal interest protected in the human rights instruments listed in the Annex of the Directive. Third, the company must have reasonably been able to foresee the risk that the human right in question may be affected. To assess whether this is the case, the circumstances of the specific case, including the nature and extent of the company's business operations and its chain of activities, the characteristics of the economic sector and the geographical and operational context, shall be duly considered.

2.2 Adverse Environmental Impact

According to art. 3(1(b) CSDDD, an 'adverse environmental impact' is an impact that results from a breach of the prohibitions and obligations outlined in the Annex of the Directive, whereby national legislation pertaining to the provisions of the instruments listed therein is taken into consideration.

2.3 Chain of Activities

The term value chain, as initially proposed by the European Commission, was replaced by the term 'chain of activities' at the initiative of the Council. This is

1842 Art. 4(2) CSDDD.

1843 Art. 1(2) CSDDD.

because the term 'chain of activities' was considered to be more neutral and less likely to cause confusion with already existing definitions.[1844]

Pursuant to art. 3(1)(g) CSDDD, the chain of activities encompasses both the activities of a company's upstream business partners as well as certain activities of a company's downstream business partners. With respect to a company's upstream business partners, all activities related to the production of goods or the provision of services are covered. This includes the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of products, and the development of the product or the service.[1845] With respect to a company's downstream business partners, activities related to the distribution, transport, and storage of a product are covered, if these activities are carried out for or on behalf of the obliged company.[1846] Activities such as the sale, commercialisation, use, and disposal of products and services are thus excluded from the downstream chain of activities.[1847] Moreover, art. 3(1)(g)(iii) CSDDD explicitly excludes distribution, transport, and storage of products that are subject to export control by a Member State, meaning either the export control under Regulation (EU) 2021/821[1848] or the export control of weapons, munitions or war material under national export controls, after the export of the product is authorised.

The term 'business partner' encompasses both direct business partners, with which the company has a commercial agreement, and indirect business partners (tier 1, tier 2, etc.), which perform business operations related to the operations, products or services of the company.[1849] The concept of an 'established business relationship', as inspired by the LdV and initially proposed by the European Commission[1850] to limit the scope of due diligence obligations, was therefore evidently dropped. This is to be welcomed, since the requirement for a business relationship to be 'established' for due diligence obligations to apply could incentivise companies to rely on unstable and temporary business arrangements, which may aggravate precarious working conditions throughout the chain of activities, and thus inevitably human right risks.[1851]

1844 EU Council, CSDDD Proposal, 6.

1845 Art. 3(1)(g)(i) CSDDD.

1846 Art. 3(1)(g)(ii) CSDDD.

1847 Cf. recital 25 and 26 CSDDD.

1848 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, OJ 11.6.2021, L 206/1.

1849 Art. 3(1)(f) CSDDD.

1850 EC, CSDDD Proposal, 23.

1851 Cf. OHCHR: Feedback CSDDD EU Commission Proposal, 3 f.; Section I 3.2 of this Chapter.

3. Personal Scope

Both EU companies and non-EU companies fall under the personal scope of the Directive.[1852] Art. 3(1)(a) CSDDD defines a company as any legal person constituted as one of the legal forms listed in Annexes I and II to the EU Accounting Directive or any legal person constituted in accordance with the law of a third country in a form comparable to those listed in Annexes I and II to the EU Accounting Directive. Under French law, the forms covered include the SA *(société anonyme),* SCA *(société en commandite par actions),* SARL *(société à responsabilité limitée),* SAS *(société par actions simplifiée),* SNC *(société en nom collectif),* and the SCS *(société en commandite simple).* In comparison to the LdV, the CSDDD thus covers more legal forms, including the SAS, which was debated under the LdV.[1853] Under German law, the legal forms covered include the *Aktiengesellschaft, Kommanditgesellschaft auf Aktien, Gesellschaft mit beschränkter Haftung, offene Handelsgesellschaft,* and the *Kommanditgesellschaft*. In contrast to the SCDDA, which applies to companies reaching certain employee thresholds irrespective of their legal form, the CSDDD is therefore more restrictive in this regard.[1854] Pursuant to art. 3(1)(a)(iii) CSDDD, regulated financial undertakings are generally included in the definition of 'company', irrespective of their legal form. Exceptions to this rule are defined in art. 2(8) CSDDD.

Irrespective of the business sector, exemptions from fulfilling due diligence obligations under the CSDDD may apply to companies in two cases. First, an exemption may apply to subsidiaries falling under the personal scope of the Directive, if their parent companies, which also fall under the personal scope of the CSDDD, fulfil the due diligence obligations stipulated in art. 7–11 and art. 22 CSDDD on their behalf.[1855] The fulfilment of due diligence obligations by a parent company on behalf of its subsidiary is subject to five conditions set out in art. 6(2) CSDDD. Even if these conditions are met, art. 6(1) sentence 2 CSDDD explicitly states that the subsidiary is still subject to the exercise of the supervisory authority's powers under art. 25 CSDDD and to civil liability in accordance with art. 29 CSDDD. Second, an exemption may apply to a 'ultimate parent company', if the company in question is a pure holding company as described in art 2(3) sentence 1 CSDDD. For the exemption to be granted, one of the ultimate parent company's EU subsidiaries must be designated to fulfil the obligations stipulated in art. 6–16 and art. 22 CSDDD on behalf of the ultimate

1852 Art. 2(1) and 2(2) CSDDD.

1853 Cf. Section I 2. of this Chapter.

1854 Cf. Chapter 4 II 3.

1855 Art. 6(1) CSDDD.

parent company.[1856] According to art. 3(1)(r) CSDDD, a ultimate parent company is a company that controls, either directly or indirectly in accordance with the criteria set out in art. 22(1)-22(5) of the EU Accounting Directive, one or more subsidiaries and is not controlled by another company.

With regard to EU companies, i.e. companies that are formed according to the legislation of a Member State, the Directive will ultimately apply to very large EU companies with more than 1,000 employees that generate a net worldwide annual turnover of EUR 450 million, irrespective of the sector in which they operate.[1857] To avoid the circumvention of the Directive, these thresholds are calculated at the group level.[1858] With regard to non-EU companies, the Directive will ultimately apply to companies generating a net turnover of more than EUR 450 million in the EU market.[1859] Here too, the threshold is calculated at the group level.[1860] Companies that have entered into franchising or licensing agreements in the EU, receive royalties amounting to more than EUR 22.5 million in the EU, and generate a net turnover exceeding EUR 80 million are covered as well.[1861]

Pursuant to art. 2 Stop-the-Clock Directive amending art. 37(1) CSDDD, the obligations under the Directive will gradually apply to the companies falling under the personal scope of the Directive in two phases.

For EU companies, the phase-in applies as follows:

(1) From 26 July 2028: Transposition laws would apply to companies exceeding 3,000 employees and a net worldwide turnover of EUR 900 million;[1862]
(2) From 26 July 2029: Transposition laws would apply to companies exceeding 1,000 employees and a net worldwide turnover of EUR 450 million as well as companies that have entered into franchising or licensing agreements in the EU as described in art. 2(1)(c) CSDDD.[1863]

According to NGO estimates, the Directive will only apply to less than 5500 EU companies, i.e. 0.05% of EU companies, in the final stage of the phase-in.[1864]

1856 Art. 2(3) sentence 2 CSDDD.
1857 Art. 2(1)(a) CSDDD.
1858 Art. 2(1)(b) CSDDD.
1859 Art. 2(2)(a) CSDDD.
1860 Art. 2(2)(b) CSDDD.
1861 Art. 2(1)(c) and 2(2)(c) CSDDD.
1862 Art. 2(1)(a) Stop-the-Clock Directive amending art. 37(1)CSDDD.
1863 Art. 2(1)(c) Stop-the-Clock Directive amending art. 37(1) CSDDD.
1864 European Coalition for Corporate Justice, 'CSDDD Endorsement Brings us 0.05% Closer to Corporate Justice' (15 March 2024). According to the estimates of the EU Commission, the number is slightly higher with approximately 6,000 companies (EC, CSDDD: FAQ, 6).

This marks the clearest departure from the December Agreement, which initially targeted large EU companies with more than 500 employees and an annual net worldwide turnover of EUR 150 million as well as medium-sized companies operating in so-called high impact sectors, i.e. textile, agriculture, extractives and construction.[1865]

For non-EU companies, such as Swiss companies, the phase-in applies as follows:

(1) From 26 July 2028: obligations under the Directive would apply to companies exceeding a turnover of EUR 900 million in the EU;[1866]
(2) From 26 July 2029: obligations under the Directive would apply to companies exceeding a turnover of EUR 450 million in the EU as well as companies that have entered into franchising or licensing agreements in the EU as described in art. 2(2)(c) CSDDD.[1867]

With respect to non-EU companies, the Directive significantly departs from the December Agreement as well. The latter envisioned due diligence obligations to apply to non-EU companies generating an annual net turnover of EUR 300 million in the EU.[1868] In any case, the EU Commission estimates that the Directive will approximately cover 900 non-EU companies.[1869]

The CSDDD, similarly to the LdV and the SCDDA, thus bases its personal scope on company size, and excludes SMEs from due diligence obligations, instead of taking a risk-based approach.[1870] However, in contrast to the LdV and the SCDDA, company size under the CSDDD is not only measured in terms of employee thresholds, but also net turnover.[1871] Given the difficulties experienced by French civil society organisations and the French Ministry of Economy and Finance in identifying companies falling under the personal scope of the LdV, similar issues may arise for civil society organisations under the

1865 BERNAZ/BIANCHINI/BRIGHT et al., Effectiveness of the Compromised CSDDD, Rebalance Project Blog; HOLLY, EU CSDDD: Maximising Impact, 9.

1866 Art. 2(1)(b) Stop-the-Clock Directive amending art. 37(1) CSDDD.

1867 Art. 2(1)(c) Stop-the-Clock Directive amending art. 37(1) CSDDD.

1868 Cf. EU Council, December Agreement, Press Release.

1869 EC, CSDDD: FAQ, 7.

1870 Cf. BRIGHT CLAIRE / DA GRAÇA PIRES CÉLINE / STREIBELT MICHAELA et al., 'A Comparative Analysis between the Corporate Sustainability Due Diligence Directive and the French and German Legislation', Verfassungsblog (30 May 2024) (hereinafter: BRIGHT / DA GRAÇA PIRES / STREIBELT et al., CSDDD Comparative Analysis, Verfassungsblog).

1871 Cf. Section I 2 of this Chapter and Chapter 4 II 3.

CSDDD as well.[1872] This is especially true for non-EU companies, which are in principle required to inform the competent supervisory authority of a Member State that they meet the relevant thresholds[1873]. It remains to be seen whether they will do so in practice.[1874] So far, the EU Commission has neither published a list of EU companies nor non-EU companies falling under the personal scope of the Directive.

The transposition of the Directive will eventually imply a significant widening of the personal scope of both the LdV as well as the SCDDA. The LdV notably currently applies to companies which at the group level employ at least 10,000 employees worldwide. From 26 July 2027, this threshold will have to be lowered to 5,000.[1875] The SCDDA currently applies to companies irrespective of their legal form. It bases its employee thresholds, currently set at 1,000, on the number of people employed in Germany, in contrast to the CSDDD, which bases the threshold on worldwide employee numbers.[1876] In any case, owing to the prohibition of diminishing already existing, more comprehensive protections pursuant to art. 1(2) CSDDD, the CSDDD's turnover thresholds must not be used to exempt companies from due diligence obligations that would apply to them under national legislation.[1877]

Overall, similarly as under the SCDDA[1878], the Directive will indirectly impact many more companies, including SMEs, both based in as well as outside

1872 Cf. SHIWAKOTY SUMESH, 'Lessons from the French Vigilance Law for the EU's Corporate Sustainability Due Diligence Directive', Oxford Human Rights Hub (25 May 2023); Section I 2 of this Chapter.

1873 Art. 23(3) CSDDD; EC, CSDDD: FAQ, 8. See further, Section II 5.1 of this Chapter.

1874 Cf. ATAMER YEŞIM M. / WITTUM PATRICK, Von Laissez-faire zu Regulierung: Grundlagen der EU-Richtlinie über die Sorgfaltspflichten von Unternehmen im Hinblick auf Nachhaltigkeit (CSDDD), Zeitschrift für Europarecht (EuZ) 9/2024, 1 ff., 21.

1875 See Section I 2 of this Chapter.

1876 Cf. Chapter 4 II 3.

1877 Cf. GRABOSCH ROBERT, 'Die EU-Lieferkettenrichtlinie: Weltweiter Schutz für Mensch und Umwelt' (April 2024), Friedrich Ebert Stiftung (hereinafter: Grabosch, CSDDD), 3 and 11; HAGEL ULRICH / WIEDMANN MICHAEL, Wie muss das LkSG aufgrund der CS3D angepasst werden?, Corporate Compliance Zeitschrift (CCZ) 2024, 185 ff., 187; HOLLY/DICALOU, CSDDD Practical Guide for NHRI, 15; SIMANOVSKI, Ein Schritt vorwärts, keiner zurück, Verfassungsblog. For an in-depth analysis of why narrowing the SCDDA's personal scope to align with the CSDDD would violate EU law, see further MITTWOCH ANNE-CHRISTIN, 'Möglichkeiten und Grenzen der Gestaltung des Anwendungsbereichs des Lieferkettensorgfaltspflichtengesetzes (LkSG) bei der Umsetzung der Corporate Sustainability Due Diligence Directive (CSDDD)' (July 2024), legal opinion commissioned by Germanwatch and Oxfam Germany. For an opposite opinion, see RUTLOFF MARC / WAGNER ERIC / HAHN MATTHIAS, Spielräume bei der stufenweisen Umsetzung der EU-Lieferketten-RL, Neue Juristische Wochenschrift (NJW) 2024, 3401 ff., 3403 ff.

1878 See Chapter 4 II 3.

the EU market. This is because companies obliged under the CSDDD are required to seek contractual assurances from direct business partners to ensure compliance with due diligence obligations pursuant to art. 10(2)(b) and art. 11(3)(c) CSDDD.[1879] Companies in Switzerland, for instance, will at least be indirectly impacted, given the geographical proximity of Switzerland to the large economies of Germany and France.[1880] Moreover, indirect impacts of due diligence legislation on Swiss companies are already apparent with the SCDDA.[1881] EU lawmakers recognised the indirect impacts the Directive may have on SMEs and incorporated provisions in the CSDDD that are meant to support these companies in meeting expectations regarding their human rights and environmental performance.[1882]

4. Material Scope

4.1 Covered Human Rights and other Protected Grounds

Covered human rights and environmental matters are listed in Annex part 1 and part 2 of the Directive. Annex part 1 first lists certain rights and prohibitions and then enumerates human rights and labour rights treaties that are relevant for the purpose of this Directive. As seen, adverse human rights impacts can arise from the abuse of one of the listed human rights or the breach of one of the listed prohibitions and, under certain conditions, from the abuse of a right that is not enumerated in the Annex, but nevertheless enshrined in the enumerated treaties.[1883]

With regard to human rights, listed treaties include the ICCPR, the ICESCR, and the CRC. Strikingly, the UDHR, the CRPD, the UN Declaration on the Rights of Indigenous Peoples, and European human rights instruments, such as the ECHR, the European Social Charter, and the Charter of Fundamental Rights of the European Union, are not listed.[1884] This is in spite of the fact that

1879 HOLLY, EU CSDDD: Maximising Impact, 10. See further, Section II 4.3 of this Chapter.

1880 Cf. FOJ, Analysis CSRD and CSDDD Draft, 22. For an in-depth analysis of the CSDDD's direct and indirect potential effecs on Swiss companies, see MEYER NICLAS / KAPPELER FABIANA / SIELER ROMAN et al., 'Auswirkungen der CSDDD auf die Unternehmen, den Standort und den Wettbewerb in der Schweiz' (last updated on 28 November 2024), study commissioned by the Swiss Federal Office of Justice and the State Secretariat for Economic Affairs.

1881 Federal Council: Portal for SMEs: SCDDA.

1882 These include art. 10(2)(e), art. 10(5), art. 11(3)(f), art. 11(6), and art. 20(1) CSDDD. See further, Section II 4.3 of this Chapter.

