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THESIS TITLE

Humanizing Global Value Chains through Mandatory Human Rights Due Diligence: An Assessment of Domestic, Regional (EU), and International Legislative Practices

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ABSTRACT

The proliferation of global value chains (GVCs) has shaped society both positively and negatively. A notable manifestation of the adverse impacts of GVCs is the underregulated corporate human rights abuses. The UN Guiding Principles on Business and Human Rights (UNGPs) represents a promising transnational strategy to address the accountability gap associated with such abuses. Mandatory human rights due diligence (mHRDD) is one of the latest and most promising endeavors to operationalize the UNGPs. As the mHRDD legislative bandwagon gains momentum at domestic, regional, and international levels, corporate human rights abuses along GVCs have escalated. Addressing this accountability gap is urgent, and identifying an mHRDD law that can do so effectively is thus the central inquiry of this study. This requires a comprehensive understanding of the empirical complexity of human rights governance in GVCs and demands a holistic and critical examination of major mHRDD laws.

This study comprises a three-layered progressive critique of mHRDD laws, considering factual, normative, and comparative dimensions. In the first layer, an emblematic case—the Rana Plaza tragedy—is explored to map the complexities of human rights governance along GVCs. These complexities create preconditions that must be satisfied for responsive mHRDD laws, but they have not been systematically considered by BHR scholars. In the second layer, the UNGPs are decoded, and an analytical framework for evaluating and comparing mHRDD laws is developed by extending Surya Deva's framework. This approach is a viable option for assessing mHRDD laws and a complement to conventional doctrinal and normative methods, allowing the strengths and weaknesses of the laws to be set out concisely. The third layer of critique involves in-depth examinations of and among domestic (France, Germany, and Norway), EU, and international mHRDD laws. It is the culmination of the three progressive critiques. It addresses the central inquiry by identifying best practices from among the laws considered and ascertaining the most viable option in the short term.

This research establishes that while there is neither a perfect nor a unified model for enacting mHRDD, the EU CSDDD stands out as the legislative effort holding the most promise for humanizing GVCs in the coming years. Through the proposed analytical framework, the EU CSDDD excels in domestic and international contexts, demonstrating a balanced approach that properly addresses the empirical complexities identified and the normative demands of the UNGPs. It also has the potential to aid in harmonizing vying domestic mHRDD laws and, through the "Brussels Effect," to advance mHRDD globally in the near future. However, the EU CSDDD is neither flawless nor a substitute for a BHR treaty in the long term. To fully unlock its potential, EU legislators should rectify the shortcomings of the EU CSDDD by incorporating best practices from other mHRDD laws. EU legislators should also engage with concerns raised from the critical Third World Approach to International Law perspective. Doing so is important if the EU CSDDD is to be fully responsive to the complexities of

accountability for corporate human rights abuses, which often take place in so-called Third World countries.

Sommario

La proliferazione delle catene di fornitura globale ha plasmato la società in modo positivo e negativo. Una manifestazione piuttosto considerevole degli impatti avversi delle catene di fornitura globale è rappresentata dagli abusi dei diritti umani da parte delle aziende, scarsamente regolamentati. I Principi Guida delle Nazioni Unite su Impresa e Diritti Umani rappresentano una promettente strategia transnazionale per contrastare il divario di responsabilità in connessione a tali abusi. Il più recente e promettente sforzo per rendere operativi i principi menzionati è rappresentato dalla due diligence obbligatoria in materia di diritti umani. Mentre lo strumento legislativo di tale due diligence guadagna slancio a livello domestico, regionale e internazionale, gli abusi dei diritti umani da parte delle aziende nell'ambito delle catene di fornitura globali sono aumentati. Affrontare questo divario di responsabilità è urgente e identificare una legge efficace sulla due diligence obbligatoria in materia di diritti umani è pertanto l'analisi centrale di questo contributo scientifico. Ciò richiede una comprensione approfondita della complessità empirica della governance dei diritti umani nelle catene di fornitura globale ed altresì esige una valutazione olistica e critica delle principali leggi riguardanti la due diligence obbligatoria in materia di diritti umani.

Questo contributo scientifico comprende una critica progressiva a tre livelli delle leggi relative alla due diligence obbligatoria in materia di diritti umani, venendo a considerare dimensioni fattuali, normative e comparative. Nel primo livello viene esplorato un caso emblematico – la tragedia di Rana Plaza – al fine di identificare le complessità della governance dei diritti umani nell'ambito delle catene di fornitura globale. Queste complessità creano condizioni preliminari che devono essere soddisfatte attraverso leggi "reattive" in materia di due diligence obbligatoria, ma non sono state considerate sistematicamente dagli studiosi di Impresa e Diritti Umani. Nel secondo livello, i Principi Guida delle Nazioni Unite vengono decodificati mentre viene sviluppato un quadro analitico per valutare e confrontare le leggi sulla due diligence obbligatoria in materia di diritti umani estendendo il quadro generale di Surya Deva. Questo approccio rappresenta un'opzione valida per valutare le leggi relative a tale problematica ed è un supplemento ai metodi dottrinali e normativi convenzionali consentendo di delineare in modo conciso i punti di forza e debolezza delle leggi. Il terzo livello di critica comporta esami approfonditi delle relative leggi domestiche (in Francia, Germania e Norvegia) e della normativa dell'Unione Europea ed internazionale. Questa è la sintesi dei tre livelli di critica. L'indagine centrale identifica le best practices tra le leggi considerate e tende a stabilire l'opzione più realizzabile nel breve termine.

Questo contributo scientifico stabilisce che, sebbene non esista un modello perfetto o unificato per emanare leggi sulla due diligence in materia di diritti umani, la Direttiva

UE su Corporate Sustainability Due Diligence si distingue come lo sforzo legislativo che offre maggiori promesse per "umanizzare" le catene di fornitura globale nei prossimi anni. Attraverso il quadro analitico proposto, la richiamata direttiva europea eccelle sia in ambito nazionale che internazionale, dimostrando un approccio bilanciato che affronta adeguatamente le complessità empiriche identificate e le richieste normative dei Principi Guida delle Nazioni Unite su Impresa e Diritti Umani. Tale direttiva ha altresì il potenziale per contribuire ad armonizzare le leggi domestiche tra di loro contrastanti sulla due diligence obbligatoria in materia di diritti umani e, attraverso l'effetto "Bruxelles", può far progredire la due diligence a livello globale nel prossimo futuro. Tuttavia, occorre precisare che la Direttiva UE in discussione non è priva di imperfezioni ed inoltre non è una sostituzione di un trattato in materia di Impresa e Diritti Umani nel lungo termine. Per sbloccarne appieno il suo potenziale, i legislatori UE dovrebbero correggere le carenze della Direttiva UE su Corporate Sustainability Due Diligence incorporando le best practices di altre leggi sulla due diligence obbligatoria in materia di diritti umani. I legislatori UE dovrebbero anche affrontare le preoccupazioni sollevate dalla prospettiva del Third World Approach to International Law. Questo è rilevante nel caso in cui la Direttiva UE su Corporate Sustainability Due Diligence deve rispondere pienamente alle complessità della responsabilità per gli abusi dei diritti umani da parte delle aziende che spesso si verificano nei cosiddetti paesi del Terzo Mondo.

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ABBREVIATIONS

BAFA	Bundesamt für Wirtschaft und Ausfuhrkontrolle (German Federal Office for Economic Affairs and Export Control)
BHR	Business and Human Rights
BGMEA	Bangladesh Garment Manufactures and Exporters Association
COP	Conference of Parties
CSO	Civil Society Organizations
CSP	Conference of States Parties
CSR	Corporate Social Responsibility
ESG	Environmental, Social, and Governance
EU	European Union
FCPA	Foreign Corrupt Practices Act
FPIC	Free, Prior, and Informed Consent
GDP	Gross Domestic Product
GFC	Global Financial Crisis
HRDD	Human Rights Due Diligence
IBA	International Bar Association
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IFV	International Fund for Victims
ILC	International Law Commission
ILO	International Labor Organization
ISO	International Organization for Standardization
ITUC	International Trade Union Confederation
LBI	Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises
mHRDD	Mandatory Human Rights Due Diligence
NAP	National Action Plan
NCP	National Contact Point
NGO	Non-governmental Organization
OECD	Organization for Economic Co-operation and Development
OEIGWG	Open-ended Intergovernmental Working Group on a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights

OHCHR	United Nations Human Rights Office of the High Commissioner
SDGs	Sustainable Development Goals
SME	Small and Medium Sized Enterprise
SRSG	Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises
Sub-Commission	UN Sub-Commission on the Promotion and Protection of Human Rights
TNC	Transnational Corporation
TWAIL	Third World Approach to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN BHR Forum	UN Forum on Business and Human Rights
UNCTC	UN Commission on Transnational Corporations
UN Framework	UN Protect, Respect and Remedy Framework
UN HRC	UN Human Rights Council
UN Guiding Principles	UN Guiding Principles on Business and Human Rights
UNWG	UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises

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PART I Setting the Scene

Chapter 1 Introduction

The year 2023 marks the tenth anniversary of the Rana Plaza tragedy, one of the most horrific yet potentially avoidable industrial catastrophes on record. A decade has elapsed, but the victims and other individuals affected by this calamity still have not received adequate remedies. Also, there has been limited progress in addressing human rights abuses in the Bangladesh garment industry. More broadly, despite the rapid norm cascade in Business and Human Rights—an academic discourse and social movement focused on corporate human rights accountability—including the adoption of mandatory human rights due diligence laws around the world, tragic corporate human rights abuses are reported as usual. This scenario calls for a further examination of incidents like the Rana Plaza tragedy to better inform legislators of the empirical complexities of regulating corporate human rights responsibility in the globalized value chains. To this end, Section 1 of this introductory chapter provides an overview of global value chains and their human rights implications. Then, Section 2 utilizes the Rana Plaza tragedy as a case study to concretize these human rights challenges and elaborate on the transitional approach needed to address them. Following the scene-setting, Section 3 introduces the rationale and methodology employed to undertake a vertical comparison of mandatory human rights due diligence laws.

1. Global Value Chains and Their Human Rights Implications

Global value chains (GVCs), the prevailing manifestation of globalized commercial interactions, have dominated our production and consumption systems since the 1990s,[1] becoming "[t]he face of the modern global economy."[2] From a legal perspective, GVCs can be conceptualized as a mixture of structurally separate entities formed through equity ownership or contractual relationships, primarily orchestrated by transnational corporations (TNCs).[3] In the domains of economics and management, GVCs are employed to illustrate the phenomenon that "[g]lobal investment and trade (…) is

1 See Gary Gereffi, John Humphrey, and Timothy Sturgeon, "The Governance of Global Value Chains," *Review of International Political Economy* 12, no. 1 (2005): 78-104.

2 See Pascal Lamy, "Global Value Chains and the New World of Trade," in *Duke GVC Global Summit* (October 20 2014), aacessed 10 December 2022, https://globalvaluechains.org/video/duke-global-summitkeynote-address.

3 See Kevin B Sobel-Read, "Global Value Chains: A Framework for Analysis," *Transnational Legal Theory* 5, no. 3 (2015): 364-407.

inextricably intertwined through the international production networks of firms investing in productive assets worldwide, and trading inputs and outputs in cross-border value chains of various degrees of complexity."[4] As denoted by the terms "global" and "value," every single value chain "consists of a series of stages involved in producing a product or service that is sold to consumers, with each stage adding value, and with at least two stages being produced in different countries."[5] The rationale behind engaging in GVCs is to pursue upgrading, primarily, though not exclusively, economic upgrading. The latter is generally understood as "the process by which economic actors—nations, firms, and workers—move from low-value to relatively high-value activities in global production networks."[6] While escalating geopolitical confrontations, the outbreak of the COVID-19 pandemic, and other factors have collectively contributed to the so-called "slobalization,"[7] there is compelling evidence that supports the trend that GVCs-based economic globalization "is not uniformly slowing—and in many aspects, it has grown in complex and interesting ways."[8] In light of these estimations, it is reasonable to posit that the operations of GVCs will persist in shaping our lives.