1883 Art. 3(1)(c) CSDDD. See further, Section II 2.1 of this Chapter.

1884 Cf. HOLLY, EU CSDDD: Maximising Impact, 10 f.; MEYER NELE / PATZ CHRISTOPHER, 'Human Rights under the EU Corporate Sustainability Due Diligence Directive', Ver-

companies falling under the personal scope of the CSRD must report on the human rights enshrined in these treaties[1885] and that the CSRD and the CSDDD are supposed to interrelate[1886]. Besides the CRC, specialised UN human rights treaties for the protection of historically disadvantaged and marginalised individuals and groups such as the ICERD are not enlisted in the Annex, even though the importance of these human rights treaties in the context of business activities has been stressed by human rights bodies.[1887] At the same time, the UNGPs are rather ambiguous regarding the corporate responsibility to respect human rights beyond the rights enshrined in the International Bill of Rights, which is composed of the UDHR, ICCPR, and ICESCR, and the ILO Core Labour Standards.[1888] While recital 33 of the CSDDD notes that 'companies may need to consider additional standards' such as the ICERD and CEDAW, it is doubtful whether this vague statement is sufficient to encourage culturally and gender-sensitive approaches to due diligence, given that the consideration of particular vulnerabilities of marginalised individuals and groups is not simultaneously emphasised in the formulation of due diligence obligations.[1889]

With regard to labour rights, the Annex lists all of the ILO conventions that were considered to be part of the four ILO Core Labour Standards before the addition of the standard regarding a safe and healthy working environment, i.e. ILO Conventions Nos. 155 and 187, in 2022.[1890] This is because not all Member States have ratified these two conventions yet.[1891]

The rights and prohibitions listed in the Annex broadly relate to classic civil and political rights such as the prohibition of torture (nos. 1-5), children's rights (nos. 8-10), labour rights (nos. 6 and 11-14), rights regarding sustenance

fassungsblog (1 June 2024) (hereinafter: MEYER/PATZ, Human Rights under the CSDDD, Verfassungsblog).

1885 See Chapter 3 II 3.1.

1886 Cf. Recital 62 and art. 16(2) CSDDD referencing relevant articles in the EU Accounting Directive that have been amended by the CSRD.

1887 Cf. Chapter 1 III 1.2.

1888 See Commentary to UNGP 12 and Chapter 2 I 3.1 b.

1889 In addition, recital 36 CSDDD states that companies may also need to take the UN Convention against Corruption into account when conducting due diligence.

1890 These are namely the ILO Convention on Forced Labour, 1930 (No. 29), ILO Convention on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87), the ILO Convention on the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the ILO Convention on Equal Remuneration, 1951 (No. 100), the ILO Convention on the Abolition of Forced Labour, 1957 (No. 105), the ILO Convention on Discrimination in Employment and Occupation, 1958 (No. 111), the ILO Convention on Minimum Age, 1973 (No. 138), and ILO Convention on the Worst Forms of Child Labour, 1999 (No. 182).

1891 Cf. recital 32 CSDDD.

(no. 7 and 15), and land rights (no. 16). All of the rights and prohibitions reference the relevant article in the UN treaty or ILO convention in light of which they ought to be interpreted, which is a useful clarification in view of potentially diverging levels of protection in different human rights instruments and legal certainty considerations. The first enumerated rights and the first enumerated prohibition are each accompanied by an example of an abuse or breach: The right to life is notably accompanied by the explanation that an abuse of that right would include security guards protecting the company's resources, facilities or personnel causing the death of a person due to a lack of instruction or control by the company. Similarly, the prohibition of torture, cruel, inhuman or degrading treatment is accompanied by the explanation that a breach could involve security guards protecting the company's resources, facilities or personnel subjecting a person to inhuman treatment due to a lack of instruction or control by the company. These examples are reminiscent of the prohibition contained in art. 2(2) no. 11 SCDDA.[1892]

The enjoyment of certain rights is restricted to specific contexts and tailored to specific corporate actions. For instance, the right to an adequate standard of living pursuant to art. 11(1) ICESCR is notably only covered by prohibition no. 7, insofar as companies are required to refrain from restricting workers' access to adequate housing, if the workforce is housed in accommodation provided by the company. Under the same prohibition, companies are also required to refrain from restricting workers' access to adequate food, clothing, and water and sanitation in the workplace. In addition, certain aspects of the right to an adequate standard of living, namely the right to food, water, and sanitary facilities are protected by prohibition no. 15, insofar as their abuse is linked to measurable environmental degradation (e.g. harmful soil change, water or air pollution, harmful emissions, excessive water consumption, degradation of land, or other impact on natural resources) that is caused by a company. The right to health pursuant to art. 12 ICESCR is also protected under prohibition no. 15 provided that the same conditions are met. This framing of the right to an adequate standard of living and the right to health is reminiscent of the prohibition contained in art. 2(2) no. 9 SCDDA.[1893]

1892 Pursuant to art. 2(2) no. 11 SCDDA, companies must refrain from hiring or using security forces for the protection of the company if, due to a lack of instruction or control on the part of the company, the use of security forces (1) is in violation of the prohibition of torture and cruel, inhumane or degrading treatment, (2) causes death or bodily injury or (3) impairs freedom of assembly or freedom of association. See further, Chapter 4 II 4.1.

1893 Pursuant to art. 2(2) no. 9 SCDDA, companies must refrain from causing any harmful soil change, water pollution, air pollution, harmful noise emission or excessive water consumption that (1) significantly impairs the natural bases for the preservation and

Other rights, such as the right to privacy pursuant to art. 17 ICCPR, are listed but important contexts of application are excluded from the Directive's material scope due to limitations in terms of covered downstream business activities.[1894] This creates significant protection gaps. Under the Directive, an ICT company would namely not breach due diligence obligations by selling spyware to a regime that notoriously surveils and persecutes political activists.[1895]

The approach taken under the CSDDD is not fully aligned with the UNGPs, since the UNGPs cover all of the rights enshrined in the UDHR, ICCPR, ICESCR, and ILO Core Labour Standards[1896], and any action that removes or reduces the enjoyment of these rights[1897].[1898] However, the listed rights and prohibitions are the result of balancing comprehensive coverage with framing human rights and labour rights abuses in more concrete terms. The latter enables companies falling under the personal scope of the Directive to operate with more legal certainty, which is particularly important against the threat of penalties in art. 27 CSDDD. This balance appears to be well struck, as most rights have a clear connection to corporate activities by nature (right no. 6), have been interpreted in relation to business activities by UN treaty monitoring bodies (right no. 8)[1899], or are underpinned by concrete examples of corporate abuses (right no. 1). Furthermore, the prohibitions are generally formulated in terms of concrete human rights abuses tailored to corporate misconduct, connected to labour rights, or reflective of frequently reported cases of corporate involvement in human rights abuses. Thus, companies should generally be able to navigate the listed rights and prohibitions with legal certainty. However, there are three noteworthy exceptions which are less clear in terms of expected corporate conduct. First, it is not evident in which context, outside of a company's involvement with security forces, the right to liberty and security pursuant to art. 9(1) ICCPR could be abused by a company. Without any further authoritative guidelines issued by the EU Commission pursuant to art. 19(1) CSDDD, what would constitute an abuse of this right in other contexts would likely have to be interpreted narrowly due to the principle of legality. Second, it is not evident how a company could breach the prohibition of

production of food, (2) denies a person access to safe and clean drinking water, (3) impedes or destroys a person's access to sanitary facilities or (4) harms the health of a person.

1894 Cf. art. 3(1)(g)(ii) CSDDD. See further, Section II 4.2 of this Chapter.

1895 For an illustrative case, see Chapter 2 II 2.3 a.

1896 UNGP 12 and Commentary thereto.

1897 OHCHR Interpretative Guide, 5.

1898 Cf. HOLLY, EU CSDDD: Maximising Impact, 10.

1899 CRC, General Comment No. 16 (2013), para. 12 ff. and 35 ff.

interfering with freedom of thought, conscience and religion pursuant to art. 18 ICCPR outside the realm of workplace discrimination, which is already covered by the prohibition of unequal treatment in employment, i.e. prohibition 14 (b). In the absence of further authoritative guidelines, breaches of this prohibition outside a workplace setting will likely have to be interpreted restrictively as well. Third, art. 3(c)(ii) CSDDD aims to balance additional human rights protections with legal certainty considerations.[1900] The provision notably references rights enshrined in the treaties listed in the Annex and enumerates conditions for any other human rights impact to be considered a relevant abuse under the Directive. These conditions are complex and include that the abuse must 'directly impair a legal interest protected in the human rights listed in the Annex' and that the company must have 'reasonably foreseen the risk that such human right may be affected'. The notion of 'legal interest' is not defined in the Directive. It is thus unclear what this condition refers to and how a legal interest is to be distinguished from a human right enshrined in the listed treaties.[1901] Art. 3(c)(ii) CSDDD creates an additional layer of complexity by requiring foresight of *a risk,* instead of an actual right being impacted. Moreover, foresight under art. 3(c)(ii) CSDDD relates to a human right being *affected,* rather than being abused. A right being 'affected' as opposed to 'abused' would imply a lower threshold that is more easily met, as rights can be affected in a multitude of ways. This undefined notion could give rise to questions regarding the required threshold which pre-empt the identification process pursuant to art. 8 CSDDD.[1902] In the absence of authoritative guidelines issued by the EU Commission pursuant to art. 19(1) CSDDD, art. 3(c)(ii) CSDDD will thus likely create legal uncertainty for companies and may have to be interpreted narrowly.[1903]

Besides human rights, the Directive also covers prohibitions and obligations regarding environmental matters in Part II of the Annex. These relate to risks posed by specific harmful substances (mercury, persistent organic pollutants and hazardous waste), biodiversity, trade in endangered species, the prior informed consent procedure for the import and export of hazardous chemicals, natural heritage sites, wetlands, and the marine environment. Similarly to the covered human rights abuses, Part II of the Annex accompanies each prohibition and obligation with the relevant article in the international

1900 Cf. Section II 2.1 of this Chapter.

1901 MEYER/PATZ, Human Rights under the CSDDD, Verfassungsblog.

1902 Ibid.; HOLLY/DICALOU, CSDDD Practical Guide for NHRI, 19.

1903 Cf. MEYER/PATZ, Human Rights under the CSDDD, Verfassungsblog. See also, ATAMER/WITTUM, EuZ 9/2024, 30 f.

treaty or EU legislative act. In this regard, the CSDDD goes well beyond the expectations of the UNGPs, as they do not cover environmental matters.[1904]

Finally, the Directive covers specific obligations related to climate change mitigation. These are stipulated in art. 22 CSDDD and depart from the rest of due diligence obligations laid down in art. 7–16 CSDDD.[1905]

For the LdV, the transposition of the CSDDD will first and foremost bring more clarity to the Act's material scope: As seen, there is disagreement in the French literature on which human rights the LdV covers beyond those enshrined in the ECHR and how to interpret the condition of 'severity'. In terms of covered environmental matters and climate concerns, the LdV is similarly ambiguous.[1906] With the transposition of the CSDDD, French companies will certainly have to conduct due diligence with regard to more rights than the ones enshrined in the ECHR and be able to navigate their obligations with more legal certainty. For human rights that are both enshrined in the ECHR and listed in the Directive's Annex, the right in question should be interpreted in light of the human rights treaty that offers a higher level of protection pursuant to art. 1(2) CSDDD. As this is a complex interpretative task, it should not be left to companies to accomplish, but taken up by French lawmakers for legal certainty. This is especially important to avoid enforcement issues with regard to the penalties stipulated in art. 27 CSDDD.

For the SCDDA, the transposition of the Directive will imply a widening of the material scope, as numerous of the human rights (e.g. children's rights beyond the prohibition of child labour) and environmental protections (e.g. related to biodiversity) under the CSDDD are not contained in the SCDDA. The SCDDA does not stipulate any obligations related to climate change mitigation either.[1907] In addition, the transposition of the CSDDD will improve protection related to some rights that are already covered by the SCDDA. This is because the CSDDD references international human rights and labour rights standards as benchmarks for appropriate corporate action, unlike the SCDDA, which in some instances refers to the national law of host states instead (e.g. regarding the right to a fair and adequate living wage).[1908]

1904 According to UNGP 12, business enterprises should respect 'all internationally recognized human rights'. As seen, these include the rights enshrined in the UDHR, ICCPR, ICESCR, and the ILO Core Labour Standards.

1905 See further, Section II 4.3 of this Chapter.

1906 See Section I 3.1 of this Chapter.

1907 Cf. GRABOSCH, CSDDD, 5; HAGEL/WIEDMANN, CCZ 2024, 191 f.; SCHMIDT JESSICA, Die EU-Lieferketten-Richtlinie (CSDDD): Meilenstein oder bürokratische Hydra?, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2024, 859 ff., 861. See further, Chapter 4 II 4.1.

1908 See Chapter 4 II 4.1.

4.2 Covered Business Activities

The CSDDD stipulates due diligence obligations that cover the obliged company's own operations, the operations of its subsidiaries, and the activities of its direct and indirect business partners throughout its chains of activities.[1909]

One important carve-out pertains to regulated financial undertakings within the meaning of art. 3(1)(a) CSDDD: Even though they fall under the personal scope of the Directive, they are largely exempted from conducting due diligence with regard to activities that constitute their core business in practice.[1910] This is because the Directive excludes the provision of services and products to downstream business partners from the definition of chain of activities.[1911] Financial institutions are thus not required to consider the impacts of their investments, loans, or other financial services on people and the planet. Since financial services lay at the very heart of financial institutions' business activities and pose the greatest risk of human rights abuses and environmental impacts in the financial sector, their exclusion is a missed opportunity to onboard a pivotal player in the transition to a more sustainable global economy.[1912] Nevertheless, the Directive requires the EU Commission to review the necessity of imposing more comprehensive due diligence obligations on regulated financial undertakings and submit a report to the Council and EU Parliament by 26 July 2024. This review shall be accompanied by a legislative proposal where appropriate.[1913]

Irrespective of the carve-out for financial undertakings, the reach of due diligence obligations under the Directive is not fully aligned with the UNGPs. This is because the UNGPs call on companies to conduct due diligence throughout their value chains,[1914] but the concept of 'chain of activities' only encompasses certain downstream business activities pursuant to art. 3(1)(g) CSDDD[1915].[1916] The covered business activities under the CSDDD also diverge

1909 Art. 8–16 in conjunction with art. 3(1)(g) CSDDD.

1910 Recital 26 CSDDD. See further, SAVOUREY ELSA / LITWIN DANIEL, 'The Financial Sector and the Corporate Sustainability Due Diligence Directive (CSDDD): In or Out?', Oxford Business Law Blog (16 October 2024).

1911 Cf. Recital 26 and art. 3(1)(g) CSDDD.

1912 HOLLY, EU CSDDD: Maximising Impact, 16. For illustrative cases on the risk of human rights abuses with respect to financial services, see further Chapter 2 II 2.2.

1913 Art. 36(1) CSDDD.

1914 Cf. Commentary to UNGP 13 and UNGP 17 (a).

1915 See Section II 2.3 of this Chapter.

1916 BUENO/BERNAZ/HOLLY et al., BHRJ 2024, 296.

from the CSRD, which expressly requires companies to consider the full value chain.[1917]

Nevertheless, the reach of due diligence obligations under the Directive is significantly more aligned with the UNGPs than the LdV and the SCDDA, as neither of the two cover downstream business activities. For the LdV, besides the inclusion of downstream business activities, the transposition of the CSDDD will also bring clarity with regard to the reach of due diligence obligations: the ambiguity surrounding the concept of 'established business relationship' in the context of the LdV will have to be replaced by the more straightforward concept of chain of activities, which is defined in the Directive itself and includes both direct and indirect business partners. It will also stop incentivising companies to rely on temporary arrangements in order to avoid responsibility for their business relationships.[1918] For the SCDDA, in addition to extending due diligence obligations to certain downstream business activities pursuant to art. 3(1)(g)(ii) CSDDD, the transposition of the Directive will lead to the abandonment of the Act's graduated-tier logic for obligations.[1919]

4.3 Content

The Directive establishes distinct due diligence obligations with regard to human rights and environmental impacts on the one hand and climate change on the other. The former are stipulated in art. 7–16 CSDDD, the latter in art. 22(1) CSDDD. According to art. 22(1) CSDDD, companies are notably required to adopt and implement a transition plan for climate change mitigation. This plan shall ensure, through best efforts, that the company's business model and strategy are compatible with the transition to a sustainable economy and the limitation of global warming to 1,5 °C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119[1920].[1921]

With regard to human rights and environmental impacts, due diligence is understood as an ongoing, repetitive process that is comprised of six steps that build on each other and are interrelated.[1922] These steps are described in art. 5(1) CSDDD and can be summarised as follows: First, companies are

1917 See Chapter 3 II 3.2.

1918 See Section I 3.2 of this Chapter.

1919 See Chapter 4 II 4.2 and 4.3.

1920 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, OJ 9.7.2021, L 243/1.