The widespread prevalence and maturation of GVCs have undeniably contributed to advancing human society. According to the World Bank, GVCs have "powered an economic revolution over the past three decades: growth accelerated, income rose, and poverty rates plunged," with "a 1% increase in GVC participation estimated to boost per capita income levels by more than 1%—about twice as much as conventional trade."[9] Considering the optimistic prospects of GVCs, the former Secretary-General of the Organization for Economic Co-operation and Development (OECD), Ángel Gurría, emphatically stated that "everyone can benefit from global value chains."[10] However, this assertion holds true only in a very limited sense. The proliferation of GVCs has resulted in pronounced inequalities, disproportionately favoring developed nations and affluent individuals while marginalizing and disadvantaging many in the

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4 UNCTAD, *Global Value Chains and Development: Investment and Value-Added Trade in the Global Economy*, UNCTAD/DIAE/2013/1, January 2013, p.iii.

5 Pol Antras, "Conceptual Aspects of Global Value Chains," *World Bank Group Policy Research Working Paper* 9114, (January 2020): 5.

6 Gary Gereffi, "The Global Economy: Organization, Governance, and Development," in *The Handbook of Economic Sociology*, ed. Neil J. Smelser and Richard Swedberg (New York: Princeton University Press, 2005), 171.

7 The term "slobalization" has been coined to refer to the deceleration of globalization that occurred after the global financial crisis of 2008, which stands in contrast to the period of "hyperglobalization" that characterized the rapid advancement of globalization in the 1990s and early 2000s. By using these terms, this paper aims to highlight the unstoppable nature of GVCs once they are established, regardless of the state of the global economy. For more elaborations on "slobalization" and "hyperglobalization" see respectively, "Globalisation Has Faltered: It Is Now Being Reshaped," *The Economist*, 24 January 2019, accessed 10 December 2022, https://www.economist.com/briefing/2019/01/24/globalisation-has-faltered; Arvind Subramanian and Martin Kessler, "The Hyperglobalization of Trade and Its Future," *Working Paper Series* No. 13-6, Peterson Institute for International Economics (July 2013).

8 Asian Development Bank *et al.*, "Global Value Chain Development Report 2021: Beyond Production," (November 2021): 39, accessed 10 December 2022, https://www.wto.org/english/res_e/booksp_e/00_gvc_dev_report_2021_e.pdf.

9 World Bank, "World Development Report 2020: Trading for Development in the Age of Global Value Chains," (2020), accessed 9 November 2022, https://www.worldbank.org/en/publication/wdr2020.

10 See Mateo Crossa and Nina Ebner, "Automotive Global Value Chains in Mexico: a Mirage of Development?," *Third World Quarterly* 41, no. 7 (2020): 1219.

Global South and less privileged communities.[11] Recent statistics indicate that approximately 10% of the world's population owns 76% of the wealth, while the "Global bottom 50%" owns only 2% of that (Figure 1).[12] In this connection, some authors criticize GVCs as "global poverty chains"[13] or "global inequality chains."[14] Even one scholar asserts the GVCs represent a form of "new economic imperialism,"[15] in which multinational firms from the Global North extract surplus value at the expense of workers from the Global South. Hence, the tagline "everyone will benefit from global value chains" has been discredited.

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11 The terms "Global South" and "Global North" delineate broad categorizations of countries based on economic development, geopolitical influence, and historical context. The Global South typically comprises countries located in the Southern Hemisphere, primarily encompassing regions of Africa, Latin America, Asia, and certain parts of Oceania. These nations commonly exhibit lower levels of economic development, limited infrastructure, and higher rates of poverty. Moreover, they often share a history of colonization and exploitation by countries of the Global North. Conversely, the Global North consists of countries primarily situated in the Northern Hemisphere, including North America, Europe, Japan, and certain parts of Oceania. These nations are generally characterized by higher levels of economic development, robust infrastructure, and lower rates of poverty. Additionally, they wield significant political and economic influence on the global stage, owing to historical factors such as colonialism and imperialism. For further exploration of the concept of "Global South", see Sebastian Haug, Jacqueline Braveboy-Wagner, and Günther Maihold. "The 'Global South' in the Study of World Politics: Examining a Meta Category." *Third World Quarterly* 42, no. 9 (2021): 1923-44.

12 Lucas Chancel *et al.*, "World Inequality Report 2022," World Bank Inequality Lab (January 2022): 89, accessed 12 December 2022, https://wir2022.wid.world/www-site/uploads/2022/03/0098-21_WIL_RIM_RAPPORT_A4.pdf.

13 See, for example, Benjamin Selwyn, "Poverty Chains and Global Capitalism," *Competition & Change* 23, no. 1 (2019): 71-97.

14 See Christa D. Court et al., "Accounting for Global Value Chains: Rising Global Inequality in the Wake of COVID-19?," *International Review of Applied Economics* 35, no. 6 (2021): 813-31; Juliane Lang, Stefano Ponte, and Thando Vilakazi, "Linking Power and Inequality in Global Value Chains," *Global Networks* 23, no. 4 (2022): 1-17.

15 See, in general, Intan Suwandi, *Value Chains: The New Economic Imperialism* (New York: Monthly Review Press, 2019).

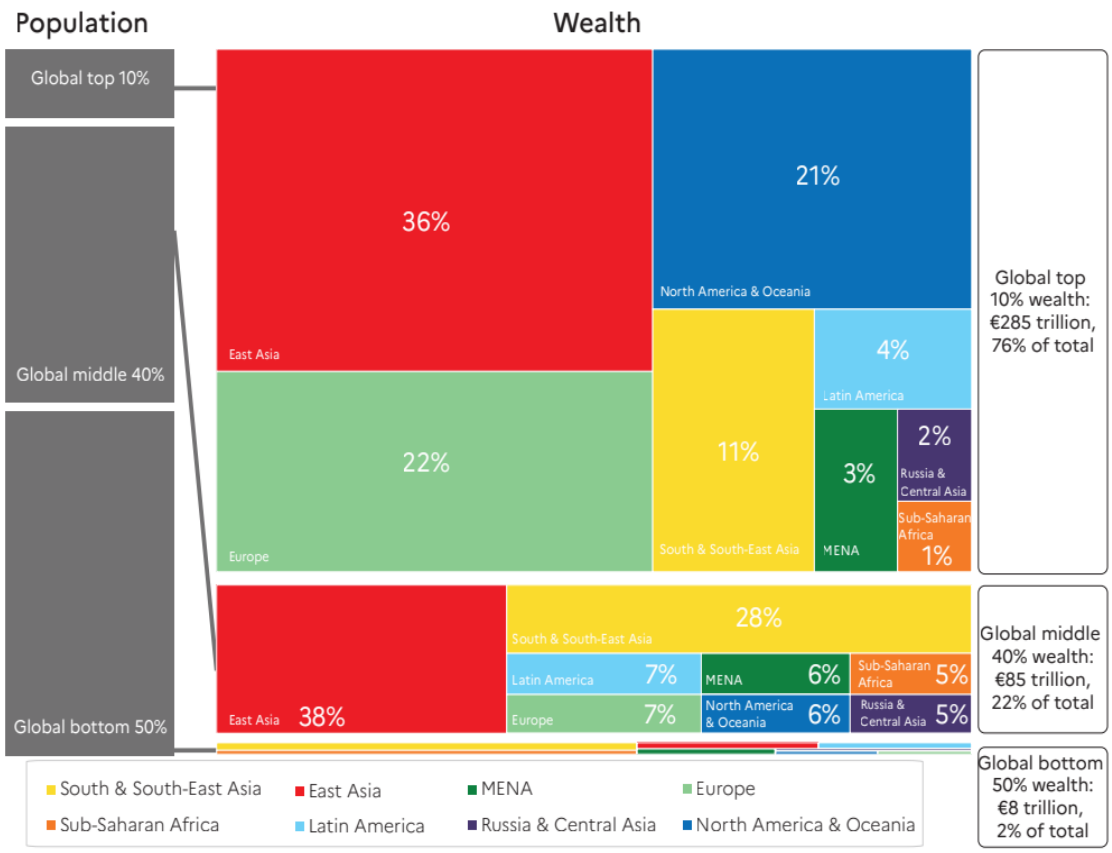

Figure 1 Regional Composition for World Wealth in 2021

Source: Lucas et al., 2022

Many scholars have adopted a more inclusive interpretation of "upgrading" in GVCs to map and address the disparities that arise from the expansion of the globalized economy.[16] Their primary emphasis has been on labor issues, as indicated by the notion of "social upgrading"—"the process of improvements in the rights and entitlements of workers as social actors by enhancing the quality of their employment."[17] Addressing labor rights is of utmost importance, especially in light of the fact that there are 40.3 million individuals worldwide who are subject to modern slavery.[18] Many of them are exploited in the supply chains of industries such as electronic manufacturing, garment, fishery, cocoa, and sugarcane. Recent research, including the findings from the International Commission of Jurists,[19] has revealed that insufficient regulation of

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16 The manifold social problems accompanying the massive expansion of GVCs have promoted the recognition that economic upgrading does not necessarily lead to social upgrading. Consequently, an increasing number of academics, practitioners, and civil society have advocated for a partnership between social and economic upgrading since the 2000s. See Gary Gereffi and Joonkoo Lee, "Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters," *Journal of Business Ethics* 133, no. 1 (2016): 25-38.

17 Arianna Rossi, "Social Upgrading," in *Handbook on Global Value Chains*, ed. Arianna Rossi et al. (Edward Elgar Publishing, 2019), 272.

18 See Walk Free Foundation, "The Global Slavery Index 2018," (20 July 2018): i-iii, accessed 20 May 2023, https://cdn.walkfree.org/content/uploads/2023/04/13181704/Global-Slavery-Index-2018.pdf.

19 The *Maastricht Principles on Extraterritorial Human Rights Obligations of States in the area of Economic, Social and Cultural Rights* drafted and endorsed by a group of reputable international legal scholars in 2011, embodies the fundamental stance of the international legal community on this matter. See International Commission of Jurists, "Maastricht Principles on Extraterritorial Human Rights Obligations of States in the area of Economic,

business activities in GVCs undermines a wide range of human rights, expanding beyond just labor rights.

John Ruggie, the architect of the *United Nations Guiding Principles on Business and Human Rights* (UN Guiding Principles), concluded, after examining 320 cases, that "[f]irms from a broad range of sectors have been alleged to abuse or contribute to the abuse of one or more human rights—covering *the full range of human rights*, including civil and political; economic, social and cultural; and labor-related rights."[20] For instance, local people may experience human rights abuses as a result of land-grabbing, contamination of air, soil, and water, deforestation, and other exploitative activities carried out by construction, extractive, and logging companies.[21] Numerous cases have brought attention to the vulnerability of indigenous communities,[22] migrant workers,[23] human rights defenders,[24] and others whose human rights are brutally infringed upon by companies. In addition, the Castan Centre for Human Rights Law at Monash University has presented compelling cases,[25] illustrating how companies violate human rights listed in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Although there have been international efforts to hold businesses accountable for human rights violations through hard-law mechanisms like international criminal law and international economic law, as well as soft-law initiatives like the *UN Global Compact*, these efforts have not completely solved the problems.[26] However, they have contributed significantly to the formation and maturation of business and human rights (BHR)—an emerging but rapidly developing academic field and social movement addressing "how business may negatively impact human rights and the various ways in which such violations can be prevented and addressed, including how business can be held accountable."[27] Nevertheless, even with the adoption and implementation of the

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Social and Cultural Rights," (December 2012), accessed 12 December 2022, https://www.icj.org/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf.