1921 Art. 22(1) CSDDD.

1922 Cf. Recital 20 CSDDD.

required to have in place a due diligence policy that is to be elaborated in consultation with the company's employees and their representatives.[1923] Second, they must integrate due diligence in their policies and risk management systems.[1924] Third, they are obliged to conduct risk analyses.[1925] Fourth, they must address identified risks and abuses.[1926] Fifth, they are required to review and monitor the effectiveness of the steps taken.[1927] Lastly, they must publicly report on their due diligence.[1928] The due diligence measures are then further specified in art. 7–16 CSDDD. Meaningful stakeholder engagement is notably explicitly prescribed in art. 13 CSDDD for steps three to five. The description of due diligence in the Directive is largely aligned with the UNGPs. The structure that the formulation of due diligence obligations follows, i.e. an overview in one article with references to subsequent articles specifying the obligations, is reminiscent of the SCDDA.[1929]

In the Directive, due diligence is understood as an obligation of effort, rather than an obligation of result. Therefore, human rights abuses and violations of the prohibitions set forth in the Annex of the Directive do not by themselves constitute a breach of obligations under the Directive, if the company in question has taken 'appropriate measures' to prevent or mitigate the occurrence of the abuse or breach.[1930] The appropriateness of a measure is determined by three factors pursuant to art. 3(1)(o) CSDDD: First, if the measure in question is capable of achieving the objectives of due diligence by effectively addressing adverse impacts. Second, if it is commensurate to the degree of severity and the likelihood of the adverse impact. Third, if it is reasonably available to the company, considering the circumstances of the specific case, including the nature and extent of the adverse impact and relevant risk factors. Connected to this last factor is the type of corporate involvement in the risk

1923 Art. 5(1)(a) in conjunction with art. 7(1) and art.7(2) CSDDD.

1924 Art. 5(1)(a) in conjunction with art. 7(1) CSDDD.

1925 Art. 5(1)(b) in conjunction with art. 8(2) and 9(2) CSDDD.

1926 Art. 5(1)(c) and art. 5(1)(d) in conjunction with art. 9–12 CSDDD.

1927 Art. 5(1)(g) in conjunction with art. 15 CSDDD.

1928 Art. 5(1)(h) in conjunction with art. 16 CSDDD.

1929 See Chapter 4 II 4.3.

1930 Recital 19 CSDDD. See further, ATAMER/WITTUM, EuZ 9/2024, 10; HAGEL/WIEDMANN, CCZ 2024, 197; SCHMIDT, NZG 2024, 862. Nonetheless, SCHMIDT rightfully points out that depending on the circumstances, the obligation of effort may come closer to an obligation of result, for instance, when having to take appropriate measures to bring an adverse impact to an end pursuant to art. 11 CSDDD. The SCDDA is more explicit in this regard: With respect to violations related to the company's own business activities in Germany, sec. (7)(1) sentence 3 SCDDA requires that the measures taken must *always* bring the violation to an end, which is an obligation of result (cf. Chapter 4 II 4.3 d).

or abuse and the influence the company can exert over the business partner perpetuating the risk or abuse. For the type of corporate involvement, the Directive differentiates between (1) the company causing the risk or abuse by itself, (2) the company jointly causing the risk or abuse with a subsidiary or business partner, (3) and the risk or abuse being solely caused by a business partner in the chain of activities.[1931] Jointly causing the adverse impact not only encompasses equal involvement of the company and its subsidiary or business partner in the impact, but also all other cases of the company's acts or omissions causing the adverse impact in combination with the acts or omissions of subsidiaries or business partners. This includes cases where the company substantially facilitates or incentivises a business partner to cause an adverse impact, that is, excluding minor or trivial contributions.[1932] The formulation of the modes of involvement in the Directive thereby deviates from the UNGPs, which distinguish between 'causing', 'contributing', and being 'directly linked to' an impact.[1933] The departure from the UNGPs' terminology was a deliberate choice made by EU legislators 'to avoid confusion with existing legal terms in national legal systems'.[1934] According to recital 45 and 53, the terms 'cause' and 'jointly cause' should be interpreted in light of international due diligence standards. The term 'causing' under the CSDDD can thus be equated to the same one under the UNGPs, the term 'jointly causing' under the Directive to the term 'contributing' under the UNGPs, and the third type of involvement under the Directive, whereby the risk or abuse is solely caused by a business partner in the chain of activities of a company, to 'being directly linked to' under the UNGPs.[1935] It is doubtful whether this reference to the UNGPs is of significant assistance in interpreting the terms, as the modes of involvement under the UNGPs, particularly the distinction between 'contributing' and being 'directly linked to' an impact, are neither clearly outlined in the UNGPs nor in the OHCHR Interpretative Guide.[1936] However, the precise delineation of the modes of involvement is especially important from the perspective of rights-holders because companies cannot be held liable for damages solely caused by a business partner pursuant to art. 29(1) CSDDD. It will

1931 Cf. recital 45 and 53 as well as art. 10(1) and art. 11(1) CSDDD.

1932 Recital 45 and 53 CSDDD.

1933 Cf. UNGP 13, 17(a), 19(b), and 22.

1934 Recital 45 and 53 CSDDD.

1935 Recital 45 and 53 CSDDD. See also, BRIGHT / DA GRAÇA PIRES / STREIBELT et al., CSDDD Comparative Analysis, Verfassungsblog.

1936 Similarly, NIETSCH MICHAEL, Die zivilrechtliche Haftung nach der EU-Lieferketten-RL – ein Gamechanger?, Neue Juristische Wochenschrift (NJW) 2024, 2865 ff., 2867 f. See further, Chapter 2 I 3.1 c.

thus be up to the EU Commission to provide guidelines pursuant to art. 19 CSDDD on this matter and the courts to establish nuanced case law.

The formulation of the principle of appropriateness in art. 3(1)(o) CSDDD balances two opposing objectives: On the one hand, it provides companies with the necessary flexibility to navigate their particular circumstances. On the other hand, it provides contours to the conditions under which a breach of obligations under the Directive may trigger sanctions. This balance appears to be well struck and should not pose a problem for the enforcement of due diligence obligations in light of the principle of legality for several reasons.[1937] First, art. 3(1)(o) CSDDD lists the criteria by which appropriate action is determined conclusively. The UNGPs, the OHCHR Interpretative Guide, the OECD Guidelines, the OECD Guidance on Responsible Business Conduct, and the OECD sector-specific guidances provide further clarification to these criteria. Second, art. 19(1) CSDDD enables the EU Commission to issue guidelines on the implementation of due diligence. This includes guidance on appropriate measures pursuant to art. 8-16.[1938] Art. 19(3) CSDDD explicitly tasks the EU Commission with publishing such guidance by 26 January 2027. Third, the concept of appropriateness is commonly applied in the jurisprudence of the European Human Rights Court (ECtHR). EU Member States, which all ratified the ECHR, should thus be familiar with it. Under the ECHR, the concept of appropriateness is notably used to determine whether a state fulfilled its positive obligations under the Convention, i.e. it took appropriate measures to prevent the harm in question from occurring.[1939] Moreover, the concept of appropriateness, albeit referred to as 'reasonableness', is commonly used in tort law to determine negligence across different European jurisdictions. According to this notion, a person can be held liable if they did not act with appropriate care, i.e. the care a reasonable person would have exercised, in view of the specific circumstances of the case.[1940] EU Member States should thus not have any difficulty 'translating' and tailoring the concept of appropriateness to corporate human rights and environmental conduct when transposing the Directive. For France, transposing the definition of appropriateness under the Directive will again enhance clarity concerning expected corporate conduct, since the LdV does not stipulate the criteria against which the

1937 Cf. PIETROPAOLI/ELLIOTT/GONZALEZ DE AGUINAGA, Towards New HREDD Laws, 27 f.

1938 Art. 19(2) CSDDD.

1939 See, e.g., art. 2(1) sentence 1 ECHR, which not only obliges states 'to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction' (ECtHR Judgement of 9 June 1998, *L.C.B. v. the United Kingdom,* Reports of Judgments and Decisions 1998-III, para. 36).

1940 VAN DAM CEES, JETL 2011, 237. See further, Chapter 2 I 3.2 f.

appropriateness, or what it refers to as 'reasonableness', of measures ought to be assessed.[1941] For Germany, when transposing the Directive, the adjustments will be more nuanced. This is because the definition of appropriateness in the CSDDD and the SCDDA largely overlap. However, one significant difference is that under the Directive, influence over the entity perpetrating the human rights and environmental risk or abuse and the type of corporate involvement in the risk or abuse is used to determine *how* a company should act appropriately, not whether it should take any action at all.[1942] Whereas under the SCDDA, the element of influence or proximity may be tied to responsibility, which would not be aligned with the UNGPs.[1943]

a) Due Diligence Policy and Risk Management System

Pursuant to art. 7(1) CSDDD, companies falling under the personal scope of the Directive are required to put in place a due diligence policy. To develop this policy, companies are required to consult with their employees and employee representatives according to art. 7(2) CSDDD. Stakeholder engagement is thus limited to one type of stakeholder at this stage of the due diligence process under the Directive. With the integration of this consultation requirement, EU lawmakers recognise the fundamental role of meaningful stakeholder engagement in effective due diligence. However, art. 7(1) CSDDD unduly focuses on the concerns of workers, instead of considering the perspectives of a wide range of stakeholders, as international due diligence standards would call for.[1944] In addition, art. 7(1) CSDDD does not enshrine any criteria for the consultation to be conducted meaningfully, which would leave companies with considerable discretion regarding the implementation of the provision. Art. 13(6) sentence 2 CSDDD simply holds that participation in industry and multistakeholder initiatives[1945] is not sufficient to fulfil a company's obligation to consult

1941 Cf. BRIGHT / DA GRAÇA PIRES / STREIBELT et al., CSDDD Comparative Analysis, Verfassungsblog. See further, Section I 3.3 of this Chapter.

1942 Cf. art. 10(1), art. 11(1), and art. 11(3)(a) CSDDD; BRIGHT / DA GRAÇA PIRES / STREIBELT et al., CSDDD Comparative Analysis, Verfassungsblog. See further, Chapter 4 II 4.3.

1943 According to UNGP 19(b)(i), appropriate action to prevent and mitigate adverse impacts notably depends on whether the company causes or contributes to an adverse impact, or whether it is solely directly linked to it through a business relationship. Furthermore, under the UNGPs, a company should exercise its influence, i.e. leverage, to prevent or mitigate abuses, and increase it to effect change whenever possible (UNGP 19(b)(ii)). See Chapter 4 II 4.3.

1944 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 49 f.; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 14. For an illustrative case on the importance of meaningful stakeholder engagement, see also Chapter 2 II 2.2 b.

1945 Art. 3(1)(j) CSDDD defines industry or multistakeholder initiatives as a combination of voluntary due diligence procedures, tools and mechanisms, created and overseen

employees and their representatives. The forthcoming guidelines on meaningful stakeholder engagement, which are scheduled to be released by the EU Commission by 26 January 2027, should thus provide more clarity.[1946] In the meantime, EU Member States should consult international due diligence standards when transposing the Directive to prepare their corporate nationals for meaningful consultations of their workers and worker representatives.

In any case, the due diligence policy must include the following three elements: First, a description of the company's due diligence approach.[1947] Second, a code of conduct outlining rules and principles to be complied with throughout the company and its subsidiaries, and the company's direct or indirect business partners in accordance with art. 10(2)(b), art. 10(4), art.11(3)(c), or art. 11(5) CSDDD.[1948] Third, a description of the processes established to integrate due diligence into the company's relevant policies and to implement due diligence, including the measures taken to ascertain compliance with the code of conduct previously referred to and to extend its application to business partners.[1949] The due diligence policy shall be reviewed regularly and updated where necessary, including whenever a significant change occurs. Such reviews shall at least be conducted every 24 months.[1950]

Companies are then required to embed due diligence in all their relevant policies and risk management systems according to art. 7(1) CSDDD. The Directive does not further elaborate on this step.

b) Risk Assessment

According to art. 8(1) CSDDD, companies must take appropriate measures to identify and assess risks and abuses arising from their own operations, those of their subsidiaries, and throughout their chains of activities. To do so, companies shall first map their own operations, those of their subsidiaries, and those of their business partners in their chains of activities, in order to identify general areas where adverse impacts are most likely to occur and to be most severe.[1951] Under the Directive, the severity of an impact is determined

by governments, industry associations, interested organisations, including civil society organisations, or groupings or combinations thereof, that companies may participate in to facilitate the implementation of their due diligence obligations.

1946 Art. 19(3) in conjunction with art. 19(2)(a) CSDDD.

1947 Art. 7(2)(a) CSDDD.

1948 Art. 7(2)(b) CSDDD.

1949 Art. 7(2)(c) CSDDD.

1950 Art. 7(3) CSDDD.

1951 Art. 8(2)(a) CSDDD.

by its scale, scope, and remediability.[1952] This conceptualisation of severity is aligned with the UNGPs.[1953]

Based on the result of the mapping, companies are in a subsequent step required to conduct an in-depth assessment of their own operations, those of their subsidiaries, and those of their business partners in their chains of activities, in the areas where adverse impacts were identified to be most likely to occur and most severe.[1954] To avoid overburdening business partners with generic questionnaires, art. 8(4) CSDDD specifies that companies shall use information requests in a targeted manner, as part of their in-depth risk assessment, and focus their enquiries on business partners with an elevated risk profile at the relevant level of the chain of activities.[1955] The concept of creating such a 'risk map' is highly reminiscent of the LdV, even though the latter is less prescriptive than the CSDDD in this regard.[1956] The two-step approach also corresponds to BAFA's recommendations on conducting risk assessments under the SCDDA.[1957]

To gather the necessary information for their risk mapping, companies are obliged to meaningfully consult with stakeholders pursuant to art. 13(3)(a) CSDDD. The term stakeholder is defined broadly in art. 3(1)(n) CSDDD. It notably includes the employees of the company, its subsidiaries and business partners, trade unions and workers' representatives, and all other individuals and communities whose rights are or could potentially be affected by the products, services and operations of the company, its subsidiaries and its business partners. Art. 3(1)(n) CSDDD also expressly names national human rights institutions and civil society organisations as potential stakeholders. While this

1952 Art. 3(1)(v) CSDDD. Art. 3(1)(l) CSDDD uses a slightly different formulation to define the term 'severe adverse impact'. Art. 3(1)(l) CSDDD notably also uses the three criteria of scale, scope, and remediability to determine whether an adverse impact is considered severe. However, it adds that an adverse impact may *alternatively* be considered severe if its '[…] especially significant on account of its nature, such as an impact that entails harm to human life, health or liberty […]'. It is not clear why legislators used this slightly more complex wording in art. 3(1)(l) CSDDD. To reduce ambiguity and promote alignment with the UNGPs, the focus should be on the three criteria common to both art. 3(1)(v) and art. 3(1)(l) CSDDD, i.e. scale, scope, and remediability, to determine severity (cf. HOLLY/DICALOU, CSDDD Practical Guide for NHRI, 29).

1953 Cf. Commentary to UNGP 14 according to which the '[s]everity of impacts will be judged by their scale, scope and irremediable character'.

1954 Art. 8(2)(b) CSDDD.

1955 MARES RADU, 'The Unintended Consequences of Mandatory Due Diligence: The Importance of Supportive Measures in the EU Corporate Sustainability Due Diligence Directive', Verfassungsblog (13 June 2024) (hereinafter: MARES, The Unintended Consequences of Mandatory Due Diligence, Verfassungsblog).

1956 See Section I 3.3 a of this Chapter.

1957 See Chapter 4 II 4.3 c.

broad definition aligns with international due diligence standards[1958], art. 13 CSDDD does not prioritise engagement with rights-holders among the group of stakeholders[1959], and does not contain sufficient criteria ensuring engagement with stakeholders is carried out meaningfully and effectively.[1960] The latter contrasts with relevant provisions in drafts of the CSDDD, which were more prescriptive and, for instance, explicitly stated the need for employing cultural and gender-sensitive approaches to stakeholder engagement and respecting the United Nations Declaration on the Rights of Indigenous Peoples. Nevertheless, art. 13 CSDDD employs stronger language as compared to the relevant stakeholder engagement provisions in the LdV and SCDDA represents an improvement in this regard.[1961] For the LdV, the transposition of the Directive will notably transform the discretionary stakeholder engagement into an obligation.[1962] For the SCDDA, the transposition of the Directive will signify a departure from the Act's primary focus on one group of rights-holders, i.e. workers, and require companies to proactively consider a wider array of stakeholder perspectives.[1963]

The Directive only stipulates three requirements when it comes to the engagement process. First, art. 13(3) CSDDD states that companies shall provide stakeholders with relevant and comprehensive information. Reaching out to stakeholders and informing them in a timely manner about the avenues through which the company seeks to engage with them (e.g. meetings, hearings, complaints procedures) is a precondition for stakeholders to be able to express themselves in the first place.[1964] While such communication is thus a fundamental element of stakeholder engagement, it does not ensure that the process is carried out in a meaningful way. Second, art. 13(5) CSDDD requires

1958 Cf. OHCHR Interpretative Guide, 8; OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 48; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 19 f.

1959 Cf. FIELITZ PADMA-DOLMA / GIRARDI FACHIN MELINA / PAMPLONA DANIELLE ANNE, 'More of the Same or True Evolution?: Meaningful Stakeholder Consultation and the EU Corporate Sustainability Due Diligence Directive', Verfassungsblog (12 June 2024) (hereinafter: FIELITZ / GIRARDI FACHIN / PAMPLONA, Meaningful Stakeholder Consultation and the CSDDD, Verfassungsblog); HOLLY/DICALOU, CSDDD Practical Guide for NHRI, 31.

1960 Similarly, FIELITZ / GIRARDI FACHIN / PAMPLONA, Meaningful Stakeholder Consultation and the CSDDD, Verfassungsblog.

1961 LICHUMA, The CSDDD and its Implications for Meaningful Engagement, Verfassungsblog.

1962 See Section I 3.3 a of this Chapter.

1963 Cf. HAGEL/WIEDMANN, CCZ 2024, 196; See further, Chapter 4 II 4.3 b.

1964 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 49 f.

companies to identify and address barriers to engagement and to ensure confidentiality and anonymity. The former measure seeks to guarantee the accessibility of the engagement process, including by using appropriate language, taking into account the potential vulnerabilities of certain stakeholder groups such as women and minorities, and considering the reality on the ground such as difficulties in accessing the internet.[1965] The latter measure seeks to protect stakeholders that are voicing their concerns from potential retaliation and retribution.[1966] Third, art. 13(6) CSDDD holds, that except for consultations with their own employees and employee representatives, companies may fulfil their obligation to meaningfully engage with stakeholders through participation in industry and multistakeholder initiatives, provided that these collaborative approaches to stakeholder engagement meet the requirements set out in the Article. This means that under the Directive, engagement with a company's own employees and their representatives is only considered meaningful if it is conducted directly and not through collaborative initiatives. Beyond these requirements, the forthcoming guidelines on meaningful stakeholder engagement should, as previously mentioned, provide more clarity regarding the engagement process.[1967] In the meantime, EU Member States should consult international due diligence standards when transposing the Directive to prepare their corporate nationals for the obligations arising from art. 13 CSDDD.

To conduct their risk assessment, companies may, but are not obliged to, use information obtained through their complaints procedure established in accordance with art. 14 CSDDD.[1968] Pursuant to art. 14(1) CSDDD, companies must enable persons and entities with legitimate concerns regarding actual or potential adverse impacts connected to the companies' own operations as well as the operations of their and business partners in their chains of activities, to file complaints. These persons and entities include (1) natural or legal persons who are affected or have reasonable grounds to assume that they are potentially affected, (2) the legitimate representatives of actual or potentially affected persons, (3) trade unions and other workers' representatives, and (4) civil society organisations that are active and experienced in related areas where an adverse environmental impact is the subject matter of the complaint.[1969]

1965 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 51.

1966 Cf. FIELITZ / GIRARDI FACHIN / PAMPLONA, Meaningful Stakeholder Consultation and the CSDDD, Verfassungsblog.

1967 Art. 19(3) in conjunction with art. 19(2)(a) CSDDD.

1968 Art. 8(3) CSDDD.

1969 Art. 14(2) CSDDD.

To deal with these complaints, companies are required to establish a procedure that is fair, publicly available, accessible, predictable, and transparent. To prevent retaliation, companies shall ensure that complaints can be submitted confidentially.[1970] These requirements are largely aligned with UNGP 31. Nonetheless, they do not sufficiently capture the importance of meaningful stakeholder engagement for the design of an effective complaints mechanism and the monitoring of its effective performance as compared to UNGP 31. Meaningful stakeholder engagement is not required under art. 13(3) CSDDD for the design and monitoring of the complaints procedure either.

Upon request by complainants, companies must provide a follow-up, send a representative to discuss the subject matter of the complaint as well as potential remediation, and elaborate on the reasons why a complaint has been considered founded or unfounded and, where deemed founded, provide information on the action taken or to be taken.[1971] Where a complaint is well-founded, companies are required to take appropriate measures in accordance with art. 10 and 11 CSDDD to prevent, mitigate and end an adverse impact, and provide remediation in accordance with art. 12 CSDDD.[1972] The specification of the latter is particularly important, as complaints mechanisms serve three main purposes according to the UNGPs: raising concerns for (potentially) affected people, i.e. assessing risks (UNGP 18), tracking the effectiveness of company responses (UNGP 20), and providing access to remediation for human rights abuses that have occurred (UNGP 22).

Another important source of information that companies *may* use to conduct their risk assessment in accordance with art. 8(3) CSDDD, is the notification mechanism pursuant to art. 14(5) CSDDD. This mechanism is an additional mandatory avenue to be established by companies to allow a wider range of individuals and entities to anonymously or confidentially submit information or voice concerns. The notification mechanism is notably open to any individual or entity interested in submitting information regarding risks or abuses related to a company's own operations, the operations of its subsidiaries, and the operations of its business partners in its chain of activities.[1973] Both, the obligation to establish a complaints procedure and the obligation to establish a notification mechanism may be fulfilled by companies through collaborations as part of industry and multistakeholder initiatives,

1970 Art. 14(3) CSDDD.

1971 Art. 14(4) CSDDD.

1972 Art. 14(3) subpara. 2 CSDDD.

1973 Art. 14(5) CSDDD.

if these collaborations meet the requirements under art. 13 CSDDD.[1974] The differentiation between the complaints and notification mechanism is a striking feature of the CSDDD that neither exists in the LdV nor the SCDDA. Besides the mandatory involvement of trade unions in its design, the LdV does not state any minimal requirements for its complaints mechanism. It notably does not name the groups of stakeholders that are able to submit information and complaints, which may result in companies focusing on the concerns of workers.[1975] The transposition of the CSDDD will hence lead to greater clarity in this regard and ensure that a wide array of stakeholders is able to raise concerns. In contrast, the SCCDA is more prescriptive regarding the requirements for its complaints' mechanism. Under the SCDDA, a broad range of stakeholders, including (potentially) affected rights-holders and other interested persons such as whistleblowers, can notably already submit concerns. The transposition of the CSDDD will therefore only lead to few subtle changes in the SCDDA.[1976]

Lastly, companies may use information obtained through participation in industry and multistakeholder initiatives to carry out their risk assessment in accordance with art. 8 CSDDD.[1977] As demonstrated in previous Chapters, such initiatives have an important role to play in carrying out effective due diligence. Companies should thus participate and benefit from the resources these initiatives offer.[1978] In the context of risk assessments, information acquired through participation in industry and multistakeholder initiatives can notably cut costs and prevent overburdening business partners with indiscriminate and generic data sharing requests. However, as previously highlighted as well, companies should carefully consider the credibility and effectiveness of these initiatives and check the validity of information for their particular circumstances.[1979] Art. 20(4) subpara. 2 CSDDD explicitly recognises this issue by stipulating that the EU Commission shall issue guidance setting out fitness criteria and a methodology for companies to assess the fitness of industry and multistakeholder initiatives.

1974 Art. 14(6) CSDDD.

1975 See Section I 3.3 a of this Chapter.

1976 Cf. HAGEL/WIEDMANN, CCZ 2024, 195 f.

1977 Cf. Art. 20(4) para. 1 CSDDD.

1978 OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 27. See further, Chapter 2 II 2.1 c.

1979 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 12; OECD, Sustainability Initiatives & HRDD, 12. See further, Chapter 2 II 2.1 c.

c) Measures to Address Identified Impacts

Once risks and abuses are identified, companies shall prevent, mitigate, bring to an end, and minimise risks and abuses pursuant to art. 10 and 11 in conjunction with art. 9 CSDDD.

According to art. 10(1) CSDDD, companies shall take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate identified risks. Where it is not possible to prevent or mitigate all identified risks at the same time and to their full extent, companies shall prioritise the prevention and mitigation of risks based on their severity and likelihood of occurrence.[1980] Such prioritisation is aligned with the UNGPs, which allow for prioritisation of impacts based on their severity and saliency.[1981]

The appropriate preventative measures that companies are required to take are listed in art. 10(2) CSDDD. These measures include (1) implementing a prevention action plan[1982], (2) seeking contractual assurances from direct business partners[1983], (3) making necessary financial or non-financial investments in, adjustments or upgrades of facilities, production or other operational processes and infrastructures[1984], (4) making necessary modifications of, or improvements to, the company's own business plan, overall strategies and operations such as purchasing practices, design and distribution practices[1985], (5) providing support to business partners that are SMEs[1986], and (6) collaborating with other entities, including, where relevant to increase the company's leverage[1987]. Companies may take appropriate measures in addition to the ones listed in art. 10(2) CSDDD.[1988]

With respect to the development of the prevention action plan, companies are required to meaningfully engage with stakeholders for its development according to art. 13(3)(b) CSDDD. Moreover, they can, but are not obliged to, develop the action plan in cooperation with industry or multistakeholder initiatives.[1989] In any case, the prevention action plan must contain reasonable

1980 Art. 9(1) and 9(2) CSDDD.

1981 UNGP 17 and 24 and Commentary thereto; OHCHR Interpretative Guide, 8.

1982 Art. 10(2)(a) CSDDD.

1983 Art. 10(2)(b) CSDDD.

1984 Art. 10(2)(c) CSDDD.

1985 Art. 10(2)(d) CSDDD.

1986 Art. 10(2)(e) CSDDD.

1987 Art. 10(2)(f) CSDDD.

1988 Art. 10(3) CSDDD.

1989 Art. 10(2)(a) sentence 2 CSDDD.

and clearly defined timelines for the implementation of appropriate measures and qualitative and quantitative indicators for measuring improvement.[1990]

The contractual assurances shall ensure that the company's direct business partners comply with the company's code of conduct and, as necessary, prevention action plan, and ensure that the expectations contained therein are cascaded down the chain of activities through corresponding contractual obligations.[1991] The Commission will draw up voluntary model contractual clauses to support companies in the implementation of the obligation to obtain contractual assurances.[1992] Where contractual assurances are obtained from, or a contract is established with, an SME, the terms used shall be fair, reasonable, and non-discriminatory.[1993] Furthermore, companies are obliged to assess whether contractual assurances of SMEs should be accompanied by support measures pursuant to art. 10(2)(e) CSDDD.[1994] According to art. 10(2)(e) CSDDD, in-scope companies are required to provide targeted and proportionate support to their small and medium-sized business partners to prevent the latter from being overburdened by the cascaded human rights and environmental expectations of the former. Support measures pursuant to art. 10(2)(e) CSDDD include providing or enabling access to capacity-building, training, and upgrading management systems. In the event that small and medium-sized business partners would risk bankruptcy due to compliance with the code of conduct or prevention action plan of the lead company, the latter is even required to provide targeted and proportionate financial support to these business partners. Such financial support includes direct financing, low-interest loans, guarantees of continued sourcing, or assistance in securing financing.[1995] The promotion of such a shared responsibility approach to the implementation of human rights and environmental standards throughout the chains of activities is essential considering potential resource and knowledge constraints of SMEs in general and the vulnerability of SMEs based in developing states in particular. It can notably help prevent lead companies from simply divesting from challenging contexts, empower local SMEs in developing states to build stable long-term business relationships, and thus contribute

1990 Art. 10(2)(a) sentence 1 CSDDD.

1991 Art. 10(2)(b) CSDDD. On the use of codes of conduct in the CSDDD, see further, VANDENBROUCKE SARAH, The Evolution of Codes of Conduct to Ensure Labor Rights in Global Supply Chains, American Journal of International Law (AJIL) 2024, 297 ff.

1992 Art. 18 CSDDD.

1993 Art. 10(5) subpara. 1 sentence 1 CSDDD.

1994 Art. 10(5) subpara. 1 sentence 2.

1995 Cf. recital 46 in conjunction with art. 10(2)(e) CSDDD.

to sustainable development.[1996] From the perspective of international due diligence standards, which call on companies to base their business relationships on the spirit of dialogue, cooperation, and mutual learning, the incorporation of supportive measures for business partners, especially SMEs, in the Directive was crucial too.[1997]

In any case, companies should consider harmonising their contractual requirements with industry-wide standards and participating in industry and multistakeholder initiatives to further align themselves with international due diligence standards. This is because their business partners will often have various customers with potentially different or even conflicting expectations. Harmonising their requirements can help address this challenge. Collaborating with other companies and actors within the framework of industry and multistakeholder initiatives can also increase leverage and help tackle widespread and recurring risk situations more effectively.[1998] Increasing leverage by collaborating with other entities for the purpose of preventing or mitigating adverse impacts is explicitly mandated in art. 10(2)(f) CSDDD.

Companies are then required to verify compliance with contractual assurances under art. 10(5) CSDDD. To do so, they may use independent third-party verification, including through industry or multistakeholder initiatives.[1999] Where measures to verify compliance are carried out vis-à-vis SMEs, companies shall cover the costs of independent third-party verification.[2000] This helps reduce the compliance burden on SMEs, which is critical in view of their resource constraints.[2001] Independent third-party verification is defined as verification of company compliance with the human rights and environmental requirements arising from this Directive by an expert. This expert shall be objective, completely independent from the company, free from any conflicts of interest, and from external influence. Furthermore, the expert must possess experience and expertise in environmental or human rights matters,

1996 Cf. HOLLY, EU CSDDD: Maximising Impact, 21; MARES, The Unintended Consequences of Mandatory Due Diligence, Verfassungsblog. See further, European Commission, Directorate-General for International Partnerships / International Trade Centre, 'Making Mandatory Human Rights and Environmental Due Diligence Work for All: Guidance on Designing Effective and Inclusive Accompanying Support to Due Diligence Legislation' (22 April 2022) (hereinafter: EC/ITC, Making mHREDD Work for All), 22 ff. and 33 f.

1997 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 26; OECD RBC Guidance, 60.

1998 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 26; OECD RBC Guidance, 60. See further, EC/ITC, Making mHREDD Work for All, 22 and 33.

1999 Art. 10(5) sentence 2 CSDDD.

2000 Art. 10(5) subpara. 1 sentence 3 CSDDD.

2001 Cf. MARES, The Unintended Consequences of Mandatory Due Diligence, Verfassungsblog.

based on the nature of the adverse impact, and shall be accountable for the quality and reliability of the verification.[2002] This definition considers frequently brought up shortcomings of social audits and certifications, notably potential conflicts of interests between the auditing firm and its paying client.[2003] However, the definition does not address the risk of social audits and certifications using 'snapshot' and box-ticking approaches to assess compliance. As highlighted in previous Chapters, social audits and certifications cannot serve but as auxiliary tools in effective due diligence. Importantly, they cannot replace meaningful engagement with stakeholders such as workers and trade unions on site to verify compliance.[2004] Similarly, participation in industry and multistakeholder initiatives can pool resources and assist in data sharing, thereby cutting compliance costs and protecting suppliers from enduring duplicative audits at the request of different in-scope companies.[2005] Nonetheless, as outlined in previous Chapters, companies should scrutinise the credibility of such initiatives and assess the reliability of information they provide.[2006] To prevent overreliance on third-party verification and participation in industry and multistakeholder initiatives as a means to verify compliance with contractual assurances, art. 29(4) CSDDD explicitly holds that companies remain individually responsible for meeting their due diligence obligations. The inclusion of this provision in the Directive was crucial to prevent the creation of 'safe harbours' from civil liability and thus tick-box approaches to due diligence.[2007] Art. 29(4) CSDDD is aligned with international due diligence standards[2008] and represents an improvement from the perspective of rights-holders compared to the LdV and the SCDDA, which do not contain such a clarification and therefore create a potential for overreliance on social audits, certifications, and participation in industry and multistakeholder initiatives.[2009]

2002 Art. 3(1)(h) CSDDD.

2003 As pointed out in previous Chapters, these shortcomings include 'snapshot' and box-ticking approaches to assessing working conditions instead of meaningful engagement with workers and trade unions, potential conflicts of interests between the auditing firm and their paying client, reliance on incomplete or inaccurate information, and even audit fraud (for an illustrative case, see Chapter 2 II 2.1 b).

2004 Cf. OECD RBC Guidance, 18, 50, and 66 f.; OECD, Sustainability Initiatives & HRDD, 11 and 17. For an illustrative case, see further, Chapter 2 II 2.1 b.

2005 Cf. EC/ITC, Making mHREDD Work for All, 23 and 24.

2006 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 12; OECD, Sustainability Initiatives & HRDD, 12. For an illustrative case, see Chapter 2 II 2.1 c.