20 UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Addendum. Corporations and human rights: a survey of the scope and patters of alleged corporate-related human rights abuse*, A/HRC/8/5/Add.2, 23 May 2008, para.95. Emphasis added.

21 See Florian Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives* (Cambridge: Cambridge University Press, 2022), 83-91.

22 The Ogoni case, which marked the beginning of the business and human rights movement as an international agenda, is illustrative of how transnational corporations harm indigenous people. See Sigrun I Skogly, "Complexities in human rights protection: Actors and rights involved in the Ogoni conflict in Nigeria," *Netherlands Quarterly of Human Rights* 15, no. 1 (1997): 47-60.

23 Institute for Human Rights and Business provides a comprehensive introduction to migrant workers in GVCs as well as some land-marking international initiatives, see, https://www.ihrb.org/focus-areas/migrant-workers.

24 The Business & Human Rights Resource Centre recorded over 3,800 business-related attacks on human rights defenders from 2015 to 2021, with 615 in 2021. More detailed information is available at:https://www.business-humanrights.org/en/from-us/briefings/hrds-2021/human-rights-defenders-business-in-2021-protecting-the-rights-of-people-driving-a-just-transition/.

25 See Sarah Joseph, "Human Rights Translated 2.0: A Business Reference Guide," Castan Centre for Human Rights Law at Monash University (2015), accessed 12 December 2022, https://jmarketing.agency/monash/Monash_HRT_Final.pdf.

26 For a detailed historical investigation in this regard, see Nadia Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap* (New York: Routledge, 2017), 43-208. See also Chapter 2 of this research.

27 Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap*, 3 (n.26).

UN Guiding Principles—the fundamental norm of BHR today—and the rise of mandatory human rights due diligence laws,[28] numerous severe business-related human rights abuses persist. For instance, consecutive accidents in Bangladeshi garment factories and the human rights abuses of migrant workers in Qatar before, during, and after the 2022 World Cup illustrate these ongoing challenges. One reason for this may be the failure of legal scholarship, including BHR academia, to holistically consider the complexity of GVCs when examining human rights issues and proposing policy designs for regulating the globalized production process. In other words, there is "little research on how exogenous facts or the systematic setup of GVCs and business and human rights' laws are linked."[29] To address this deficiency and lay the groundwork for further discussions on how to better institutionalize mandatory human rights due diligence (mHRDD), the subsequent section employs the Rana Plaza tragedy as a case study to unveil "the empirical complexity of the BHR regime."[30]

2. Protecting Human Rights in Global Value Chains: Lessons from the Rana Plaza Tragedy

2.1 An Overview of the Rana Plaza Tragedy and Its Significance

Capturing the complexity inherent in GVCs is a prerequisite for proposing systematic solutions that fully harness their positive potentials and address adverse externalities. The Rana Plaza tragedy, along with its underlying transnational garment production network, serves as a "microcosm" of transnational production systems and their human rights implications, making it an illustrative example to decipher these dynamics. To elaborate further, the garment sector stands as a symbol of globalized production networks and is one of the most critical industries with intricate connections to human rights issues.[31] The Rana Plaza tragedy is particularly emblematic, mirroring a crucial node in the globalized, labor-intensive garment supply chains that span both developing (host) countries and developed (home) countries, involving vulnerable suppliers and workers, as well as exploitative lead firms.[32] As one commentator aptly stated, "the Rana Plaza tragedy is not an isolated case of accidental occurrence, but

28 A detailed explanation of this matter comes in Chapter 2 of this research.

29 Stefanie Lorenzen, "New Business and Human Rights Laws—Support for Social Upgrading?," in *Economic and Social Upgrading in Global Value Chains: Comparative Analyses, Macroeconomic Effects, the Role of Institutions and Strategies for the Global South*, ed. Christina Teipen et al. (Cham: Springer International Publishing, 2022), 441.

30 René Wolfsteller and Yingru Li, "Business and Human Rights Regulation After the UN Guiding Principles: Accountability, Governance, Effectiveness," *Human Rights Review* 23, no. 1 (2022): 5.

31 See Laura A. Carlson and Vera Bitsch, "Social Sustainability in the Ready-made-garment Sector in Bangladesh: An Institutional Approach to Supply Chains," *International Food and Agribusiness Management Review* 21, no. 2 (2018): 207.

32 A lead firm, in the context of GVCs, refers to a company that holds a dominant position within a particular supply chain network. It typically wields considerable control and influence over the production processes, often orchestrating activities across diverse suppliers and subcontractors. Consequently, lead firms play a role in shaping the dynamics and governance structures of GVCs. See Michael Rawling, "Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment," *The Economic and Labour Relations Review* 26, no. 4 (2015): 661-63.

rather the result of the interaction of multiple systemic factors, such as a serious power imbalance in the global supply chain, gaps in government regulation, corruption, and a lack of organization and representation of workers."[33] Considering these significances, this section employs the Rana Plaza tragedy and the garment sector to map the multi-layer and interconnected complications of human rights governance in GVCs. The aim is to inform the formulation of a normative framework, based on the UN Guiding Principles, for evaluating and enhancing mHRDD laws, thereby offering more robust solutions for humanizing GVCs.

The Rana Plaza tragedy refers to the collapse of an eight-story factory building called Rana Plaza in Dhaka, Bangladesh, on April 24, 2013. The incident resulted in the tragic loss of over 1,100 lives and caused severe injuries to more than 2,500 individuals. The building housed over 4,000 garment workers engaged in producing clothing for various global brands, including Gap Inc., Walmart Store Inc., and J.C. Penny Company Inc. This catastrophic yet preventable event garnered global attention for the human rights violations and governance gaps in GVCs,[34] marking it as one of the most devastating industrial accidents on record.[35] Moreover, it stands as an emblematic BHR case with far-reaching implications, contributing to the institutionalization of human rights due diligence, in particular mHRDD legislation.[36] To comprehensively decode the systematic factors leading to the Rana Plaza tragedy and establish a factual groundwork for elaboration on the complexities of human rights governance in GVCs, this section reconsiders the causes from macro (state level), meso (industry level), and micro perspectives (corporate level), respectively. Where appropriate, this research also cites other emblematic cases that hold significant relevance to depicting the broader landscape of human rights governance within GVCs.

2.2 State-level Analysis

As a densely populated and technologically backward developing country, entering the globalized production network through labor-intensive industries has been one of Bangladesh's main strategies for economic upgrading. Up until 2020, Bangladesh consistently held the position of the second-largest exporter of garments globally, following China. The country's annual garment exports exceeded $20 billion since 2012 and hit a new milestone of $42.61 billion in 2022, with garment exports constituting more than 80% of the country's total annual exports since 2013.[37] The remarkable expansion of Bangladesh's garment industry can be attributed to the

33 Huang Zhong, "Progress and Challenges in the Remedy Framework of UN Guiding Principles on Business and Human Rights: Lessons from Rana Plaza, " *Chinese Journal of Human Rights*, no. 10 (2022): 5.

34 Tejshree Thapa, "Remember Rana Plaza: Bangladesh's Garment Workers Still Need Better Protection," Human Rights Watch (24 April 2018), accessed 15 December 2022, https://www.hrw.org/news/2018/04/24/remember-rana-plaza.

35 ILO, "The Rana Plaza Accident and Its Aftermath," accessed 15 December 2022, https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm.

36 See Barnali Choudhury, "Hardening Soft Law Initiatives in Business and Human Rights," in *Corporate Governance Codes for the 21st Century: International Perspectives and Critical Analyses*, ed. Jean J. du Plessis and Chee Keong Low (Springer, 2017), 198-208.

37 The Bangladesh Garment Manufacturers and Exporters Association, "Export Performance," accessed 15 December 2022, https://www.bgmea.com. bd/page/Export_Performance.

government's strategies aimed at catering to global buyers, which involve maintaining low wages, boosting productivity, and lax regulations. However, these strategies come at the expense of workers' welfare and sow the seeds for industrial tragedies such as the collapse of Rana Plaza.[38]

2.2.1 The Unwillingness of Bangladesh Government to Regulate Garment Value Chains

The affluent labor force with low costs in Bangladesh presents an enticing advantage for overseas buyers.[39] In 2009, a Bangladeshi worker earned only US$0.12 per hour, while her counterparts in Sri Lanka, Pakistan, India, and Vietnam earned US$0.44, US$0.56, US$0.51, and US$0.40 per hour, respectively.[40] Even three years after the Rana Plaza tragedy, the minimum salary for Bangladeshi garment workers was reported to be US$68 per month, only one-fourth that of their Chinese counterparts.[41] The "competitive" low pay level in the Bangladeshi garment industry appears to be a result of governmental manipulation.

Actually, the government-led Minimum Wage Board determines the minimum wage for the garment sector as a part of Bangladesh's industry-based statutory minimum wage scheme. Not only is the minimum wage in the Bangladesh garment sector lower than that in other industries nationwide, but it often ranks as the lowest in the worldwide garment industry.[42] Additionally, the minimum wage in Bangladesh's garment industry is categorized into seven grades, ranging from Grade 1 to Grade 7, with the former receiving more than twice as much as the latter. Unfortunately, the majority of garment workers are remunerated at Grades 7 to 3, putting their wages below those in prominent Asian apparel manufacturing countries such as Pakistan, Cambodia, Vietnam, and China.[43] Despite several modifications by the Bangladeshi government to the minimum wage in the garment industry, these nominal adjustments have proven insufficient to achieve a standard of living wage, especially when

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38 According to the Solidarity Center, from 2012 to 2019, over 150 incidents related to fires and safety in the garment industry have been recorded in Bangladesh, leading to the deaths of over 1,300 individuals and injuries to more than 3,800 people. See, Solidarity Center, "Fire and Other Safety Incidents in the Bangladesh Garment Sector," accessed 15 December 2022, https://www.solidaritycenter.org/wp-content/uploads/2019/04/Bangladesh-2019-Safety-Incident-Chart.April-18-2019.pdf.

39 See Sarah Butler, "Why Are Wages So Low for Garment Workers in Bangladesh?, " *The Guardian* (21 January 2019), accessed 15 December 2022, https://www.theguardian.com/business/2019/jan/21/low-wages-garment-workers-bangladesh-analysis#:~:tex_t=The%20legal%20minimum%20wage%20for,a%20comfortable%20life%20in%20Bangladesh; Ishtehar Sharif Swazan and Debanjan Das, "Bangladesh's Emergence as a Ready-Made Garment Export Leader: An Examination of the Competitive Advantages of the Garment Industry," *International Journal of Global Business and Competitiveness* 17, no. 2 (2022): 162-74.

40 See Ahemd M, "Message to Walmart: Low Wages Hamper the Credibility of the Top RMG Exporting Country," *The Prothom Alo* (21 July 2010).

41 See Rina Chandran, "Three Years after Rana Plaza Disaster, Has Anything Changed?, " *Reuters* (22 April 2016), accessed 15 December 2022, https://www.reuters.com/article/us-bangladesh-garments-lessons-analysis-idUSKCN0XJ02G.