2007 SMIT/BRIGHT/NEELY, BHRJ 2023, 10 ff.

2008 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 12; OECD, Sustainability Initiatives & HRDD, 12

2009 See Section I 3.3 b and c of this Chapter and Chapter 4 II 4.3 d.

With the inclusion of an obligation for companies to assess their own business plan, overall strategies and operations such as purchasing practices as a preventative measure under art. 10(2)(d) CSDDD, the Directive recognises the role of a buying company's own business model and practices in incentivising human rights and labour rights abuses further down the supply chain.[2010] As highlighted before, there is mounting evidence that low prices, short production lead times, and short-term contracts, can contribute to labour rights abuses such as unfair wages, excessive working hours, forced overtime, and poor operational safety and health measures at suppliers.[2011] Companies should therefore assess whether their contracts and practices place a disproportionate burden on suppliers and potentially incentivise abuses.[2012] In this regard, companies should consult the model contractual clauses to be developed by the EU commission pursuant to art. 18 CSDDD.[2013] The incorporation of responsible purchasing practices as a mandatory preventative measure under the Directive was thus a significant step to help foster effective due diligence. It is also reminiscent of the SCDDA, which contains a similar obligation.[2014]

Where risks cannot be prevented or mitigated using the measures listed in art. 10(2) CSDDD, obliged companies may seek contractual assurances from their *indirect* business partners to ensure compliance with their code of conduct or prevention action plan. If such assurances are obtained, the same conditions under art. 10(5) CSDDD shall apply to indirect business partners.[2015]

In the event that none of the listed measures in art. 10(2), 10(4), and 10(5) CSDDD were able to successfully prevent or mitigate risks of human rights and environmental impacts, companies shall, as a last resort, refrain from entering into new or extending existing business relationships with the business partner from whom or from whose chain of activity the risk emanates. According to art. 10(6) CSDDD, companies are additionally required to either suspend or terminate the business relationship in question, if the law governing their

2010 BRIGHT / DA GRAÇA PIRES / STREIBELT et al., CSDDD Comparative Analysis, Verfassungsblog. See also, VANDENBROUCKE, AJIL 2024, 301.

2011 OECD Guidance for Garment and Footwear Sector, 49 f. and 73; ANNER/BAIR/BLASI, CLL & PJ, 8 ff; Human Rights Watch, Purchasing Practices and Labor Abuses, 2 ff.; Better Buying Institute, Purchasing Practices and Factory-Level Noncompliances, 3 ff. For an illustrative case, see Chapter 1 III 2.2.

2012 OECD Guidance for Garment and Footwear Sector, 73. See also, EC/ITC, Making mHREDD Work for All, 23 f.

2013 BRIGHT / DA GRAÇA PIRES / STREIBELT et al., CSDDD Comparative Analysis, Verfassungsblog. Guidance on responsible contracting practices, developed by business and human rights practitioners and legal experts, is already publicly available on a website called the Responsible Contracting Project.

2014 See Chapter 4 II 4.3 d.

2015 Art. 10(4) CSDDD.

business relationships allows them to. Before temporarily suspending or terminating the business relationship, companies must meaningfully consult their stakeholders.[2016] Moreover, companies shall assess whether the ramifications for rights-holders from temporarily suspending or terminating a business relationship 'can be reasonably expected to be manifestly more severe' than the human rights or environmental abuses that could not be prevented or mitigated.[2017] If a company decides that the ramifications for rights-holders are manifestly more severe, it is not obliged to suspend or terminate the business relationship.[2018] Nevertheless, it shall be prepared to provide the competent supervisory authority with the reasons governing this decision.[2019] If the ramifications of suspension or termination for rights-holders are less severe, the next step will depend on whether there is a reasonable expectation that a temporary suspension of the business relationship will be successful in bringing about the prevention or mitigation of the risk in question.[2020] If this is the case, companies shall first adopt and implement an enhanced prevention action plan tailored to the specific risk without undue delay. The enhanced action plan shall include a specific and appropriate timeline for the adoption and implementation of all actions therein, during which the company may also seek alternative business partners.[2021] It must also be developed in consultation with stakeholders.[2022] If there is no reasonable expectation that those efforts would succeed, or if the implementation of the enhanced prevention action plan has failed to prevent or mitigate the adverse impact, companies are obliged to terminate the business relationship with respect to the activities concerned. However, this obligation only applies if the risk is severe.[2023] The Directive therefore conceptualises the termination of a business relationship as the very last resort for situations in which there are no other milder means available and the risks in question are severe within the meaning of art. 3(1)(l) CSDDD. Conceptualising the termination of business relationships as a last resort is a vital measure to help prevent in-scope companies from withdrawing from challenging contexts too readily. It notably lowers the risk of excluding SMEs based in developing states from global supply chains more broadly. This exclusion could not only have adverse impacts

2016 Art. 13(3)(c) CSDDD.

2017 Art. 10(6) subpara. 2 sentence 1 CSDDD.

2018 Art. 10(6) subpara. 2 sentence 2 CSDDD.

2019 Art. 10(6) subpara. 2 sentence 2 CSDDD.

2020 Art. 10(6) subpara. 1 CSDDD.

2021 Art. 10(6) subpara. 1(a) CSDDD.

2022 Art. 13(3)(b) CSDDD.

2023 Art. 10(6) subpara. 1(b) CSDDD.

on workers and their families, but also ripple effects on the sustainable development of these countries, ultimately subverting the very aim of the Directive.[2024] In any case, companies are required to take steps to prevent, mitigate, and bring to an end adverse impacts arising from their decision to temporarily suspend or terminate a business relationship.[2025]

Art. 10(6) CSDDD is a complex provision, using several undefined terms such as 'manifestly' and 'reasonably expected'. However, its inclusion in the Directive was important to help ensure responsible corporate disengagement. Notably, neither the LdV nor the SCDDA expressly stipulate an obligation to consider the human rights and environmental ramifications of terminating a business relationship.[2026] Art. 10(6) CSDDD is largely aligned with UNGP 19. Moreover, the concept of reasonableness is commonly used in other legal fields, such as tort law to determine negligence.[2027] Recital 50 names state-backed forced labour as an example for a situation where other measures than termination cannot reasonably be expected to be successful. While this is certainly an illustrative example, guidelines are needed for companies to navigate art. 10(6) CSDDD with more legal certainty. Under art. 19(2)(a) in conjunction with art. 19(3) CSDDD, the EU Commission is obliged to issue such guidelines by 26 January 2027. Art. 10(6) CSDDD does not expressly establish a general obligation to disengage from contexts of systemic gross human rights abuses and thus recognises the limits of due diligence in achieving respect for human rights in certain settings. The guidelines should therefore at least acknowledge the limits of due diligence in achieving respect for human rights in particular situations and define the criteria to determine these limits. Otherwise, companies may legitimise entering certain markets or remaining in countries or regions, where gross human rights abuses are endemic, and potentially even state-backed, with the argument of having a due diligence process in place, despite the near inevitability of involvement in gross human rights abuses.[2028]

2024 Cf. MARES, The Unintended Consequences of Mandatory Due Diligence, Verfassungsblog; MIESZKOWSKA JOWITA, The Unintended Consequences of the EU Corporate Sustainability Due Diligence Directive, American Journal of International Law (AJIL) 2024, 291 ff., 292 f.

2025 Art. 10(6) subpara. 4 CSDDD.

2026 See Section I 3.3 c of this Chapter and Chapter 4 II 4.3 d.

2027 The common feature to determine civil liability across different European jurisdictions is whether the defendant has acted like a 'reasonable person', considering the circumstances of the case (cf. VAN DAM CEES, JETL 2011, 237).

2028 Cf. VAN HO, in: Deva/Birchall (eds.), Research Handbook on Human Rights and Business, 385 ff.; QUIJANO/LOPEZ, BHRJ 2021, 251 ff.; DEVA, LJIL 2023, 18. See further, Chapter 2 I 3.2 g.

To bring actual impacts to an end, companies are required to take appropriate measures enumerated in art. 11(3) CSDDD. Where actual impacts cannot immediately be brought to an end, companies shall minimise their extent.[2029] The measures listed in art. 11(3) largely mirror the preventative ones enumerated in art. 10(2) CSDDD. Art. 11(3) includes, but is not limited to, the following measures: First, taking measures proportionate to the severity of the adverse impact and the company's involvement to neutralise the adverse impact or at least minimise its extent.[2030] Second, adopting and implementing a corrective action plan with reasonable and clearly defined timelines where the adverse impact cannot be immediately brought to an end.[2031] To develop such action plans, companies are required under art. 13(3)(b) CSDDD to meaningfully consult stakeholders. Third, seeking contractual assurances from direct business partners and verifying adherence thereto.[2032] Fourth, making necessary financial or non-financial investments in, adjustments or upgrades of facilities, production or other operational processes and infrastructures.[2033] Fifth, making necessary modifications of, or improvements to, the company's own business plan, overall strategies and operations such as purchasing practices, design and distribution practices.[2034] Sixth, providing targeted and proportionate support to business partners that are SMEs, such as capacity-building and, under certain conditions, financial support.[2035] Seventh, collaborating with other entities, including, where relevant to increase the company's leverage.[2036] Eighth, providing remediation in accordance with art. 12 CSDDD.[2037]

Companies may take additional appropriate measures to the ones listed in art. 11(3) CSDDD.[2038] This includes companies seeking contractual assurances from their indirect business partners to ensure compliance with their code of conduct or corrective action plan. If such assurances are obtained, the conditions under art. 11(6) CSDDD shall apply.[2039] In the event that none of these

2029 Art. 11(2) CSDDD.
2030 Art. 11(3)(a) CSDDD.
2031 Art. 11(3)(b) CSDDD.
2032 Art. 11(3)(c) in conjunction with art. 11(6) CSDDD.
2033 Art. 11(3)(d) CSDDD.
2034 Art. 11(3)(e) CSDDD.
2035 Art. 11(3)(f) CSDDD.
2036 Art. 11(3)(g) CSDDD.
2037 Art. 11(3)(h) CSDDD.
2038 Art. 11(4) CSDDD.
2039 Art. 11(5) CSDDD.

measures were able to successfully bring to an end or at least minimise the human rights and environmental impacts in question, companies shall, as a last resort, refrain from entering into new or extending existing business relationships with the business partner in connection with which, or in the chain of activities of which, the impact has arisen.[2040] According to art. 11(7) CSDDD, companies are additionally required to either suspend or terminate the business relationship in question, if the law governing their business relationships allows them to. The same decision-making process and conditions for temporary suspension and termination apply under art. 11(7) as under art. 10(6) CSDDD.

According to art. 12(1) CSDDD, a company is required to provide remediation if it has caused or jointly caused human rights abuses or adverse environmental impacts. This is aligned with UNGP 22, which only calls on companies to provide remediation for adverse impacts they caused or contributed to. Under the Directive, remediation is understood as restoring the *status quo ante* as closely as possible and shall be proportionate to the company's implication in the adverse impact. It includes the payment of financial or non-financial compensation to affected rights-holders and, where applicable, the reimbursement of costs incurred by public authorities for any necessary remedial measures.[2041] When adopting appropriate measures to remediate adverse impacts, companies are required under art. 13(3)(d) CSDDD to meaningfully consult stakeholders. Pursuant to art. 25(5)(a)(iii) CSDDD, remediation may be ordered by supervisory authorities.[2042] However, the Directive is unclear on how the obligation to provide remediation under art. 12 CSDDD relates to art. 29 CSDDD, which establishes civil liability for a company that has 'caused' damage to a natural or legal person by intentionally or negligently failing to comply with its obligations under art. 10 and 11 CSDDD.[2043] While remediation under art. 12 CSDDD appears to be result-based, civil liability under art. 29 CSDDD is fault-based by requiring the breach of a due diligence obligation.[2044] Neither the recitals in the Directive nor the publication released by the EU Commission in July 2024 on frequently asked questions clarify this issue.[2045] Recital 58 simply holds that victims of human rights abuses and environmental impacts shall not be required to seek remediation before asserting their claims in court. It

2040 Art. 11(7) CSDDD.

2041 Art. 3(1)(t) CSDDD.

2042 For more on the powers of the supervisory authority, see Section II 5.1 of this Chapter.

2043 For more on the civil liability provision, see Section II 5.2 of this Chapter.

2044 Cf. SCHMIDT, NZG 2024, 865.

2045 With regard to the latter, the section on the content of obligations does not address remediation at all, see EC, CSDDD: FAQ, 10 ff.

remains to be seen whether the EU Commission will elaborate on the relationship between remediation and civil liability when issuing guidelines on appropriate measures for remediation pursuant to art. 19(2)(a) CSDDD.

In any case, transposing art. 12 CSDDD will entail significant amendments for both the LdV and the SCDDA, as neither of these Acts contains a comparable obligation to provide remediation irrespective of civil liability claims.[2046]

d) Monitoring

According to art. 15 CSDDD, companies are required to monitor the adequacy and effectiveness of measures taken to fulfil their due diligence obligations under the Directive. This assessment shall include a company's own operations, the operations of its subsidiaries, and, where related to the company's chain of activities, those of its business partners.[2047] Assessments should be understood as an iterative process that must be carried out immediately after the occurrence of a 'significant change', but at least every 12 months.[2048] A change is considered to be significant if it concerns the *status quo* of the company's own operations, the operations of its subsidiaries or business partners, its legal or business environment or any other substantial aspect of the company's situation or operating context. Examples include a company entering a new business sector or geographical area, the launch of a new product, and a change in a product's production process or technology.[2049] In addition, such assessments shall be conducted 'whenever there are reasonable grounds to believe' that new risks of adverse impacts may have arisen. Such reasonable grounds could arise as a result of publicly available reports of new risks, stakeholder engagement, or the company's notification mechanism.[2050]

In any case, assessments under art. 15 CSDDD shall be based, where appropriate, on qualitative and quantitative indicators, which are to be developed in meaningful consultation with stakeholders.[2051]

e) Reporting

According to art. 16(1) CSDDD, EU companies are obliged to report on the implementation of their due diligence obligations. To do so, they shall publish

2046 Cf. BRIGHT / DA GRAÇA PIRES / STREIBELT et al., CSDDD Comparative Analysis, Verfassungsblog.

2047 Art. 15 sentence 1 CSDDD.

2048 Art. 15 sentence 2 CSDDD.

2049 Recital 61 CSDDD.

2050 Recital 61 and art. 15 sentence 2 CSDDD.

2051 Art. 15 sentence 2 in conjunction with art. 13(3)(e) CSDDD.

an annual statement on their company website.[2052] The content and criteria of this statement will be laid down by the EU Commission through the adoption of delegated acts.[2053] For non-EU companies, the statement must contain information on the company's authorised representative within the meaning of art. 3(1)(k) in conjunction with art. 23(2) CSDDD.[2054]

In order to prevent duplicating reporting obligations, art. 16(2) exempts companies falling under the personal scope of the CSRD from additionally reporting under the CSDDD.[2055] These companies therefore fulfil their obligation to report on the implementation of their due diligence obligations under the CSDDD by complying with the requirements of the CSRD.[2056]

5. Enforcement

5.1 Public Enforcement

To ensure the effective implementation of the Directive, Member States are required to appoint at least one national supervisory authority and provide it with independent staff with sufficient expertise and powers to carry out the tasks assigned to them.[2057] Pursuant to art. 25(1) sentence 1 CSDDD, these tasks include carrying out investigations related to compliance with the obligations set out in art. 7–16 CSDDD. This means that with regard to climate change mitigation, supervisory authorities are only required to verify the adoption and design of climate change mitigation plans in accordance with art. 22 CSDDD, not whether these plans have also been effectively implemented.[2058] In any case, the EU Commission shall maintain a publicly available list of all competent supervisory authorities.[2059]

Competent national supervisory authorities are empowered to investigate on their own initiative or as a result of submitted substantiated concerns within the meaning of art. 26 CSDDD.[2060] According to art. 26(1) CSDDD, any

2052 Art. 16(1) CSDDD.

2053 Art. 16(3) CSDDD.

2054 Art. 16(1) subpara. 2 CSDDD.

2055 Cf. recital 62 CSDDD.

2056 Art. 16(2) CSDDD.

2057 Art. 24(1) and 24(9) in conjunction with art. 25(1), and 27(1) CSDDD.

2058 Cf. art. 25(1) sentence 2 CSDDD. See further, BUENO/BERNAZ/HOLLY et al., BHRJ 2024, 296; WELLER MARC-PHILIPPE / SCHWEMMER SOPHIA, Klimatransformationspflichten für Großunternehmen, Umsetzung des Art. 22 CSDDD via Klimaquote, Die Aktiengesellschaft (AG) 2024, 517 ff., 518.

2059 Art. 24(8) CSDDD.

2060 Art. 25(2) CSDDD.

natural or legal person shall be entitled to submit substantiated concerns, through easily accessible channels, to any supervisory authority if, based on objective circumstances, they have reason to believe, that a company is failing to comply with its due diligence obligations. Persons submitting such concerns may request measures to protect their identity and personal information, if disclosure of such information would prove harmful.[2061] When transposing the Directive, Members States should ensure that the procedure for submitting concerns takes into account practical obstacles, such as language barriers. Moreover, for this procedure to be an effective 'alert mechanism', the criteria for determining whether a submitted concern is 'substantiated' should not be interpreted exceedingly strict. In other words, the evidentiary threshold should not be placed too high.[2062] In any case, supervisory authorities are required to assess substantiated concerns within an appropriate timeframe and, where indicated, take action in accordance with art. 25 CSDDD.[2063] They shall inform the persons having submitted their concerns of the result of their assessment and elaborate on the reasons for their conclusion.[2064] Under art. 26(6) CSDDD, Member States are obliged to ensure that persons submitting substantiated concerns have access to a court or other independent and impartial body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the supervisory authority. This right to initiate legal proceedings against supervisory authorities for allegedly failing to fulfil their duties adequately is innovative and has the potential to ensure the accountability of these bodies and thereby trust in their decision-making process as independent, impartial, and transparent. However, to exercise this right, concerned individuals or legal persons are required to have 'a legitimate interest' in the matter, which is determined by the standards of the applicable national law pursuant to art. 26(6) CSDDD. To avoid restrictive interpretations of legitimate interests and ensure a harmonised approach across Member States, this term should have been clarified in the Directive.[2065] In order to rectify this missed opportunity, the Commission should issue relevant guidelines

2061 Art. 26(2) CSDDD.

2062 Under the SCDDA for instance, the BAFA is notably required to take action if the described circumstances render the asserted breach of a due diligence obligation plausible (cf. Chapter 4 II 5.1). A similar standard should apply when assessing concerns pursuant to art. 26 CSDDD.

2063 Art. 26(4) CSDDD.

2064 Art. 26(5) CSDDD.

2065 Cf. KRAJEWSKI MARKUS, 'Administrative Enforcement of Corporate Human Rights Due Diligence Legislation: A Flower in the "Bouquet of Remedies"', Verfassungsblog (29 May 2024) (hereinafter: KRAJEWSKI, Administrative Enforcement of Corporate Human Rights Due Diligence Legislation, Verfassungsblog).

pursuant to art. 19(1) CSDDD. Overall, art. 26 CSDDD is reminiscent of sec. 14(1) no. 2 SCDDA, which provides individuals and legal persons with the opportunity to alert the competent German authority BAFA of an imminent or actual breach of due diligence obligations in a similar manner.[2066] In the absence of clarifying guidelines by the EU Commission, Member States could thus look to the experience with the German Act when transposing art. 26 CSDDD.[2067]

Competent national supervisory authorities have the power to (1) order injunctions, for instance the cessation of a breach of due diligence obligations[2068], (2) adopt interim measures in the event of an imminent risk of severe an irreparable harm[2069], and (3) impose penalties, including pecuniary penalties[2070]. According to art. 27(1) CSDDD, penalties shall be effective, proportionate, and dissuasive. Pecuniary penalties shall be based on a company's worldwide net turnover. The maximum pecuniary penalty shall amount to at least 5% of a company's worldwide net turnover.[2071] In any case, Member States shall ensure that any decision of the supervisory authorities imposing penalties for breaches of due diligence obligations is publicly available for at least five years and sent to the European Network of Supervisory Authorities established in accordance with art. 28 CSDDD.[2072]

For EU companies, the competent supervisory authority is the authority of the Member State in which the company is registered.[2073] For non-EU companies, it is the authority of the Member State in which the company has a branch. In the event that the company does not have a branch in any Member State, or has branches across multiple Member States, the competent supervisory authority shall be the authority of the Member State in which the company generated most of its net turnover in the Union.[2074] However, with regard to non-EU companies, the question arises of whether competent supervisory authorities will be able to enforce penalties beyond EU territory in practice.[2075]

Besides enforcement through competent supervisory authorities, Member States shall ensure that non-compliance with due diligence obligations

2066 See Chapter 4 II 5.1.

2067 Art. 19 CSDDD does not oblige the EU Commission to publish guidelines on supervisory authorities.

2068 Art. 25(5)(a) CSDDD.

2069 Art. 25(5)(b) CSDDD.

2070 Art. 25(5)(c) in conjunction with art. 27 CSDDD.

2071 Art. 27(4) CSDDD.

2072 Art. 27(5) CSDDD.

2073 Art. 24(2) in conjunction with art. 2(1) CSDDD.

2074 Art. 24(3) in conjunction with art. 2(2) CSDDD.

2075 BUENO/BERNAZ/HOLLY et al., BHRJ 2024, 298.

arising from the Directive can be considered when awarding public and concession contracts.[2076] This possibility too is reminiscent of the SCDDA.[2077]

Overall, mandating the establishment of national oversight authorities with powers to investigate and sanction breaches of due diligence obligations, instead of solely relying on civil society organisations and other stakeholders to monitor compliance, was an essential step in rendering the Directive more effective.[2078] To boost the potential of the Directive's public enforcement mechanism and prevent companies from 'shopping' for the most favourable conditions, it will be important to reach a certain level of harmonisation across EU Member States with respect to penalties. The EU Commission should thus consider issuing guidelines in accordance with art. 19(1) CSDDD to that effect. Otherwise, one of the Directive's key objectives of levelling the playing field regarding responsible business conduct may be undermined.[2079]

In any case, for the LdV, the transposition of the CSDDD will finally establish a regulatory oversight body, thereby alleviating the burden of monitoring compliance for civil society organisations and other stakeholders.[2080] For the SCDDA, the introduced changes as a result of the transposition of the CSDDD will be more subtle, as the Act already contains a robust public enforcement mechanism similar to the one envisaged by the CSDDD. Nevertheless, one important amendment will be the introduction of noticeably higher maximum fines.[2081] Thanks to the similarities between the SCDDA and the CSDDD, Member States will be able to benefit from the German supervisory authority's experience with enforcing the Act.

5.2 Private Enforcement

Art. 29 CSDDD introduces a fault-based liability for breaches of due diligence obligations under the Directive.[2082] According to art. 29(1) CSDDD, companies

2076 Art. 31 CSDDD.

2077 Pursuant to sec. 22 SCDDA, companies that have been fined for breaches of due diligence obligations under the Act may also be excluded from public procurement procedures (see further, Chapter 4 II 5.1).

2078 Similarly, KRAJEWSKI, Administrative Enforcement of Corporate Human Rights Due Diligence Legislation, Verfassungsblog.

2079 Cf. recital 31 CSDDD. See further, Section I 1. of the present Chapter.

2080 Cf. AKIN, Implications of the LdV for the EU, BHRJ Blog. See further, Section I 4.1 of this Chapter.

2081 Sec. 24 SCDDA currently foresees the imposition of administrative fines of up to EUR 8,000,000 or up to 2% of the annual turnover for legal persons as opposed to art. 27(4) CSDDD, which stipulates a maximum pecuniary penalty of *at least* 5% of a company's worldwide net turnover (see further, Chapter 4 II 5.1).

2082 BUENO/BERNAZ/HOLLY et al., BHRJ 2024, 298.

shall notably be liable if three conditions are met: First, a company must intentionally or negligently fail to comply with its obligation to prevent, mitigate, end or minimise adverse impacts in accordance with art. 10 and 11 CSDDD. The reference to art. 10 and 11 CSDDD particularly ensures that companies cannot be held liable for breaches of obligations related to climate change mitigation established in art. 22 CSDDD.[2083] Considering that national supervisory authorities are not required to monitor the effective implementation of climate change mitigations plans, it is questionable whether art. 22 CSDDD will not remain a dead letter in practice due to lack of enforcement.[2084] Art. 29(1)(a) CSDDD in conjunction with recital 79 clarifies that persons whose rights are not covered pursuant to the Annex of the Directive cannot claim liability for adverse impacts indirectly caused to them. This requirement is aimed at excluding derivative damage.[2085] Second, the failure to comply with due diligence obligations must result in damage to a natural or legal person's legal interests that are protected under national law (e.g. death, injury, damage to a person's property).[2086] This condition raises the question of whether purely environmental damage can be litigated if there is no clearly discernible individual claimant harmed, or where harm is sustained as a group.[2087] It also leaves EU Member States with discretion regarding covered legal interests.[2088] Third, there must be a causal link between the failure to comply with due diligence obligations and the damage in question.[2089] Art. 29(1) subpara. 2 CSDDD specifies that liability is excluded if the damage in question was solely caused by a company's business partners. This is consistent with UNGP 22,

2083 NIETSCH, NJW 2024, 2867; WELLER/SCHWEMMER, AG 2024, 518.

2084 Cf. previous Section II 5.1 of this Chapter.

2085 Recital 79 uses the example of a landlord of an employee which is unable to pay rent as a result of damage suffered because his or her company's failure to respect safe working conditions. The landlord should not be able to bring a claim against the company under the CSDDD for economic loss resulting from one of their employees inability to pay rent. See further, BUENO NICOLAS / OEHM FRANZISKA, 'Conditions of Corporate Civil Liability in the Corporate Sustainability Due Diligence Directive: Restrictive, but clear?', Verfassungsblog (28 May 2024) (hereinafter: BUENO/OEHM, Conditions of Corporate Civil Liability in the CSDDD, Verfassungsblog); Nietsch, NJW 2024, 2866; Schmidt, NZG 2024, 866.

2086 Art. 29(1) CSDDD in conjunction with recital 79. See further, BUENO/OEHM, Conditions of Corporate Civil Liability in the CSDDD, Verfassungsblog; NIETSCH, NJW 2024, 2866 and 2869.

2087 BUENO/BERNAZ/HOLLY et al., BHRJ 2024, 298; HOLLY/DICALOU, CSDDD Practical Guide for NHRI, 36. Clearly negating the possibility of liability for purely environmental damage: NIETSCH, NJW 2024, 2866.

2088 SCHMIDT, NZG 2024, 868.

2089 Art. 29(1) CSDDD. See further, NIETSCH, NJW 2024, 2869.

which only calls on companies to provide remediation for adverse impacts they caused or contributed to. Art. 29(5) subpara. 2 CSDDD further clarifies that if the damage was caused jointly by the company and its subsidiary or the company and its business partners, they shall be liable jointly and severally in accordance with national laws.[2090] In any case, the CSDDD does not stipulate upon which side – claimants or defendants – the burden of proof is incumbent. Accordingly, Member States may decide to reverse the burden of proof in their transposition laws.[2091] In the absence of such a reversal, claimants will have to prove all the elements of civil liability.[2092] As previously highlighted, this is a difficult task to accomplish.[2093] Consequently, the 'flood of claims' feared by opponents of the civil liability provision in the CSDDD is an unlikely scenario.[2094]

Art. 29(3) and art. 29(7) CSDDD then contain measures aimed at addressing practical and procedural obstacles commonly faced by claimants seeking access to justice for human rights abuses. Art. 29(3) CSDDD notably establishes a minimum limitation period of five years, forbids prohibitively high litigation costs, and stipulates the availability of injunctive relief, access to information and representative action.[2095] The formulation of the second measure is vague: what is not prohibitively high by European standards may be an unbearable cost for claimants based in developing countries seeking justice.[2096] Moreover, claimants with insufficient means are typically already able to apply for assistance for court fees and free legal representation.[2097] This measure will therefore do little in practice to diminish the power imbalance experienced by victims of human rights abuses and environmental harm, on the one hand,

2090 See also recital 87 sentence 2.

2091 Cf. recital 81 CSDDD. See also, HOLLY/DICALOU, CSDDD Practical Guide for NHRI, 37; JENTSCH VALENTIN, Marktregulierung durch Privatrecht, Schweizerische Juristen-Zeitung (SJZ) 2025, 239 ff., 246.

2092 BUENO/BERNAZ/HOLLY et al., BHRJ 2024, 298; HOLLY, EU CSDDD: Maximising Impact, 20. See further, JENTSCH, SJZ 2025, 247 f.; KOENIG CARSTEN, Human Rights or Private Rights? – Effective Protection of Victims in Global Supply Chains, American Journal of International Law (AJIL) 2024, 269 ff., 271.

2093 See Chapter 4 II 5.2 and Section I 4.2 b of the present Chapter.

2094 Cf. BUENO/OEHM, Conditions of Corporate Civil Liability in the CSDDD, Verfassungsblog; NIETSCH, NJW 2024, 2871.

2095 HOLLY, EU CSDDD: Maximising Impact, 20; HOLLY/DICALOU, CSDDD Practical Guide for NHRI, 38 f.

2096 SCHMIDT, NZG 2024, 868. See also, BUENO/OEHM, Conditions of Corporate Civil Liability in the CSDDD, Verfassungsblog.

2097 ZIMMERMANN ANTON, 'Access to Supply Chain Justice?: Some Procedural Spotlights on Art. 29 para. 3 CSDDD', Verfassungsblog (27 May 2024) (hereinafter: ZIMMERMANN, Art. 29 para. 3 CSDDD, Verfassungsblog).

and large, resourceful companies on the other.[2098] However, the last two measures in particular may indeed help alleviate some of these power imbalances. This is because evidence regarding potential breaches of due diligence obligations will regularly be held by the company and is thus difficult to access for claimants without relevant procedural measures to request disclosure of such evidence. Representative action, whereby trade unions, NGOs, and National Human Rights Institutions may bring claims on behalf of affected rights-holders, can help reduce procedural hurdles for rights-holders, such as linguistic barriers, and help preserve their anonymity, as they may fear reprisals.[2099]

Art. 29(7) CSDDD obliges Member States to ensure that the provisions of national law transposing the civil liability regime are of overriding mandatory application in instances where the law applicable to such claims is not the national law of a Member State. This clarification is important, as under the rules of private international law, the law applicable to a dispute regarding harm having occurred in a third country would normally be the law of that third country *(lex loci damni)*. The law of that third country may offer less advantageous liability conditions and procedural measures, including shorter limitation periods and significant barriers to access information, for claimants than the CSDDD. However, if Member States ensure that their transposing provisions are of overriding mandatory application, courts will apply the standard set out in art. 29 CSDDD.[2100] Conversely, this provision also means that the national provisions transposing the civil liability regime will have to be applied even if the third-country law would actually be more favourable to the injured party. This is due to the clear wording of art. 29(7) CSDDD and the fact that initial proposals[2101] allowing claimants to choose the applicable law were evidently rejected.[2102]

Overall, art. 29 CSDDD is significantly more aligned with UNGP 26 than the relevant provisions under the LdV and the SCDDA. Art. 29 CSDDD therefore marks an improvement from the perspective of rights-holders in this regard.[2103]

2098 Cf. BUENO/OEHM, Conditions of Corporate Civil Liability in the CSDDD, Verfassungsblog; ZIMMERMANN, Art. 29 para. 3 CSDDD, Verfassungsblog.

2099 Cf. ZIMMERMANN, Art. 29 para. 3 CSDDD, Verfassungsblog. See further, Chapter 4 II 5.2 and Section I 4.2 b of the present Chapter.

2100 Cf. recital 90. See also, HOLLY/DICALOU, CSDDD Practical Guide for NHRI, 37.

2101 For instance, in its report published on 11 February 2021 (A9-0018/2021), the Committee on Legal Affairs of the European Parliament proposed the introduction of Art. 6a Rome II Regulation, which would have provided for such a right to choose. This proposition received criticism in the literature, see, e.g., RÜHL GIESELA, 'Human Rights in Global Supply Chains: Do We Need to Amend the Rome II Regulation?' (9 October 2020), The European Association of Private International Law Blog.

2102 SCHMIDT, NZG 2024, 869.

2103 Cf. Chapter 4 II 5.2 and Section I 4.2 b of the present Chapter.

While the measures introduced by art. 29 CSDDD will undeniably facilitate access to remedy for victims of human rights abuses, the absence of a mandatory reversal of the burden of proof still represents a major hurdle for victims seeking justice in European courts.[2104] This diminishes the deterring effect of potential civil liability claims and enhances the likelihood of companies engaging in a tick-box approach to due diligence obligations.[2105] Moreover, the persisting relevance of the respective national law of EU Member States in crucial aspects of establishing civil liability, including covered legal interests and the burden of proof, may encourage companies to 'shop' for favourable conditions in EU Member States. This would undermine one of the Directive's key objectives of levelling the playing field.[2106]

Learning from the French experience with the private enforcement of the LdV, Member States should clarify which courts have jurisdiction to hear civil liability claims when transposing the Directive.[2107] This can help claimants save considerable time and procedural costs. In addition, given the complexity of transnational human rights and environmental litigation, Member States should consider designating a specialised court chamber, as eventually did the French legislator, for lawsuits based on the LdV.[2108]

Even though art. 29 CSDDD addresses important legal and practical barriers to access remedy in European courts, it does not fundamentally challenge the *status quo* for rights-holders. Thus, submitting a complaint to the competent NCP of an EU Member State may still offer a faster, less burdensome, and more cost-effective alternative to civil liability proceedings.[2109] This is especially true if competent national supervisory authorities have already been alerted to possible breaches of due diligence obligations, as pending investigations before such authorities may incentivise companies to be more cooperative during NCP proceedings and agree to pay damages and/or provide remediation.

6. Concluding Remarks

As demonstrated, the CSDDD is not fully aligned with the UNGPs. First, this is true for the Directive's personal scope, which bases the applicability of due diligence obligations on company size and net turnover, instead of taking a

2104 Cf. HOLLY, EU CSDDD: Maximising Impact, 20.

2105 Cf. Chapter 4 II 5.2 and Section I 4.2 b of the present Chapter.

2106 Cf. recital 31 CSDDD. See further, Section I 1. of the present Chapter.

2107 Cf. AKIN, Implications of the LdV for the EU, BHRJ Blog.

2108 See Section I 4.2 of the present Chapter.

2109 See Chapter 2 II 3.

risk-based approach.[2110] Second, the Directive does not encompass the full spectrum of human rights enshrined in the UDHR, ICCPR, ICESCR, and ILO Core Labour Standards and does not cover all actions removing or reducing the enjoyment of these rights.[2111] Third, the reach of due diligence obligations under the Directive excludes important downstream business activities, including the sale of products and the provision of services. As a result, financial institutions are exempted from conducting due diligence with regard to activities that lie at the very core of their business and pose the greatest risk of human rights abuses as well as environmental impacts.[2112] Fourth, the Directive only prescribes meaningful stakeholder engagement with regard to certain steps of the due diligence process.[2113] This diminishes its legitimacy from a critical decolonial perspective described in Chapter 1 III 2.1 b.