42 See Mia Mahmudur Rahim, "Humanising the Global Supply Chain: Building a Decent Work Environment in the Ready-made Garments Supply Industry in Bangladesh," in *Research Handbook on Human Rights and Business*, ed. Surya Deva; and David Birchall (Edward Elgar Publishing, 2020), 134-35.

43 See Damian Grimshaw and R Muñoz de Bustillo, "Global Comparative Study on Wage Fixing Institutions and Their Impacts in Major Garment Producing Countries," Asia Garment Hub (September 2016): 66-68, accessed 15 December 2022, https://asiagarmenthub.net/resources/2021/wcms_558636.pdf.

accounting for inflation.[44]

Prolonged low wages have pushed the garment industry into a focal point for strikes and worker protests in Bangladesh. Regrettably, these protests often concluded without meaningful resolutions, owing to the complicity between the government and businesses. For instance, after the outbreak of demonstrations in 2016, 59 large garment factories immediately suspended operations; criminal procedures were filed against 1,600 employees, including union leaders; and over 3,500 protesting workers were fired. The Bangladeshi Prime Minister and Labor Ministry also officially supported the businesses' action against the strike. In the end, 600 workers were accused, at least 11 activists for workers' rights were detained, a huge number of trade union organizations were forced to disband, and many textile workers were forced to flee to remote regions to avoid police pursuit.[45]

Similarly, in February 2018, 12 leaders of the Garments Workers' Trade Union Centre were accused of fabricated charges for participating in a campaign advocating for a higher minimum wage for garment workers.[46] Additionally, in January 2019, Bangladeshi police used rubber sheets and tear gas to quell a workers' protest, resulting in the tragic death of a 22-year-old garment worker, injuries of approximately 50 persons,[47] and the dismissals of 7,000 workers.[48]

In November 2023, Bangladesh witnessed civil unrest in its garment sector, with around 23,000 workers facing legal action for protesting the recently set sectoral minimum wage.[49] The IndustriALL Bangladesh Council documented 62 legal cases and over 100 arrests. Tensions escalated after the government's announcement of a monthly wage of BDT12,500 (approximately USD115), a figure contested by unions advocating for BDT23,000 (approximately USD210) as a living wage.

It is thus clear that maintaining competitive low wages is a deliberate policy choice of the Bangladeshi government to continue attracting orders from brands and retailers in the global garment industry to sustain economic upgrading. This policy stance signals the country's unwillingness to enhance labor protection through other means.

2.2.2 The Incapability of Bangladesh Government to Regulate Garment Value Chains

Besides labor costs, productivity is pivotal to the outsourcing strategies of global buyers in the garment industry. Nevertheless, low labor productivity has been a pressing issue that hinders the competitiveness of the Bangladeshi garment sector. Bangladesh

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44 Ibid, 69-70.

45 See Rahim, "Humanising the Global Supply Chain: Building a Decent Work Environment in the Ready-Made Garments Supply Industry in Bangladesh," 136 (n.42).

46 International Trade Union Confederation, "2019 ITUC Global Rights Index," (June 2019): 23, accessed 15 December 2022, https://www.ituc-csi.org/IMG/pdf/2019-06-ituc-global-rights-index-2019-report-en-2.pdf.

47 Ibid, p.22.

48 Ibid, p.30.

49 "Bangladesh: Union Leaders Say Cases Have Been Filed Against 23,000 Garment Workers in Connection with Recent Minimum Wage Protests," Business and Human Rights Resources Centre (15 November 2023), accessed 20 December 2023, https://www.business-humanrights.org/en/latest-news/bangladesh-union-leaders-say-cases-have-been-filed-against-23000-garment-workers-in-connection-with-recent-minimum-wage-protests/.

is considered to have the lowest labor productivity among nations with a significant garment industry, including Cambodia, Vietnam, Pakistan, India, and China.[50] Accordingly, Bangladesh has actively promoted local capital to invest in ready-made garment manufacturing. And the continually expanding scales and tiers of production networks make the government and third-party auditors difficult to regulate and oversee. It is submitted that the number of garment factories in the country surged from 384 in the mid-1980s to over 4,000 in 2015.[51] Yet, unofficial statistics suggest that there were more than 7,000 garment factories in 2015.[52]

The deregulatory strategies employed by Bangladesh to encourage the establishment of new factories simultaneously undermine the government's capacity to oversee the industry and safeguard human rights. Many factory owners resort to paying bribes to secure operating licenses, bypass safety regulations, and expedite processes such as land registration, all with the aim of initiating or expanding manufacturing capacity. It has been widely reported that corporate corruption in GVCs undermines the government's regulatory capacity and threatens the human rights of the locals.[53] Evading regulation through bribery and lowering construction costs with substandard engineering for garment factories is a common practice in the Bangladeshi garment industry, where the predictable safety incidents are considered a "cost of production."[54] Moreover, the limited success of Bangladeshi judicial practice in holding those responsible for industrial safety accidents accountable creates a permissive environment for collusion between regulators and the business sector,[55] systematically weakening Bangladesh's regulatory capacity.

The Rana Plaza tragedy was intricately connected to bribery practices. In 2008, Sohel Rana, the owner of Rana Plaza, constructed a five-story building without passing safety inspections and obtaining legal permission. Around 60% of the building was built on the site of an illegally acquired pond, which was filled in, compromising the building's stability from the very outset.[56] Subsequently, in 2011, Sohel Rana, through bribery, obtained permission to add three more stories and then leased these floors to

50 See Swazan and Das, "Bangladesh's Emergence as a Ready-Made Garment Export Leader: An Examination of the Competitive Advantages of the Garment Industry," 164 (n.39).

51 See Naila Kabeer, Lopita Haq and Munshi Sulaiman, "Multi-Stakeholder Initiatives in Bangladesh after Rana Plaza: Global Norms and Workers' Perspectives," *Working Paper Series*, No.19-193, London School of Economics and Political Science (January 2019): 4.

52 See Labowitz Sarah, and Dorothee Baumann-Pauly, "Beyond the Tip of the Iceberg: Bangladesh's Forgotten Apparel Workers, " NYU Stern Center for Business and Human Rights (8 December 2015): 19, accessed 15 December 2022, https://pages.stern.nyu.edu/~twadhwa/bangladesh/downloads/beyond_the_tip_of_the_iceberg_report.pdf.

53 See Hana Ivanhoe, "The Next Generation of 'Fair Trade'. A Human Rights Framework for Combating Corporate Corruption in Global Supply Chains," in *Duties Across Borders: Advancing Human Rights in Transnational Business*, ed. A. Andreassen Bard and Khanh Vinh Vo (Intersentia, 2016), 157-82.

54 See Red Marriott, "The House of Cards: the Savar Building Collapse," libcom.org (26 April 2013), accessed 15 December 2022, https://libcom.org/article/house-cards-savar-building-collapse.

55 See Clean Clothes Campaign, "Rana Plaza 3 Years On: Compensation, Justice, Workers' Safety, " (23 April 2016), accessed 15 December 2022, https://cleanclothes.org/file-repository/resources-publications-rana-plaza-three-years-on-compensation-justice-and-workers-safety-full_report.

56 See Red Marriott, T Red Marriott, "The House of Cards: the Savar Building Collapse," (n.54).

five garment factories.[57] Ironically, the permission was issued by a department unauthorized to do so.[58] It was the building's safety deficiencies that ultimately led to the Rana Plaza tragedy.

Moreover, Bangladesh's incapacity to enforce labor laws is evidenced by corporate exploitation of job grade schemes by leaving garment workers in low-paying grades for extended periods,[59] the persistent gender disparity,[60] prevalent violence against women,[61] and insufficient compliance with the ratified International Labor Organization's (ILO) Conventions.[62] For instance, despite Bangladesh having modified domestic labor laws and regulations in accordance with ILO conventions since the 1970s,[63] prevailing practices within the country's garment sector have involved providing exceedingly low wages, exposing workers to hazardous conditions, imposing uncompensated overtime hours, and inadequately protecting collective workers' rights over an extended period.[64] Consequently, in the *2022 Global Rights Index* published by the International Trade Union Confederation (ITUC), Bangladesh is categorized as having "no guarantee of rights" for the ninth consecutive year since 2014 and as having "regressive laws" for the third consecutive year since 2020.[65] This underscores the unmerciful reality that "[w]hile the government played an active role in encouraging domestic capital in the garment sector, it has been less supportive of its labor."[66]

2.3 Industry-level Analysis

Labor-intensive industries, including garment, toy, coffee, and footwear, are typical of buyer-driven supply chains. These supply chains are plagued by significant power imbalances, as buyers (large retailers, brand-named merchandisers and trading

57 See Huang Zhong, "Progress and Challenges in the Remedy Framework of UN Guiding Principles on Business and Human Rights: Lessons from Rana Plaza," 4 (n.33).

58 See Rahim, "Humanising the Global Supply Chain: Building a Decent Work Environment in the Ready-made Garments Supply Industry in Bangladesh," 140 (n.42).

59 Ibid,135-36.

60 See Muhammad Faizul Haque et al., "Discrimination of women at RMG sector in Bangladesh," *Journal of Social and Political Sciences* 3, no. 1 (2020). Also, UN Human Rights Council, *Compilation on Bangladesh. Report of the Office of the United Nations High Commissioner for Human Rights*, 19 March 2018, A/HRC/WG.6/30/BGD/2, esp. para.38.

61 UN Human Rights Council, *Compilation on Bangladesh. Report of the Office of the United Nations High Commissioner for Human Rights*, 19 March 2018, A/HRC/WG.6/30/BGD/2, esp. para.27.

62 While Bangladesh had ratified seven of the ten ILO's Fundamental Conventions at the time of the Rana Plaza tragedy, the implementation of these ILO standards has been dismal. For the full list of ILO standards ratified by Bangladesh, see ILO, "Ratifications for Bangladesh," https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103500; for a further discussion of Bangladesh's implementation of ILO standards, see Muhammod Shaheen Chowdhury, "Compliance with Core International Labor Standards in National Jurisdiction: Evidence from Bangladesh," *Labor Law Journal* 68, no. 1 (2017).

63 See Md Shawkatuzzaman Laskar, Noriaki Harada, and Harun A Rashid, "The Present State and Future Prospects of Occupational Health in Bangladesh," *Industrial Health* 37, no. 1 (1999).

64 See Afroza Anwary, "Feminized Workforce in Transnational Production: Bangladesh Ready-Made Garment Industry," *History and Sociology of South Asia* 11, no. 2 (2017): 174-91.

65 All *Global Rights Index* are available at: https://www.globalrightsindex.org/en/2022/media.

66 See Naila Kabeer, Lopita Haq and Munshi Sulaiman, "Multi-Stakeholder Initiatives in Bangladesh after Rana Plaza: Global Norms and Workers' Perspectives," 4 (n.51).

companies, etc.) wield great decision-making power over rules and standards, often viewed as the dominant actors.[67] This perceived power imbalance and the pivotal role of buyers characterize the governance of buyer-driven GVCs as a "captive" model, where buyers, as lead firms, exert significant control and monitoring capabilities over the globalized production network, despite not usually owning the producers in the network.[68] Buyers and producers in GVCs are generally legally independent entities, absolving buyers of liability for the actions of producers. Additionally, international buyers can capture governments, particularly those of developing and least-developed host countries. These dynamics imply both opportunities and challenges for international buyers engaging in human rights governance in GVCs. Of course, not all relationships in GVCs are buyer-driven or subordinate in nature.[69] Analyzing the type of relationship described in the case of the Rana Plaza garment factory serves as a reminder to legal scholars to be aware of the complex power structures and governance models in GVCs. These form the basis for any regulatory ecosystem. Similarly, without a proper understanding of the industrial practices in the garment sector, it would be impossible to fully grasp the structural factors contributing to the Rana Plaza tragedy.