Overall, the CSDDD will help align the national laws of EU Member States, including the LdV and the SCDDA, considerably more closely with the UNGPs and both directly and indirectly affect how companies conduct business in and beyond Europe. Moreover, the Directive incorporates crucial measures that help foster effective due diligence. These include four preventative measures in particular: First, art. 29(4) CSDDD, which prevents the usage of third-party verification and participation in industry and multistakeholder initiatives from creating safe harbours from civil liability. Second, art. 10(2)(b) in conjunction with art. 10(5) CSDDD, which stipulates fair contracting practices with regard to SMEs. Third, art. 10(2)(e) CSDDD, which requires companies to provide targeted and proportionate support to SMEs that are their business partners, including through capacity-building and, under certain conditions, even financial support. Fourth, art. 10(2)(d) CSDDD, which obliges companies to review their purchasing practices. The last three measures demonstrate that EU legislators clearly recognised the risk of in-scope companies simply shifting the regulatory burden to their business partners, instead of sharing responsibility for complying with due diligence obligations.

At the same time, the Directive contains elements that create the risk of a tick-box approach to compliance, such as the absence of prescribed meaningful stakeholder engagement at all stages of the due diligence process. The effectiveness of the Directive in preventing human rights and environmental abuses will largely depend on the national transposition laws of EU Member States and the commitment of Member States to the enforcement of due diligence

2110 See Section II 3. of this Chapter.

2111 See Section II 4.1 of this Chapter.

2112 See Section II 2.3 and 4.2 of this Chapter.

2113 See Section II 4.3 b-d of this Chapter.

obligations. Despite its limitations, the adoption of the CSDDD is undoubtably a milestone in the protection of rights-holders from transnational corporate misconduct. This is even more so, as art. 36 CSDDD tasks the EU Commission with regularly reviewing the effectiveness of the Directive and proposing amendments to improve it.

With the European Commission's recent adoption of the Omnibus Proposal, significant amendments to the CSDDD, in addition to the already postponed transposition deadline and applicability dates described in Section II 1. of this Chapter, may be imminent.[2114] Five of the proposed changes are particularly noteworthy: First, the Commission suggests limiting due diligence obligations to direct business partners, unless the company has 'plausible information' suggesting that there are human rights or environmental risks arising at indirect business partners.[2115] This focus on tier 1 business relationships is reminiscent of the SCDDA.[2116] As discussed in Chapter 4 II, the focus on direct business relationships discounts human rights and environmental risks where they are most likely to occur and most likely to be severe, i.e. in the lower tiers of the supply chain. In the accompanying document to the proposal, the EU Commission acknowledges this problem.[2117] Especially regarding high-risk sectors, such as the textile, agricultural, and extractive sector, there is compelling evidence of human rights and environmental risks beyond tier 1. Companies operating in these sectors would thus be well advised to conduct risk assessments beyond tier 1 anyway.[2118] In light of complementary EU legislation, such as the EU Forced Labour Regulation for instance, which will apply from 14 December 2027 onwards to all economic operators, i.e. natural persons, legal persons, and associations of persons, irrespective of their size,[2119] it would be prudent for companies to conduct risk assessment beyond tier 1

2114 EC, Omnibus Proposal: CSRD and CSDDD, 17 ff.

2115 Ibid., 18. See also, EC, Omnibus Package Press Release; EC, Omnibus Package Q&A, Q7.

2116 Cf. EC, Omnibus Proposal: CSRD and CSDDD, 18. See further, Chapter 4 II 4.2.

2117 European Commission, Staff Working Document, SWD(2025) 80 final (26 February 2025) (hereinafter: EC, Staff Working Document, Omnibus Proposal), 35.

2118 Similarly, CORE The Human Side of Business, 'CSDDD Post Omnibus: How Would the Proposed Changes Affect Your Implementation?' (27 February 2025) (hereinafter: CORE, CSDDD Post Omnibus). See further, RAVAL SAUMYA / BÄUMLER JELENA, 'Left Behind: How the Omnibus Package Fails Vulnerable Workers from Informal Economies', Verfassungsblog (18 March 2025).

2119 Art. 39 in conjunction with art. 2(9) EU Forced Labour Regulation. See further, HOLLY / ANDREASEN LYSGAARD / BLOCH VEIBERG et al., EU Regulatory Initiatives, 38 ff.; CAYGIN AYDIN FATMANUR, 'Strengthening the EU's Stand Against Forced Labour: The Regulation on Prohibiting Products Made with Forced Labour', the Danish Institute for Human Rights (13 January 2025) (hereinafter: CAYGIN, EU Forced Labour Ban), 7 ff.

nonetheless as well. The EU Forced Labour Regulation prohibits placing in and making available on the EU market products made using forced labour.[2120] The prohibition encompasses the use of forced labour at *any* stage of the product's upstream production or manufacturing process.[2121] While the Regulation does not impose due diligence obligations[2122], competent enforcement authorities will take into account whether economic operators have implemented effective due diligence measures to avoid, mitigate, and bring to an end the use of forced labour in their supply chains when assessing compliance.[2123] Therefore, it is questionable whether focusing due diligence obligations on direct business partners under the amended CSDDD would indeed significantly reduce compliance costs for many in-scope companies. Moreover, in Germany, the SCDDA's focus on direct business partners prompted in-scope companies to send out generic questionnaires to all their direct suppliers, regardless of their risk profile. Having to process and evaluate a substantial volume of such enquiries, this approach to risk assessment imposed an unnecessary bureaucratic burden on both, in-scope companies and their low-risk direct business partners, including SMEs, and was hardly effective.[2124] The proposed focus on direct business partners would thus risk duplicating mistakes made under the SCDDA when it comes to risk mapping.[2125] In an attempt to lower the risk of overburdening direct business partners with information requests for the purpose of risk mapping, the EU Commission suggests requiring in-scope companies to limit such requests to companies with more than 500 employees, unless the information cannot be obtained otherwise.[2126] Whether this proposed measure could indeed substantially alleviate compliance costs for direct business partners, which will regularly be EU companies, appears at least questionable – even according to the accompanying document to the Commission's proposal.[2127] In any case, a focus on direct business partners for conducting due diligence would signify a drastic departure from the risk-based

2120 Art. 1(1) EU Forced Labour Regulation.

2121 Art. 2(7) EU Forced Labour Regulation. See further, CAYGIN, EU Forced Labour Ban, 7.

2122 Art. 1(3) EU Forced Labour Regulation. See further, CAYGIN, EU Forced Labour Ban, 6.

2123 Cf. art. 17(5), art. 20(5), and art. 21(3) EU Forced Labour Regulation. See further, CAYGIN, EU Forced Labour Ban, 8 f.

2124 See Chapter 4 II 4.3 c.

2125 BusinessEurope, the largest European business organisation, representing 42 national business federations from 36 countries in the EU, recognised this risk and published a statement strongly opposing the EU Commission's proposed focus on tier 1 business partners, see BusinessEurope, 'Omnibus I: CS3D, CSRD and Taxonomy: Position Paper' (30 April 2025), 6.

2126 EC, Staff Working Document, Omnibus Proposal, 37.

2127 Ibid., 36.

approach stipulated in international due diligence standards and diminish the transformative potential of the amended CSDDD for rights-holders.[2128]

Second, the Commission proposes limiting the definition of stakeholders to individuals and communities whose rights or interests may potentially be or are directly affected by the business activities of an in-scope company, its subsidiaries or business partners, such as workers and their representatives. Moreover, the Commission seeks to restrict the obligation to meaningfully engage with stakeholders to fewer stages of the due diligence process.[2129] As repeatedly stated, meaningful stakeholder engagement is a cornerstone of credible and effective due diligence. The proposed restrictive definition of stakeholders would exclude civil society organisations such as NGOs and National Human Rights Institutions, which have key insights on the human rights and environmental situation on the ground and the expertise to help companies design effective due diligence measures, from the required consultation.[2130] In the Commission's accompanying document, the crucial role of engaging with a broad range of stakeholders not only for effective risk identification and harm mitigation, but also building trust, strengthening the company's reputation, and ultimately reinforcing its long-term viability, is explicitly recognised. It is doubtful whether introducing these limitations in an attempt to minimise the administrative burden on companies would actually outweigh the benefits of meaningful stakeholder engagement, as currently prescribed in the CSDDD, and not rather be short-sighted.[2131] Narrowing the definition of stakeholders and further constraining stakeholder engagement to fewer stages in the due diligence process would certainly not be aligned with the expectations set out in international due diligence standards.[2132]

Third, the Commission suggests removing the obligations to terminate business relationships as a last resort.[2133] This means that companies could remain in contexts where gross human rights abuses are systematic, and

2128 ENNHRI, Statement on EC Omnibus I, 4.

2129 EC, Omnibus Proposal: CSRD and CSDDD, 17 and 18 f. See also, EC, Omnibus Package Q&A, Q7.

2130 Similarly, ENNHRI, Statement on EC Omnibus I, 5; Network of African National Human Rights Institutions (NANHRI), 'Submission on the European Commission's Omnibus Proposal' (31 March 2025), 2.

2131 EC, Staff Working Document, Omnibus Proposal, 38. See also, CORE, CSDDD Post Omnibus.

2132 Cf. OECD Guidelines 2023, Commentary on Chapter II: General Policies, para. 28; OECD RBC Guidance, 49 f.; OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 14. For an illustrative case on the importance of meaningful stakeholder engagement, see also Chapter 2 II 2.2 b.

2133 EC, Omnibus Proposal: CSRD and CSDDD, 18. See also, EC, Omnibus Package Q&A, Q7.

potentially even state-backed, such as in Xinjiang, with the argument of having a human rights due diligence process in place, despite the near inevitability of involvement in severe human rights abuses. This modification would represent a substantial departure from the CSDDD, which explicitly recognises the virtual certainty of involvement in human rights abuses in specific contexts in recital 50, and international due diligence standards.[2134] Nevertheless, because of the recently adopted EU Forced Labour Regulation, companies that do not terminate business relationships with suppliers using forced labour would still expose themselves to the risk of having their products banned from entering the EU market, ordered to be removed, and required to be disposed of.[2135] Besides these potential legal repercussions regarding at least one type of human rights abuse, companies not terminating business relationships despite an overwhelming risk of involvement in gross human rights abuses would expose themselves to significant reputational and thereby financial risks.[2136] It is questionable whether these risks outweigh the costs associated with considering the termination of business relationships as a last resort.

Fourth, the Commission suggests reducing the stipulated frequency of monitoring the adequacy and effectiveness of implemented due diligence measures from yearly to five-year intervals. The Commission recognises the risk of reducing these assessment intervals and rightfully notes that it may expose companies to an increased risk of fines and civil liability.[2137] Prudent companies would thus monitor their due diligence measures on a yearly basis, irrespective of potential legislative changes. This is especially true if they would still be expected to annually report on their due diligence measures under the amended CSDDD or CSRD.[2138]

Fifth, the Commission proposes the removal of provisions harmonising civil liability conditions in art. 29 CSDDD and the deletion of the requirement for Member States to provide reasonable conditions under national law for representative action.[2139] If adopted, this amendment would reinforce fragmentation,[2140] instead of creating a level playing field as originally envisioned

2134 See further, Section II 4.3 c of this Chapter and Chapter 2 I 3.2 g.

2135 Art. 20(4) EU Forced Labour Regulation.

2136 Cf. CORE, CSDDD Post Omnibus.

2137 EC, Omnibus Proposal: CSRD and CSDDD, 38.

2138 Similarly, CORE, CSDDD Post Omnibus.

2139 EC, Omnibus Proposal: CSRD and CSDDD, 20. See also, EC, Staff Working Document, Omnibus Proposal, 39 f.

2140 Office of the United Nations High Commissioner for Human Rights (OHCHR), 'OHCHR Commentary on the Omnibus Proposal: EU Proposal Risks Backsliding on Historic Corporate Sustainability Directive' (May 2025) (hereinafter: OHCHR, Commentary on the Omnibus Proposal), 4.

by the CSDDD.[2141] Such fragmentation entrenches legal uncertainty for both companies and rights-holders seeking remediation in European courts.[2142] The Commission itself doubts whether this amendment would even result in a reduction of the compliance burden for companies.[2143]

These points illustrate that the proposed amendments to the CSDDD would not merely imply the simplification of due diligence obligations, but significantly water them down and mark a clear departure from the UNGPs.[2144] This would punish companies that are committed to responsible business practices and have already invested significant sums in compliance with the CSDDD. Moreover, the open outcome of the Commission's proposal creates considerable legal uncertainty for companies,[2145] which could curb buy-in from senior corporate leadership and stifle long-term investment in sustainability.[2146] It is doubtful whether the presumed cuts in compliance costs through the proposed modifications would indeed outweigh their drawbacks, including legal uncertainty, reputational and financial risks for companies, and repercussions for rights-holders.[2147] In their accompanying document to their initial CSDDD Proposal in 2022, the Commission estimated that compliance costs for large and very large companies would amount to about 0.004% to 0.006% of their yearly revenue[2148], which is certainly

2141 Recital 31 CSDDD. See further, Section II 1. of the present Chapter.

2142 Cf. ENNHRI, Statement on EC Omnibus I, 6; OHCHR, Commentary on the Omnibus Proposal, 4.

2143 EC, Staff Working Document, Omnibus Proposal, 40.

2144 UN Working Group on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises (WGBHR), 'European Commission Measures to Simplify Business Environment Must Align with UN Guiding Principles on Business and Human Rights, Warn Experts', Press Release (20 March 2025). See also, McNally, EU Omnibus: Next Steps for CSRD/CSDDD.

2145 UN Working Group on The Issue of Human Rights and Transnational Corporations and Other Business Enterprises (WGBHR), 'Statement Encouraging the European Union to Ensure that any Developments Relating to the Corporate Sustainability Due Diligence Directive are in Alignment with the UN Guiding Principles on Business and Human Rights' (12 February 2025) (hereinafter: WGBHR, Omnibus Statement), 1. See also, PANKOV SUSANNE / ÖLMEZ YALCIN, 'The EU's Omnibus Proposal: What it is Aiming for and What Lies Ahead', World Economic Forum article (10 March 2025) (hereinafter: PANKOV/ÖLMEZ, EU Omnibus Proposal).

2146 Cf. NALWOGA-DUBOIS STELLA / CARLOTA AMANDA / VERGANO PAOLO R., 'The EU's Sustainability Omnibus: Striking a Balance Between Sustainability Objectives and Competitiveness?', Lexology (20 March 2025) (hereinafter: NALWOGA-DUBOIS/CARLOTA/VERGANO, CSRD/CSDDD Omnibus, Lexology); PANKOV/ÖLMEZ, EU Omnibus Proposal.

2147 Cf. PANKOV/ÖLMEZ, EU Omnibus Proposal.

2148 European Commission, Commisson Staff Working Document SWD(2022) 42 final (23 February 2022), 59.

moderate.[2149] With the proposed amendments of the CSDDD, the Commission now estimates that the annual compliance cost savings would amount to EUR 480,000 for the largest 300 companies.[2150]

Compliance with human rights and environmental expectations that are aligned with international standards come at a certain cost. However, responsible companies recognise that risks to people and the planet can quickly manifest in reputational, legal, and financial risks to business.[2151] This is because the human rights and environmental performance of companies is increasingly scrutinised by civil society organisations,[2152] whose findings rapidly garner public attention and shape purchasing and investment decisions.[2153] It is thus unsurprising that numerous prominent companies such as Nestlé and Unilever have taken a stand against the proposed weakening of due diligence obligations under the CSDDD.[2154]

In a next step, the European Parliament and the Council will each adopt their respective positions on the Omnibus Proposal and trilogue negotiations will begin. While the proposal to push back the transposition deadline and applicability of due diligence obligations was accepted fast, other amendments to the CSDDD will be more controversial and likely involve lengthier negotiations.[2155]

2149 University of Applied Sciences BFI Vienna, 'Economists' Statement – Beyond Short-Term Profits: Why the EU Must Defend the Corporate Sustainability Due Diligence Directive and the Green Deal' (19 May 2025), Public Statement signed by 90 economists from universities across Europe, 2. See further, VAN TEEFFELEN JASPER / DE LETH DAVID OLIVIER, 'CSDDD: Companies Cry "Burden" while Paying out Billions to Shareholders' (25 February 2025), Centre for Research on Multinational Corporations (SOMO).