2.3.1 Fast Fashion and Labor Exploitation

The governance structure of GVCs is frequently shaped by business models and reflected in purchasing practices. In the context of the buyer-driven apparel industry, the influence of lead firms, such as brand owners, retailers, and trading companies, extends to their purchasing relationships with suppliers. Such purchasing relationships often result in suppliers having little bargaining power and being forced to either meet order demands or forgo orders altogether. This captive relationship, coupled with the "fast fashion" production model, poses great challenges to human rights. "Fast fashion," a characteristic of the apparel industry, necessitates that brand owners promptly adapt to fashion trends and produce items in the most cost-effective manner to thrive in a highly competitive market. The demands of brand owners for cost control and efficiency are often communicated to garment factories, resulting in harsh working conditions, and unsafe workplace, widespread unpaid overtime, and inadequate remuneration packages for workers.[70] Moreover, suppliers within the first-tier supply chain of global brands and other lead firms frequently engage in subcontracting orders within an intricate network of subcontractors to maximize profits. Subsequently, these subcontractors may further sub-subcontract to additional entities, leading to a prolonged and convoluted supply chain that intensifies difficulties in government oversight and corporate social responsibility audits. Concurrently, global brands enhance their profit margins by exerting pressure to reduce production costs.

67 See Gary Gereffi, "The Organization of Buyer-driven Global Commodity Chains: How US retailers Shape Overseas Production Networks," *Commodity Chains and Global Capitalism* (1994).

68 See Gereffi, Humphrey, and Sturgeon, "The Governance of Global Value Chains," (n.1).

69 Gereffi and his colleagues have identified five types of global value chain governance: hierarchy, captive, relational, modular, and market. These five types range from high to low levels of explicit coordination and power asymmetry. See Gereffi, Humphrey, and Sturgeon, "The Governance of Global Value Chains," (n.1).

70 See Peter Stanwick and Sarah Stanwick, "The Garment Industry in Bangladesh: A Human Rights Challenge," *Journal of Business & Economic Policy* 2, no. 4 (2015): 40-44.

Consequently, these cost-cutting measures are often transferred downstream to suppliers and, ultimately, to the workers, compelling them to endure longer working hours for reduced compensation and in substandard working conditions.[71]

The garment factories in Rana Plaza and even the broader garment industry in Bangladesh have been under the shadow of the deleterious impact of "fast fashion." More than half of the estimated 7,000 garment factories therein were indirect sourcing factories.[72] Due to the increased cost control measures employed by lead firms, the profit margin of subcontracting companies is dwindling. Several factory owners have voiced the challenges of raising wages and improving workplace facilities due to the low pricing offered and the high demands set by global buyers.[73] "Western buyers and ultimately consumers profit from this indirect system of sourcing, and many global brands devote little time and attention to understanding the nature and scope of this practice."[74] Even "some brands want to ignore subcontractors. (Because) they have their targets, too—98 per cent on-time shipment—and they don't care how they get the products."[75] This establishes a clear causal link between the purchasing practices of lead firms and the prevalent human rights abuses in the Bangladeshi garment industry, particularly in the processes of value creation and distribution. Nevertheless, it is difficult to hold lead firms, especially those TNCs, legally responsible, as they are independent legal entities from suppliers. However, international buyers cannot be completely exempt from responsibility, as social norms and the "courts of public opinion," albeit limited, function alongside legal rules and courts.[76] The former oftentimes articulates society's basic expectations for responsible business conduct and relies on social sanctions, such as "naming and shaming," to ensure compliance.

2.3.2 Sustainable Fashion and Cost Transfer

The garment industry has long grappled with human rights and environmental issues, playing a pivotal role in shaping both BHR discourse and practices. A case in point is Nike,[77] which emerged as one of the early adopters of outsourcing production, gradually relocating its production lines to low-wage and lax-regulation Asian countries from the 1970s. In the 1990s, driven by an excessive pursuit of fast fashion practices, Nike disregarded human rights and environmental concerns, leading to protests from

71 See Naila Kabeer, Lopita Haq and Munshi Sulaiman, "Multi-Stakeholder Initiatives in Bangladesh after Rana Plaza: Global Norms and Workers' Perspectives," 4 (n.51).

72 See Labowitz Sarah, and Dorothee Baumann-Pauly, "Beyond the Tip of the Iceberg: Bangladesh's Forgotten Apparel Workers, " 20-21 (n.52).

73 See Carlson and Bitsch, "Social Sustainability in the Ready-made-garment Sector in Bangladesh: An Institutional Approach to Supply Chains," 270 (n.31).

74 Justine Nolan, "Rana Plaza: the Collapse of a Factory in Bangladesh and Its Ramifications for the Global Garment Industry," in *Business and Human Rights: From Principles to Practice*, ed. Dorothée Baumann-Pauly; and Justine Nolan (London: Routledge, 2016), 58.

75 Sarah Labowitz and Dorothée Baumann-Pauly, "Business as Usual Is Not an Option: Supply Chains and Sourcing after Rana Plaza," NYU STERN Center for Business and Human Rights (2014), 20, https://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf.

76 See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 117 (n.21); Sally Wheeler, "Global production, CSR and Human Rights: the Courts of Public Opinion and the Social Licence to Operate," *The International Journal of Human Rights* 19, no. 6 (2015).

77 For a detailed introduction to the Nike case as an emblematic BHR case, see John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (London: W.W. Norton & Company, Inc., 2013), Chapter 1.

social organizations and consumers worldwide. Initially, in response to the accusations, Nike shifted blame to its factories, asserting that it was the factories rather than Nike itself that violated human rights. However, such explanations sparked dissatisfaction within the international community, resulting in an escalation of consumer campaigns globally. Eventually, Nike had to acknowledge its responsibility and commit to respecting human rights in its supply chain by publishing and implementing a code of conduct. Against this backdrop, sustainability and responsible business practices became integral themes in the global garment industry around 2000. Almost all international brands subsequently made commitments to human rights, either through codes of conduct or by participating in multi-stakeholder initiatives or certification schemes.[78]

The realization and improvement of human rights necessitate financial investment. Yet within the cost-sensitive garment industry, any increase in cost demands careful consideration. This dynamic has given rise to an intriguing phenomenon known as "policy schizophrenia" in the global apparel supply chain,[79] where buyers aim to procure high-quality products at low prices that are manufactured in a socially responsible manner. However, they are very reluctant to elevate production costs and properly assist in building a decent working environment within this industry. Simply put, global buyers in the garment supply chains tend to "pay for a bus ticket and expecting to fly."[80] An illustrative example of this paradox occurred in 2011 when Walmart, despite emphasizing ethical sourcing and corporate social responsibility, played a leading role in thwarting a proposal that sought to compel global retailers to share the costs for safety upgrades in Bangladeshi garment factories producing their goods.[81] As a result, suppliers are pressured to showcase socially responsible practices without making adequate and effective changes due to shrinking budget constraints. Additionally, the costs of compliance have been transferred to suppliers, while most of the benefits stemming from socially responsible performance are captured by lead firms.[82] In the same vein, when considering economic interests, global buyers and retailers generally prioritize the prices, quality, and lead time offered by their suppliers.[83] This orientation has perpetuated a "race to the bottom" among suppliers, ultimately resulting in worse human rights conditions.

The failure, or at least partial failure, of sustainable fashion initiatives in Bangladesh is evident. Prior to the Rana Plaza tragedy, many international brands had issued and

78 See Wang Xiu-mei and Gu Yang-yi-wen, "An Outline of the Sustainable Development of Fashion," *Journal of Zhejiang Sci-Tech University* 46, no.6 (2021):702-712.

79 See Rahim, "Humanising the Global Supply Chain: Building a Decent Work Environment in the Ready-made Garments Supply Industry in Bangladesh," 132-33 (n.42).

80 See "Paying for a Bus Ticket and Expecting to Fly—How Apparel Brand Purchasing Practices Drive Labor Abuses," Human Rights Watch (2019), https://www.hrw.org/sites/default/files/report_pdf/wrd0419_web2.pdf.

81 See Lo Puck, "Walmart Faces Increased Scrutiny over Bangladesh Sweatshop Fire," CorpWatch Blog (7 January 2013), accessed 20 December 2022, https://www.corpwatch.org/article/walmart-faces-increased-scrutiny-over-bangladesh-sweatshop-fire.

82 See Alain De Janvry, Craig McIntosh, and Elisabeth Sadoulet, "Fair Trade and Free Entry: Can a Disequilibrium Market Serve as a Development Tool?," *Review of Economics and Statistics* 97, no. 3 (2015).

83 See Helin Sven, Maira Babri. "Travelling with A Code of Ethics: A Contextual Study of a Swedish MNC Auditing a Chinese Supplier." *Journal of Cleaner Production* 107 (2015): 41-53.

pledged to implement codes of conduct regarding human rights, such as the Fair Labor Association and the *UN Global Compact*. At least two factories located in Rana Plaza had successfully passed an audit by the Business Social Compliance Initiative, operated by a Brussels-based foreign trade association.[84] However, these private regulatory measures not only fell short in addressing longstanding issues in the Bangladesh garment industry, including low wages, unpaid overtime, and poor working conditions, but also failed to prevent the predictable "murder" case of the Rana Plaza tragedy. The inefficacy and potential misuse of private regulations,[85] such as codes of conduct, certification schemes, and multi-stakeholder initiatives, have unsurprisingly faced significant scrutiny and criticism.[86] Consequently, achieving substantive realization of the instrumental function of private regulatory mechanisms would be challenging without due consideration of the multidimensional power asymmetry present in GVCs.

2.3.3 Powerful Fashion and Regulatory Capture

Liberal economic globalization has empowered multinational corporations to progressively amass economic power and social influence globally, surpassing even some national governments and leading to a "transnational space."[87] As early as 2000, multinational corporations occupied 49 seats in the world's top 100 economies,[88] and this number rose to 69 in 2016.[89] Consider Walmart, a major buyer of garment factories in Rana Plaza, as an example. In 2016, Walmart's global sales exceeded the GDP of numerous affluent developed countries, including Spain, the Netherlands, Sweden, Belgium, Norway, and Denmark. These large multinational corporations not only possess the ability to shape the policies of their home country governments but also exert direct and indirect influences on the governments of host countries. This phenomenon is exemplified by the negative effects of corporate corruption and regulatory chill based on international investment agreements. Such dynamics highlight

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84 See Syed Zain Al-Mahmood and Shelly Banjo, "Engineers Detained in Bangladesh Disaster", The Wall Street Journal (28 April 2013), accessed 20 December 2022, https://www.wsj.com/articles/SB10001424127887324474004578445991168551584.

85 A rigorous empirical study demonstrates that the profit-oriented audit system is inadequate in identifying and safeguarding labor rights and environmental concerns. However, it persists in being employed to address and safeguard the commercial interests of the industry. See Genevieve LeBaron, Jane Lister, and Peter Dauvergne, "Governing Global Supply Chain Sustainability through the Ethical Audit Regime," *Globalizations* 14, no. 6 (2017): 958-75.

86 See in general, Claudia Müller-Hoff, "Human Rights Fitness of the Auditing and Certification Industry? A Cross-sectoral Analysis of Current Challenges and Possible Responses, " European Center for Constitutional and Human Rights, Brot für die Welt, and MISEREOR (2021), accessed 15 December 2022, https://www.ecchr.eu/en/publication/human-rights-fitness-audits/.