2150 EC, Staff Working Document, Omnibus Proposal, 42.

2151 Cf. CORE, CSDDD Post Omnibus.

2152 See, e.g., the benchmarks and reports published by World Benchmarking Alliance, a non-profit organisation assessing the human rights and environmental performance of the 2,000 most influential companies.

2153 Cf. FRIEDE GUNNAR / BUSCH TIMO / BASSEN ALEXANDER, ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies, Journal of Sustainable Finance & Investment (JSF&I) 2015, 210 ff.; IIGCC/Eurosif/PRI, Investor Joint Statement on Omnibus Legislation; Eurosif, Press Release re EC Omnibus Proposal.

2154 Business & Human Rights Resource Centre, 'EU: Major Businesses Oppose Weakening of European Sustainability Regulation amid Omnibus Proposal', news article (24 February 2025).

2155 MCNALLY, EU Omnibus: Next Steps for CSRD/CSDDD.

III. Summary

The CSDDD is significantly more aligned with the UNGPs than the LdV and the SCDDA. It strikes a balance between open formulations affording companies with excessive flexibility, which may lead to legal uncertainty and enforcement issues, as demonstrated under the LdV, and being overly prescriptive, which may stifle innovative approaches to due diligence and incentivise cosmetic compliance instead. For the LdV, the transposition of the CSDDD will first and foremost lead to more clarity with regard to the personal and material scope as well as the establishment of a robust public enforcement mechanism. In terms of the material scope, the transposition law will notably clarify the human rights covered, the reach of due diligence obligations, and the content of due diligence obligations. For the SCDDA, the greatest change will be the abolition of the graduated-tier logic of due diligence obligations and the introduction of a civil liability provision.

Besides the inclusion of several provisions that are able to prompt meaningful due diligence, such as provisions related to responsible contracting and purchasing practices, and a robust public enforcement mechanism, the Directive also represents a milestone in that it directly obliges both EU and non-EU companies to adhere to the due diligence requirements of the Directive. Moreover, the Directive will indirectly affect many more companies in and outside of the EU that seek to maintain or establish business relationships with companies falling under the personal scope of the Directive. For Swiss companies, for instance, the transposition of the Directive in EU Member States will directly and indirectly lead to significantly higher expectations regarding responsible business conduct. In order to remain competitive, Swiss companies will notably have to adjust their business practices and adhere to more stringent human rights and environmental standards.

The adoption of the CSDDD represents an opportunity for Swiss lawmakers to review the Swiss due diligence legislation and assess whether to adapt to the legislative trend in Europe. After the adoption of the CSDDD and until recently, the legislative trend in Europe clearly pointed to comprehensive, cross-sectoral due diligence obligations that reach well into the supply chain and are accompanied by a robust public enforcement mechanism, civil liability provisions, and procedural measures that address legal and practical barriers to access to remedy. With the European Commission's Omnibus Proposal regarding the amendment of the CSDDD, the future development of this trend has become more opaque. What remains certain regardless of the Proposal's outcome are comprehensive, cross-sectoral due diligence obligations that are

accompanied by a robust public enforcement mechanism. To empower Swiss companies and prepare them for heightened scrutiny of their business practices, Swiss lawmakers should consequently consider abolishing the industry- and issue-specific approach to due diligence and expand due diligence obligations under Swiss law.

Depending on whether Swiss lawmakers seek to prioritise harmonisation with regulatory developments at EU level or effective human rights protection in close alignment with international due diligence standards, the preferred legislative changes will differ. Consequently, the expansion of due diligence obligations could follow either of two approaches: First, a minimal approach whereby lawmakers seek to adapt Swiss legislation to the (amended) CSDDD so that large Swiss companies falling under the personal scope of the (amended) CSDDD are prepared for their direct obligations. Following this approach, due diligence obligations related to conflict minerals may still be applied as a *lex specialis*. Second, a more comprehensive approach whereby lawmakers seek further alignment with international due diligence standards and go beyond the direct requirements of the (amended) CSDDD. The latter approach would imply a wider personal and material scope than under the (amended) CSDDD and envisage a reversal of the burden of proof for civil liability claims based on breaches of due diligence obligations. In terms of personal scope, the revised Swiss due diligence legislation could extend to SMEs operating in certain predefined high-risk sectors, such as the extractives, textile, and agriculture industry, as originally envisioned by the December Agreement.[2156] With regard to the material scope, the revised Swiss due diligence legislation could start by covering the UN Declaration on the Rights of Indigenous Peoples and all nine core human rights treaties, including the CEDAW, CRPD, and ICERD, and then progressively phase-in the rest of the international human rights treaties Switzerland has ratified. However, to satisfy the principle of legality, lawmakers will have to accompany such a list of human rights treaties with a more concrete framing of expected corporate conduct, namely define human rights abuses in tangible terms that are tailored to corporate conduct, and provide issue-, industry-, and context-specific guidance. Furthermore, the material scope could be extended with respect to covered business activities. In view of Switzerland's status as an important financial hub and the fact that in the financial sector human rights abuses are most likely to occur downstream, lawmakers should consider extending due diligence obligations to the provision of services and products to downstream business partners at least for financial institutions. In addition, the material scope could be strengthened

2156 Cf. Section II 3. of this Chapter.

by requiring meaningful stakeholder engagement throughout all steps of the due diligence process and amplifying the voices of rights-holders and human rights experts on the ground.

The expansion of Swiss legislation regarding responsible business conduct appears to be a central concern of many Swiss citizens. In autumn 2024, a popular initiative demanding the amendment of the Swiss Constitution to introduce a legal basis for the regulation of financial institutions with a view to sustainability concerns was launched. The initiative notably requires the implementation of measures aimed at regulating Swiss financial institutions with a view to reducing the greenhouse gas emissions and the impact on biodiversity caused or contributed to by their business partners abroad.[2157] A few months later, another popular initiative regarding responsible business conduct was submitted to the Swiss Federal Chancellery. This initiative requires the amendment of the Swiss Constitution by introducing new provisions on more comprehensive mandatory human rights and environmental due diligence obligations. The initiative explicitly cites international due diligence standards and legal developments at the European level as reference points for the formulation of obligations.[2158] In March 2025, the Swiss Federal Council announced that it will decide on proposing changes to the current Swiss due diligence legislation once EU lawmakers have agreed on potential amendments to the CSDDD or latest in Spring 2026.[2159] In light of the Federal Council's aforementioned statement, it is thus likely that the Federal Council will propose modelling new Swiss human rights and environmental due diligence obligations as well as climate related measures closely after the (amended) CSDDD instead of taking a more ambitious approach.

Irrespective of the eventual approach to amending due diligence legislation in Switzerland, Swiss lawmakers should ensure that SMEs are sufficiently supported in their implementation of due diligence measures and that due regard is accorded to their resource and knowledge constraints. This support should include establishing and operating a dedicated information platform modelled after art. 20(1) CSDDD as well as issuing relevant guidelines tailored to the concerns of SMEs.

2157 Federal Chancellary, Eidgenössische Volksinitiative 'Für einen nachhaltigen und zukunftsgerichteten Finanzplatz Schweiz (Finanzplatz-Initiative)', BBI 2024 2915.

2158 Federal Chancellary, Eidgenössische Volksinitiative 'Für verantwortungsvolle Grossunternehmen – zum Schutz von Mensch und Umwelt', BBI 2025 7.

2159 Federal Council, Press Release: Changes to Swiss Reporting and Due Diligence Obligations in Light of EU Developments.

Key Findings, Recommendations, and Outlook

None of the analysed mandatory due diligence laws are fully aligned with international due diligence standards. First, all selected due diligence laws limit their personal scope to a certain degree. This limitation is typically based on company size, which is measured by employee numbers, and/or certain turnover thresholds. Limitations of the personal scope based on company size and/or turnover thresholds may exclude large numbers of companies operating in high-risk sectors and/or geographical contexts, which diminishes the potential of such laws to protect rights-holders from corporate human rights abuses. Second, with the exception of the CSRD, none of the examined due diligence laws cover the full spectrum of human rights enshrined in the UDHR, ICCPR, ICESCR, and ILO Core Labour Standards and the full range of actions removing or reducing the enjoyment of these rights. This not only disregards the indivisibility, interdependence, and interrelatedness of human rights, but may also create significant protection gaps. Third, with the exception of the CSRD, none of the assessed laws cover all business activities throughout a company's value chains. This reduces the potential of such laws to protect rights-holders from the most severe human rights abuses, as they regularly occur in the lower tiers of the supply chain. Moreover, excluding the downstream supply chain or parts thereof from due diligence obligations, may result in the factual exemption of countless in-scope companies from conducting due diligence in key risk areas, such as the provision of financial and ICT services. Fourth, with the exception of reporting laws, all analysed due diligence laws understand due diligence primarily as an obligation of effort, rather than result, and conceptualise due diligence as an iterative process comprised of certain steps. Consequently, the examined due diligence laws that do contain civil liability provisions envisage civil liability to be fault-based and not strict. This renders access to remedy for rights-holders more challenging and reduces the deterring effect of potential civil liability claims on companies. Fifth, none of the assessed due diligence laws prescribe meaningful stakeholder engagement throughout all due diligence steps. This decentres the perspectives of the very people these unilateral home state laws aim to protect and diminishes the legitimacy of these laws from a critical decolonial perspective. Nevertheless, soft international due diligence standards are acknowledged

as authoritative reference points and benchmarks for responsible business conduct by lawmakers adopting these hard laws and are referenced therein. Consequently, these soft standards will remain indispensable for interpreting hard due diligence obligations and measuring progress.

Overall, the analysis of the selected due diligence laws exposes the inherent limitations of mandatory due diligence laws. It notably demonstrates the difficulty of balancing wide scopes and openly formulated due diligence obligations in an attempt to prevent tick-box compliance with legal certainty considerations. To ensure the enforceability of due diligence obligations in view of the principle of legality, mandatory due diligence laws are particularly limited by the difficulty of 'translating' human rights obligations to corporate conduct in a sufficiently precise manner. Furthermore, in the absence of an international BHR treaty, the systematic consultation of Global South perspectives in the drafting process of mandatory due diligence laws, and the prescription of meaningful stakeholder engagement throughout the due diligence process, mandatory due diligence laws run the risk of perpetuating colonial power dynamics. In addition, the implementation of such unilateral laws may accidentally lead to significant barriers for SMEs based in developing states to do business with companies in the Global North due to exceeding human rights expectations. Without the implementation and enforcement of suitable safeguards, mandatory due diligence laws also risk resulting in in-scope companies terminating business relationships with SMEs based in developing states too readily. This could not only have disastrous impacts on the livelihood of workers and their families, but may likewise cause ripple effects on the sustainable development of these countries more generally. Lastly, it is doubtful whether the human rights and environmental standards enshrined in mandatory due diligence laws will trickle down to the lowest tiers of the supply chain and improve the working conditions and livelihoods of rights-holders in the informal economy, which constitute the majority of the workforce in developing states.[2160] The formalisation of employment is not something mandatory due diligence laws alone will be able to accomplish, but a long-term goal for host states to strive towards to. Nor will these laws, by themselves, suffice to eliminate structural challenges regarding the prevention of corporate human rights abuses and close related governance gaps in the Global South.

2160 According to a recent OECD report, informal workers constitute nearly 60% of the global workforce and 90% of the workforce in low-income countries (Organisation for Economic Co-operation and Development (OECD), 'Breaking the Vicious Circles of Informal Employment and Low-Paying Work', Report (15 January 2024), 13).

A 2024 report published by the World Benchmarking Alliance, an NGO assessing the human rights and environmental performance of 2,000 prominent companies, revealed that companies based in states with mandatory human rights due diligence legislation achieve, on average, a nearly 60% higher score than those in states without such legislation.[2161] While certainly a step in the right direction, mandatory due diligence laws are not a *panacea* for protecting rights-holders from transnational corporate misconduct. There is a clear need to tackle corporate human rights abuses holistically and employ a variety of instruments to do so.[2162] States should therefore not only rely on unilateral home state laws as a means to fulfil their duty to protect, but invest in measures beyond requiring companies to conduct human rights due diligence. To do so, states should consider three measures in particular. First, states should work towards international policy coherence, particularly by ensuring that concluded trade and investment agreements are interpreted and implemented in a way that does not undermine another state's ability to fulfil its obligations under international human rights law. This can help address structural challenges with regard to the protection of rights-holders from corporate misconduct in states in the Global South and is explicitly recommended by UN treaty monitoring bodies, including the CESCR and CRC.[2163] The adoption of a binding international BHR treaty could further contribute to improving international policy coherence. Critically, the adoption of an international binding BHR treaty would also ensure the participation of states and peoples in the Global South in the development, interpretation, and enforcement of norms for responsible business conduct. In the current geopolitical climate, the adoption of such a treaty by enough states to drive change is, however, unfortunately, rather unlikely. Second, states should strengthen NCPs as complementary, fast and cost-effective sites for remedy, and the specification of due diligence standards. To do so, states should implement measures that incentivise the good faith participation of companies in NCP procedures. Third, states should encourage responsible business conduct beyond tick-box compliance with mandatory due diligence obligations through economic incentives such as public procurement contracts and export promotion.

The trend towards the adoption of mandatory human rights and environmental due diligence laws will continue. States all around the globe, including

2161 World Benchmarking Alliance, 'Social Benchmark 2024 Insights Report' (July 2024), 19.

2162 Cf. DEVA, LJIL 2023, 25.

2163 Cf. CRC, General Comment No. 16 (2013), para. 46; CESCR, General Comment No. 23 (2016), para. 72; CESCR, General Comment No. 24 (2017), para. 29.

Brazil[2164], Thailand[2165] and Korea[2166], are discussing and enacting such laws. However, the recent backsliding in Germany with the proposed suspension of sanctions for non-compliance with due diligence obligations under the SCDDA and the EU Commission's Omnibus Proposal, may regrettably send a dangerous signal, slowing down legislative developments beyond Europe and undermining their ambitiousness.[2167] The forthcoming EU trilogue negotiations on the Omnibus Proposal will certainly mark the regulatory business and human rights landscape for years to come and determine whether the long-term benefits of sustainable business practices for all will be sacrificed at the altar of short-term corporate profits.

2164 LUCENA CARNEIRO CRISTIANE / ALBIERI LAUREANO NATHALIE, 'Regulatory Initiatives on Business and Human Rights in Brazil – From the Domestic to the International and Back?', Business and Human Rights Journal Blog (19 June 2024).

2165 Walk Free, 'Thailand to Introduce Mandatory Supply Chain Due Diligence Law' (13 March 2025).

2166 LEE SANG SOO, 'BHR Regulations in South Korea: Achievements and Limitations', Business and Human Rights Journal Blog (17 June 2024).

2167 Cf. OHCHR, Commentary on the Omnibus Proposal, 5; WGBHR, Omnibus Statement, 1.

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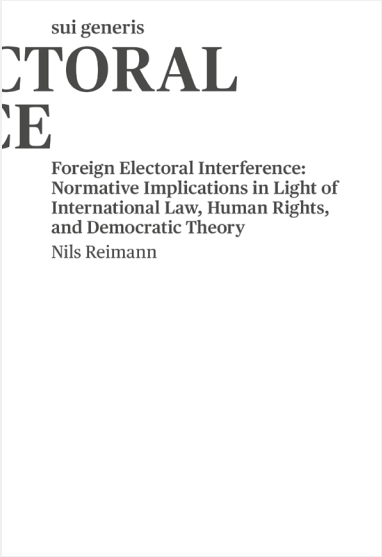

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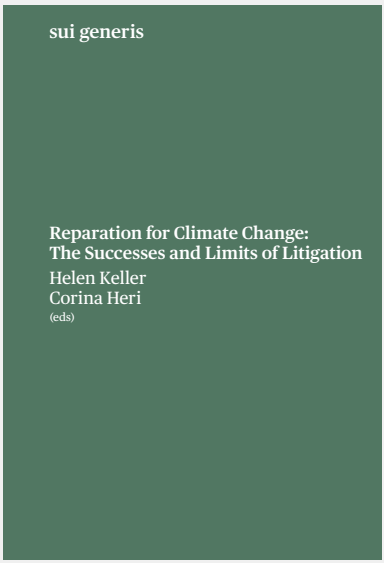

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CORPORAT RIGHTS DU IN GLOBAL CHAINS

Reports on Western parent companies' involvement in human rights abuses abroad have driven demands to regulate transnational corporate conduct. Various instruments have been discussed in this regard. The most prominent is a set of soft law norms called the United Nations' Guiding Principles on Business and Human Rights (UNGPs) urging all businesses to exercise human rights due diligence (HRDD) across value chains. The UNGPs have been incorporated in international and national instruments, ranging from voluntary initiatives, to soft, and hard law. In Europe, a trend towards the adoption of hard HRDD laws is emerging.

This book assesses the potential and limitations of these hard laws in protecting rights-holders from transnational corporate human rights abuses, and explores the complementary role of soft law and voluntary instruments.

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