87 The proliferation of economic globalization has prompted a transition from the Westphalian system to the post-Westphalian system. The former refers to an international domain that revolves around the nation-state, whereas the latter represents a transnational sphere where both state and non-state entities, such as multinational corporations, coexist and jointly share authority. States not only share authority with other actors, but they are also constrained by them in their domestic policy realm, resulting in the loss of their complete autonomy. See Wettstein, *Business and Human Right: Ethical, Legal, and Managerial Perspectives*, 172-73 (n.21).

88 "Of the World's 100 Largest Economic Entities, 51 Are Now Corporations and 49 Are Countries," Corporations.org (December 2000), accessed 15 December 2022, http://www.corporations.org/system/top100.html#:~:text=Of%20the%20world%27s%20100%20largest%20economic%20entities%2C%2051,%20%201%2C410%2C262.00%20%2088%20more%20rows%20,

89 "Corporations Dominate World's Top 100 Economic Entities," *Accountancy Daily* (14 September 2016), accessed 15 December 2022, https://www.accountancydaily.co/corporations-dominate-worlds-top-100-economic-entities.

how powerful multinational corporations can be in shaping the policies of their host countries.

To elaborate, Walmart has faced public scrutiny due to allegations of corruption within its global production and procurement networks.[90] Notably, Walmart was accused of paying $24 million in bribes to Mexican officials to secure permits for building and operating new stores. The act of bribery carries serious human rights implications. It not only undermines the safety and environmental standards of the buildings but also potentially violates the land rights of local residents and corrodes the integrity of local government through corrupt practices, ultimately resulting in systemic human rights violations.[91] While it may not be definitively confirmed that Walmart or other leading global apparel companies engaged in bribery in Bangladesh, it is a well-established fact that such corrupt practices are commonplace among the country's major garment companies, as discussed above. These corrupt practices not only undermine the regulatory capacity of the local government but also perpetuate a culture of non-compliance and unethical behavior within the industry.

Similarly, international investment treaties have been widely criticized for providing disproportionate protection to multinational corporations at the expense of human rights,[92] resulting in a "regulatory chill" on the policy space of host countries.[93] It is worth noting that such treaties often contain stabilization and dispute resolution provisions. These provisions grant multinational corporations the legal cause and status to bring lawsuits against host governments before international arbitration tribunals if new regulations concerning human rights and the environment are implemented. The basis for such arbitration typically rests on the argument that such regulations might adversely affect investors' interests, including by raising wage or environmental standards and thereby increasing production costs. Given the tendency of international arbitrators to favor investors,[94] particularly those from the Western countries,[95] host governments often refrain from introducing new environmental and social regulations that could have an impact on foreign investments.

Currently, Bangladesh has signed bilateral investment agreements with 33 countries, including the UK, Germany, France, the US, and Canada,[96] which contain well-

90 See Ivanhoe, "The Next Generation of 'Fair Trade'. A Human Rights Framework for Combating Corporate Corruption in Global Supply Chains," 157-82 (n.53).

91 Ibid.

92 For a well-organized introduction to human rights and international investment law, see Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap*, 118-36 (n.26). See also Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 298-99 (n.21).

93 See Eric Neumayer, "Do Countries Fail to Raise Environmental Standards? An Evaluation of Policy Options Addressing Regulatory Chill," *International Journal of Sustainable Development* 4, no. 3 (2001): 231-44.

94 See Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice: How Law Firms, Arbitrators and Financial Are Fuelling an Investment Arbitration Boom," Corporate Europe Observatory and the Transnational Institute (November 2012), accessed 15 December 2022, https://www.tni.org/files/download/profitingfrominjustice.pdf.

95 One empirical investigation into international investment arbitration reveals that arbitrators have a bias towards supporting investors, particularly those originating from major Western countries that export capital, see Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration," *Osgoode Hall Law Journal* 50 (2012): 211-68.

96 Bangladesh Investment Development Authority, "Bilateral Investment Treaties," (22 June 2022), accessed 15 December 2022, https://bida.gov.bd/treaties.

designed provisions related to stabilization and dispute resolution. Due to its long-standing efforts to create a favorable environment for foreign investment in the garment industry, there were few international investment disputes related to social regulations in Bangladesh, despite a slight shift in this direction after the Rana Plaza tragedy. The dearth of international investment disputes in this regard mirrors, in part, the government's inaction to improve social protection and environmental standards in Bangladesh. The regulatory chill effect in international investment agreements can also affect Bangladesh's willingness to strengthen regulations on human rights, the environment, and other areas, just as it does in other countries.

Furthermore, it is essential to emphasize the influence exerted by leading domestic apparel companies on the Bangladeshi government. As the garment industry continues to thrive, the power of Bangladeshi garment giants has steadily expanded beyond the economic domain to other social systems, including the political arena. Notably, at the time of the Rana Plaza tragedy, 10% of the country's members of parliament were also owners of garment factories.[97] The intertwining of business and politics allows garment factory owners to leverage their political clout to shape industry regulations. The close ties between the leadership of the largest industry association, the Bangladesh Garment Manufactures and Exporters Association (BGMEA),[98] and the ruling party of the Bangladesh government exacerbate the situation. There is well-documented evidence that the BGMEA, with its considerable economic power, exerts de facto political influence on the adoption and execution of domestic laws and policies. For example, several recommendations aimed at enhancing garment regulation and safety conditions, proposed by the Standing Committee in 2005-06, were completely disregarded due to interference by the BGMEA. Similarly, a decision taken by the Standing Committee of the 9th Parliament in 2010 to empower the Office of the Chief Inspector of Factories and Establishment was left unimplemented when the Rana Plaza disaster occurred in 2013.[99]

Also, the Bangladeshi government's stance towards labor organizations has been clouded by the unfavorable attitude of garment industry organizations towards trade unions. Consequently, despite the recognition of the legitimacy of trade unions in Bangladeshi labor law, the government consistently hinders their formation and operation. This obstruction is manifested through prolonged registration processes, interference in their activities, and a refusal to provide necessary support.[100] Even worse, as elaborated above, the government may support stern actions against trade

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97 See Fahreen Alamgir and Subhabrata Bobby Banerjee, "Contested Compliance Regimes in Global Production Networks: Insights from the Bangladesh Garment Industry," *Human Relations* 72, no. 2 (2019): 280.

98 The Bangladesh Garment Manufacturers and Exporters Association (BGMEA) is one of the country's largest trade groups representing the readymade garment industry, especially the woven garments, knitwear, and sweater sub-sectors with equal weight. As stated on its webpage, "to protect and promote the interests of the industry" is one of the BGMEA's primary objectives. See "BGMEA at a glance", available at: https://www.bgmea.com.bd/page/aboutus.

99 See "Readymade Garments Sector: Problems of Good Governance and Way Forward," Transparency International (31 October 2013): 17-19, accessed 15 December 2022, https://blog.transparency.org/wp-content/uploads/2014/04/2013_TIB_GarmentSector_EN.pdf.

100 Ibid, 17-19; see also, International Trade Union Confederation, "2021 ITUC Global Rights Index," (2021):27, accessed 15 December 2022, https://files.mutualcdn.com/ituc/files/ITUC_GlobalRightsIndex_2021_EN-final.pdf.

unions and peaceful protests.[101] The ITUC has extensively documented the repression of trade unions and workers' movements in the garment industry by the Bangladesh government.[102] Therefore, Bangladesh has consistently featured on the *Global Rights Index*'s list of the World's Ten Worst Countries for Workers from 2017 to 2022 due to its opposition to workers' rights.[103] Consequently, it appears to be a formidable challenge for Bangladeshi trade unions to safeguard fundamental rights for labor through collective bargaining, let alone enhance workers' welfare and human rights more broadly.

In conclusion, although not all industries adopt the fast fashion business model, it is a prevailing practice for dominant corporations in global supply chains to capture the premium of corporate social responsibility while transferring risks and costs to suppliers. Additionally, the multifaceted influence of companies on governments should not be overlooked. Properly accounting for these industry-level dynamics when designing and implementing GVC regulations is of great significance to achieve the intended purposes of reshaping business conduct and upholding human rights.

2.4 Corporate Level Analysis

The analysis at the corporate level primarily describes the exploitative relationship between the clothing factories and their workers. Firstly, as previously noted, the inadequate protection of human rights for workers in the Bangladeshi clothing industry can be attributed to several factors, including the government's reluctance and incapacity to regulate, power imbalances, cost shifting, and regulatory capture within the global garment value chain. An important variable between these reasons and their consequences exists, which can either improve workers' rights in the garment industry or potentially threaten the effective implementation of relevant legislation, viz., labor unions. As a peculiar third pole in industrial relations beyond government and corporations, labor unions are of great significance for workers, especially those who intersectionally vulnerable. Simply put, they can create and maintain working conditions and basic rights for workers and safeguard the realization of civil, political, and other human rights,[104] by serving as general human rights organizations in the workplace.[105]

As mentioned earlier, despite the legal status of labor unions, the government of Bangladesh has consistently imposed restrictions on workers' organizations. Moreover,

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101 For more credible accounts of violations by the Bangladeshi government against trade unions and the workers' movement, see International Trade Union Confederation, "Bangladesh: In practice," accessed 15 December 2022, https://survey.ituc-csi.org/Bangladesh.html?lang=en#tabs-3.

102 For example, the 2019 ITCU Report asserted that "[w]orkers in Bangladesh were exposed to mass dismissals, arrests, violence and state repression against peaceful protests. In the garment sector, strikes were often met with extreme brutality by police forces." See International Trade Union Confederation, "2019 ITUC Global Rights Index," 22 (n.46).

103 All *Global Rights Index* is available at: https://www.globalrightsindex.org/en/2022/media.

104 See Niklas Egels-Zandén and Jeroen Merk, "Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights," *Journal of Business Ethics* 123 (2014): 461-73.

105 See Matthew Evans, "Trade Unions as Human Rights Organizations," *Journal of Human Rights Practice* 7, no. 3 (2015): 466-83.

under the influence of major players in the Bangladeshi garment industry, the government has taken a series of actions to suppress union activities and workers' peaceful protests. The intricate garment production network formed by extensive indirect sourcing has further weakened the influence of unions, as many of the factories in these unregulated networks are not officially registered and lack any unions. The absence of effective labor unions and industrial collective bargaining has created a void in social dialogue,[106] exacerbating conflicts between management and labor in the industry. This situation also enables employers to retaliate against workers who speak out, resulting in the unheard voices of workers.

The Rana Plaza tragedy underscored the detrimental consequences of disregarding workers' voices. In fact, one day prior to the collapse, workers at Rana Plaza noticed conspicuous cracks in the building and promptly reported them to Rana, the owner of the building. Rana then sent an engineer to inspect the building. Unfortunately, the engineer's recommendation to immediately close the building was fully rejected. Furthermore, in an interview with the media, Rana falsely claimed that the building was safe.[107] Despite the doubts and fears expressed by many workers, they were coerced to return to the factory under threats of salary deductions or termination.[108] With little bargaining power, the majority of workers felt compelled to comply, and the tragic building collapse occurred shortly thereafter. In hindsight, it was entirely possible to prevent this tragedy even though there were serious exploitative industrial relations, "if workers at Rana Plaza had more of a voice" which could enable them to collectively reject working in a cracked building.[109] However, the grim reality was that there were no well-functioning labor unions in any of the garment factories at Rana Plaza. Workers were regarded merely as inputs for production, and workplace safety accidents were perceived as an unavoidable "cost of production."[110]

Accordingly, incorporating workers and other stakeholders broadly into corporate operations, including formulating and enforcing corporate human rights policies such as the HRDD scheme, is paramount for the sustained success of a company. As some experts observe, "[t]he test of a garment sector that is truly sustainable over the long term will be its ability to accommodate worker voices and worker representatives as the sector grows."[111] Therefore, giving employees their full voice is an essential component for any further regulatory attempts. Nonetheless, it "means not simply

106 See Rahim, "Humanising the Global Supply Chain: Building a Decent Work Environment in the Ready-made Garments Supply Industry in Bangladesh," 130-50 (n.42).

107 See Jonathan Owen, "The Day the Rana Plaza Garment Workers Dies: New Documentary Tells the Stories of Those Who Survived the Collapse of a Closing Factory near Dhaka," Independent (20 July 2014), accessed 21 December 2022, https://www.independent.co.uk/news/world/asia/the-day-the-rana-plaza-garment-workers-died-new-documentary-tells-the-stories-of-those-who-survived-the-collapse-of-a-clothing-factory-near-dhaka-9616932.html.

108 See Red Marriott, "The House of Cards: the Savar Building Collapse", (n.54).

109 "'Whoever Raises their Head Suffers the Most': Wokers' Rights in Bangladesh's Government Factories," Human Rights Watch (22 April 2015): 13, accessed 21 December 2022, https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment.

110 See Red Marriott, "The House of Cards: the Savar Building Collapse", (n.54).

111 Labowitz Sarah, and Dorothee Baumann-Pauly, "Beyond the Tip of the Iceberg: Bangladesh's Forgotten Apparel Workers, " 16 (n.52).

creating more unions but creating effective unions and forums for workers to be heard,"[112] and even making workers substantively involved in the governance structure to reconfigure industrial relations.

2.5 Further Reflections: The Need for Transnational Efforts

The preceding analysis of the direct and indirect causes behind the Rana Plaza tragedy demonstrates that the human rights challenges within GVCs are not attributable to a single actor or cause. Instead, they arise from the systemic irresponsibility among both state and non-state actors, lead firms and suppliers, even social auditors who implement private regulations. While the host country government undoubtedly bears primary responsibility, given the prevailing power asymmetry, multinational and local lead firms also play a role in regulatory capture and should be held accountable—whether legally or, at the very least, ethically—adhering to the principle that "no one should benefit from their own wrongdoing." Additionally, the public commitments made by numerous TNCs and local suppliers to operate responsibly render holding them accountable a more reasonable proposition.[113]

In fact, there is another vital party that should bear a share of responsibility, viz., the home-state governments of multinational corporations. This is attributable to a notable factor contributing to power imbalances and regulatory capture in the landscape of economic globalization: the prevailing liberal international order fostered and dominated by Western developed countries. This global architecture not only exempts multinational corporations from international legal liability but also provides them with excessive protection through institutional designs such as international investment law and international financial law.[114] Meanwhile, international law acknowledges the due diligence duty of states to prevent their territories from being exploited for actions that violate the rights of other countries, including actions by non-state actors such as multinational corporations.[115] In other words, states are obligated to adopt reasonable measures to ensure that private actors within their territory or jurisdiction refrain from violating human rights domestically and extraterritorially.[116] Neglecting this duty may lead to states breaching their obligations under international human rights law, when they fail to undertake appropriate measures to prevent, investigate, punish and remedy

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112 Nolan, "Rana Plaza: the Collapse of a Factory in Bangladesh and Its Ramifications for the Global Garment Industry," 60 (n.74).

113 There is a growing trend of legal action against companies for disseminating false and misleading human rights information. For instance, statements on product packaging asserting that products are "ethically sourced" have become subject to scrutiny. This trend could serve as a significant factor in compelling companies to take their human rights commitments and practices more seriously. An insightful discussion in this topic, see Rachel Chambers, "Litigating Corporate Human Rights Information," *American Business Law Journal* 60, no. 1 (2023): 111-74.

114 See Ilias Bantekas, "Business and Human Rights: Foundations and Linkages," in *The Cambridge Companion to Business and Human Rights Law*, ed. Ilias Bantekas and Michael Ashley Stein (Cambridge University Press, 2021), 1-21.

115 For a holistic discussion of due diligence in international law by several distinguished international law scholars, see, Heike Krieger, Anne Peters, and Leonhard Kreuzer, *Due Diligence in the International Legal Order* (Oxford University Press, 2020).

116 See Olivier De Schutter et al., "Commentary to the Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights," *Human Rights Quarterly* 34, no. 4 (2012): 1112-15.

abuses by private actors under their jurisdiction. Accordingly, TNCs' home states ought to shoulder a share of responsibility for protecting and mitigating human rights abuses within GVCs associated with their corporate citizens, in accordance with established principles of international law.

Additionally, the insights gleaned from the Rana Plaza tragedy indicate the inadequacy of concentrating solely on human rights matters within a company's immediate operations or at any single level of the chain. Instead, a comprehensive approach is imperative, extending scrutiny to the entire supply chain, ensuring that the establishment of human rights policies is not merely a lip service but translates into effective implementation. Taken all together, it becomes evident that an optimal strategy for addressing human rights challenges in GVCs necessitates *trans*national considerations involving both state and non-state actors, business entities and multiple stakeholders, coupled with collaborative actions at corporate, industrial, national, regional, and global levels. The BHR approach, concretized by the UN Guiding Principles discussed in the next chapter, advocates for such a *trans*national approach to humanizing GVCs. Indeed, it is believed that "over the past years, B&HRs has been showing an interesting pattern of evolution as it concerns both the rules and the rule-making process, the participation of new actors, the development of innovative and hybrid legal sources, and the introduction of new legal concepts and processes."[117] More recently, such a BHR approach has consolidated as a paradigmatic solution to reshape global business for good, attracting ever-increasing normative discussions and institutional practices, particularly those surrounding mHRDD.[118]

3. The Rise of Mandatory Human Rights Due Diligence and the Status Quo of Current Research

mHRDD refers to legislative practices that obligate targeted business entities to: (1) identify actual and potential adverse human rights impacts in their own operations and specific tiers of supply chains; (2) integrate and act on the findings; (3) track the effectiveness of the responses; and (4) report externally how these impacts are addressed. Since the adoption of the UN Guiding Principles, mHRDD laws have become a central focus of the BHR agenda and a significant type of BHR law.[119] Broadly speaking, HRDD has long been integrated into domestic legal systems

117 Angelica Bonfanti, "Conclusion," in *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, ed. Martina Buscemi et al. (Leiden: Brill | Nijhoff, 2020), 332.

118 For instance, see Gabriela Quijano and Carlos Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?," *Business and Human Rights Journal* 6, no. 2 (2021); Robert McCorquodale, "Human Rights Due Diligence Instruments: Evaluating the Current Legislative Landscape," in *Research Handbook on Global Governance, Business and Human Rights*, ed. Axel Marx et al. (Cheltenham: Edward Elgar Publishing, 2022); Fatimazahra Dehbi and Olga Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Rerspective," *Regulation & Governance* 17, no. 4 (2023); Surya Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," *Leiden Journal of International Law* 36, no. 2 (2023).

119 Section 1.4 in Chapter 2 of this research delves into this development in detail.

worldwide.[120] However, from a narrow but more precise perspective, the emergence of mHRDD laws, strictly based on the HRDD notion stipulated by the UN Guiding Principles, is still a nascent phenomenon.

To date, mHRDD legislation occurs at domestic, regional, and international levels with various characteristics and considerations. Some emblematic domestic mHRDD laws include the French Duty of Vigilance Law of 2017,[121] the Dutch Child Labor Due Diligence Act of 2019,[122] the German Supply Chain Act of 2021,[123] the Norwegian Transparency Act of 2021,[124] and the Swiss HRDD legislation.[125] As for regional practice, the EU is leading the way in harmonizing mHRDD laws. Besides the well-discussed EU Conflict Minerals Regulation of 2017,[126] the proposed EU Corporate Sustainability Due Diligence Directive (EU CSDDD) almost reaches the end of its legislative process.[127] At the international level, a legally binding instrument for BHR is in progress.[128] This strong momentum for legislating mHRDD is advancing and may constitute a new normal for doing business around the world. As William Anderson, the human rights counsel for Adidas, correctly puts it: "it is not a question of if, but when such laws (on mHRDD) will be in place and how they will impact current business operations and practices."[129]

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120 For a general discussion on domestic laws related to human rights due diligence, see Olivier De Schutter et al., *Human Rights Due Diligence: The Role of States* (2012), https://en.frankbold.org/sites/default/files/publikace/human_rights_due_diligence-the_role_of_states.pdf; Lukas Heckendorn Urscheler and Johanna Fournier, *Regulating Human Rights Due Diligence for Corporations* (Zurich: Schulthess Éditions Romandes, 2017).

121 *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1)*, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626.

122 *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)* (Child Labour Due Diligence Act), https://zoek.officielebekendmakingen.nl/stb-2019-401.html.

123 *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten* (the Act on Corporate Due Diligence Obligations in Supply Chains), https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1700493693838.

124 *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)* (Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions), https://lovdata.no/dokument/NL/lov/2021-06-18-99.

125 The adoption of the Swiss human rights due diligence legislation resulted from the rejection of the Responsible Business Initiative in 2020. This legislation is manifested through modifications to the Swiss Code of Obligations and the Swiss Criminal Code, which came into effect on January 1, 2022, alongside a new Federal Ordinance on Conflict Minerals and Child Labor that includes implementing provisions. The official text of the modifications in French, German and Italian is available at: https://www.parlament.ch/centers/eparl/curia/2016/20160077/Texte%20pour%20le%20vote%20final%202%20NS%20F.pdf. The English translation of the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labor is available at: https://www.fedlex.admin.ch/eli/cc/2021/847/en.

126 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 Tungsten, Their Ores, and Gold originating from Conflict-affected and High-risk Areas, OJ L 130 (2017), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017R0821.

127 *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, European Commission (Brussels, 23 February 2022), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

128 The latest version of the BHR Treaty is the 2023 Update Draft. More detailed information is available in Section 1.4.1 of Chapter 2 below.

129 William Anderson, "Mandatory Human Rights Due Diligence: A Business Perspective," Business and Human

Alongside the rapid development of mHRDD legislative practices, scholars are actively engaged in discussing this latest legislative phenomenon in GVCs. While many commendable works have been undertaken to evaluate this emerging legislative practice, a noticeable research deficiency persists. There is a limited body of research that comprehensively conducts vertical comparisons of these legislative practices across domestic, regional, and international levels (Chapters 4, 5&6) from a holistic and critical perspective (Chapter 7), considering both the empirical complexities of GVCs (Chapter 1) and normative suggestions from the UN Guiding Principles (Chapter 3).

For instance, many scholars narrow their focus on the evaluation of a specific mHRDD law, such as that in French,[130] the Netherlands,[131] Switzerland,[132] the EU,[133] and the drafts of the BHR treaty.[134] While some scholars acknowledge the significance of comparative analyses for newly emerging legislative practices of mHRDD, their research predominantly focuses on domestic mHRDD laws.[135] Several vertical comparisons can be found within the context of EU legislation and domestic laws.[136] However, limited research involves vertical comparisons among mHRDD laws across domestic, EU, and international levels.[137] Moreover, most of the existing contributions fall short of properly considering the empirical complexity of human rights governance

Rights Resources Centre (6 June 2019), accessed 20 December 2023, www.business-humanrights.org/en/mandatory-human-rights-due-diligence-a-business-perspective.

130 See Sandra Cossart, Jérôme Chaplier, and Tiphaine Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All," *Business and Human Rights Journal* 2, no. 2 (2017); Almut Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?," *Human Rights Review* 22, no. 1 (2021); Elsa Savourey and Stéphane Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption," *Business and Human Rights Journal* 6, no. 1 (2021).

131 See Liesbeth Enneking, "Putting the Dutch Child Labour Due Diligence Act into Perspective," *Erasmus Law Review* 4 (2019).

132 See Nicolas Bueno and Christine Kaufmann, "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics," *Business and Human Rights Journal* 6, no. 3 (2021).

133 See Johanna Elbel, Stephan Bose O'Reilly, and Rok Hrzic, "A European Union Corporate Due Diligence Act for Whom? Considerations about the Impact of A European Union Due Diligence Act on Artisanal and Small-scale Cobalt Miners in the Democratic Republic of Congo," *Resources Policy* 81 (2023).

134 See Olivier De Schutter, "Towards a New Treaty on Business and Human Rights," *Business and Human Rights Journal* 1, no. 1 (2015); David Bilchitz, "The Necessity for a Business and Human Rights Treaty," *Business and Human Rights Journal* 1, no. 2 (2016); Nadia Bernaz, "Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty," *Human Rights Review* 22 (2021).

135 See, for example, Markus Krajewski, Kristel Tonstad, and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," *Business and Human Rights Journal* 6, no. 3 (2021); Maria-Therese Gustafsson, Almut Schilling-Vacaflor, and Andrea Lenschow, "Foreign Corporate Accountability: The Contested Institutionalization of Mandatory Due Diligence in France and Germany," *Regulation & Governance* 17, no. 4 (2022).

136 See, for example, Quijano and Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?." (n.118); Tiphaine Beau de Loménie, Sandra Cossart, and Paige Morrow, "From Human Rights Due Diligence to Duty of Vigilance: Taking the French Example to the EU Level," in *Business and Human Rights in Europe*, ed. Angelica Bonfanti (New York: Routledge, 2018).

137 For instance, Radu Mares performs an analysis that includes specific domestic mHRDD laws, EU legislation, and the potential BHR treaty. However, instead of providing a holistic comparison, his research mainly focuses on examining how the potential treaty can glean insights from legislative practices at the domestic and EU levels, specifically concerning the liability regime. See Radu Mares, "Regulating Transnational Corporations at the United Nations–the Negotiations of a Treaty on Business and Human Rights," *The International Journal of Human Rights* 26, no. 9 (2022).

inherent in GVCs and often exhibit a Eurocentric perspective.[138]

Among the existing vertical comparative analyses of mHRDD laws covering domestic, regional, and international legislation, the majority of them are observed within critical scholarship.[139] This critical research predominantly employs the Third World Approach to International Law to criticize the excludability, Eurocentricity, and imperialistic tendency present in the mHRDD laws of the EU and its Member States.[140] The reference to the BHR treaty mainly serves to illustrate the inclusiveness and fairness of an international approach to regulating GVCs, which is distinguished from the EU-dominant regional approach and the existing domestic approaches. Therefore, they fail to provide an in-depth discussion of the substantive provisions and mechanisms of the BHR treaty, and a thorough comparative study of mHRDD laws at different levels is still notably absent.

These observed research deficiencies pose significant challenges, as they hinder a holistic understanding of different approaches to legislating mHRDD and may have unfavorable implications for designing and implementing future mHRDD laws. Phrase it differently: these observed shortcomings in current BHR scholarship mirror "the old tale of the blind men and the elephant, (where) our compartmentali[z]ation has caused us to sacrifice both descriptive accuracy and normative insight" into human rights governance in GVCs.[141] Crucially, considering the competition among different legislative approaches vying to shape the future regulatory landscape of the global economy,[142] the lack of a nuanced understanding and holistic consideration of these mHRDD legislative practices may lead to the overestimation of specific laws and the undervaluation of other promising solutions. Such oversights could result in the crafting of legislation that inadequately addresses the intricacies of GVCs, potentially undermining the effectiveness of mHRDD laws.

Furthermore, coupled with the lingering effects of the COVID-19 pandemic, the unstoppable rise of digital technology, and other challenges that make human rights protection in GVCs more intricate, we found ourselves not only at a crossroads of how

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138 An important exception is found in the article by Surya Deva, which notices the imbalance of power, information, and resources between business entities and rightsholders that may influence the effectiveness of mHRDD laws. See Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," (n.118).

139 One intriguing exception is the chapter contributed by McCorquodale. This chapter offers a comprehensive landscape mapping of current human rights due diligence instruments, including both soft and hard, domestic, and international documents. However, it does not delve into an in-depth comparison of these instruments. See McCorquodale, "Human Rights Due Diligence Instruments: Evaluating the Current Legislative Landscape," (n.118).

140 Three insightful studies in this regard, see, Caroline Omari Lichuma, "(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains," *Heidelberg Journal of International Law* 81, no. 2 (2021); Debadatta Bose, "Decentring Narratives around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law," *Business and Human Rights Journal* 8, no. 1 (2023); Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," (n.118).

141 Sobel-Read, "Global Value Chains: A Framework for Analysis," 367 (n.3).

142 Quijano and Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?." (n.118). See also Jaakko Salminen and Mikko Rajavuori, "Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and A Framework for Analysis," *Maastricht Journal of European and Comparative Law* 26, no. 5 (2019): 603.

to operationalize the UN Guiding Principles[143] but also at a Grotian Moment.[144] This crucial moment necessitates more systematic considerations regarding how to leverage the impetus of legislating mHRDD to construct a better transnational regulatory ecosystem for reshaping global business conduct. The latter is the contribution this research seeks to make.

4. Research Methodology, Objectives, and Structure

This study adds to the growing yet insufficient body of systematic research on mHRDD laws. It is structured around a central inquiry identifying a satisfactory option for enacting mHRDD laws in the short term to address the burning issue of corporate human rights abuses. This central inquiry is supported by three layers of critical reflection. The first layer concerns the empirical complexities associated with human rights governance in the globalized production network, highlighting how the BHR approach, especially the legalization of mHRDD, offers a transnational solution to humanizing GVCs. In the second layer, theoretical debates on the effectiveness of HRDD are examined. Also, an analytical framework based on the UN Guiding Principles is constructed to evaluate mHRDD laws, which are emerging yet intricate. The third layer is the core element of this study, which offers a holistic assessment of mHRDD laws at the domestic, regional, and international levels and critical research on mHRDD laws in Europe to provide evidence-based answers to the central inquiry.

This qualitative legal research employs doctrinal and comparative methods to evaluate the selected mHRDD laws. Where appropriate, critical legal perspectives, such as the Third World Approach to International Law (TWAIL), are integrated to gain a nuanced understanding of mHRDD legislative practices within Europe. Through this vertical comparison, the study is intended to deepen the existing knowledge of various mHRDD laws and identify the best practices and shortcomings they contain to support recommendations for future legislation. Moreover, the TWAIL perspective is employed to shed light on evolving critical scholarship on mHRDD laws, especially those of the EU and its Member States.

This research is organized into eight chapters, grouped into three parts that correspond with the three layers of critical investigation (Table 1). In **Part I**, the general landscape of corporate human rights abuses in GVCs is set out, and the evolution of BHR as a response to these abuses is explored. **Chapter 1**, the present chapter,

143 UN Human Rights Council, *Guiding Principles on Business and Human Rights at 10: taking stock of the first decade. Report of the Working Group on the Issue of human rights and transnational corporations and other business enterprises*, A/HRC/47/39, 22 April 2021.

144 The term “Grotian Moment” refers to a moment of transformation in international legal order, where customary international law or legal norms may evolve or adapt due to changing circumstances, new understandings, or shifts in global dynamics. Given the rapid development and the institutionalization of HRDD, in particular the mHRDD laws at various levels, many scholars believe that HRDD is shifting from a concept to an emerging principle of customary international law addressing corporate conduct. See Ingrid Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance," *Melbourne Journal of International Law* 20, no. 1 (2019); Ludovica Chiussi Curzi, "Climate Change and its ‘Grotian’ Effects on a Principle of Corporate Liability in International Law," *International Community Law Review* 25, no. 3-4 (2023). See also Section 1.4 of Chapter 2 below.

introduces GVCs and their human rights implications. The collapse of the Rana Plaza factory is employed as a case study to concretize the human rights challenges and the need for a transnational approach. The mHRDD practice status quo is then briefly described, along with a review of current academic debates and a description of the methodology, objectives, and structure of this study. **Chapter 2** explores how BHR evolves as a response to the accountability gap regarding corporate human rights abuses, with a focus on the UN Guiding Principles and the current state of HRDD institutionalization. The significance of the UN Guiding Principles as a starting point for normative analysis is highlighted.

Part II comprises **Chapter 3**, which serves as the theoretical foundation for this research. It employs Surya Deva's qualitative assessment method, which was applied to evaluate five domestic mHRDD laws.[145] This method involves four key steps: (1) identifying normative foundations, (2) formulating criteria for analysis, (3) quantifying the criteria, and (4) conducting the evaluation. Section 1 of Chapter 3 establishes the existing normative foundation, while Section 2, building upon the UN Guiding Principles, outlines the procedural and substantive parameters for further analysis. Section 3 quantifies the ten parameters proposed and details the methods adopted to evaluate mHRDD laws in the subsequent chapters.

Part III offers a comprehensive and critical analysis of the prevailing mHRDD laws at the domestic, EU, and international levels, using the theoretical framework set out in the preceding part. In **Chapter 4**, the mHRDD laws in France, Germany, and Norway are discussed and compared. The selection of these laws is based on their alignment with the UN Guiding Principles and their incorporation of substantive due diligence obligations covering a broad spectrum of human rights. **Chapter 5** examines the legislative proposals related to mHRDD at the EU level, focusing on the EU CSDDD. **Chapter 6** assesses the under-negotiated BHR treaty based on the latest version, the 2023 Updated Draft. In **Chapter 7**, a vertical comparison of the three-level legislative practices is conducted, outlining the merits and demerits of various legislative approaches and identifying best practices. The potential impact of the EU CSDDD on the GVC regulatory universe is then considered, primarily through the lens of the so-called "Brussels Effect." This chapter also offers a critique of European legislative practices from a TWAIL perspective, a critique intended to encourage critical evaluation, enhance future legislative endeavors, address legitimacy concerns, and reduce confrontations in regulating human rights in GVCs. **Chapter 8** concludes this study and puts forward recommendations for further exploration.

Table 1 Research Structure

Parts	Cha.	Title of the Chapter
Part I Setting the Scene	1	Introduction
	2	The Evolving Paradigm of Business and Human Rights and the Institutionalization of Human Rights Due Diligence

145 See Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 404-13 (n.118).

Part II Formulating the Theoretical Foundation	3	A Framework for Evaluating Mandatory Human Rights Due Diligence Laws
Part III Evaluating Mandatory Human Rights Due Diligence Laws	4	Mandatory Human Rights Due Diligence Laws at Domestic Level
	5	Mandatory Human Rights Due Diligence Law at European Union Level
	6	Mandatory Human Rights Due Diligence Law at International Level
	7	Comparative and Critical Scrutiny of Mandatory Human Rights Due Diligence Laws
	8	Concluding Remarks

CHAPTER 2 THE EVOLVING PARADIGM OF BUSINESS AND HUMAN RIGHTS AND THE INSTITUTIONALIZATION OF HUMAN RIGHTS DUE DILIGENCE

As an emerging but consolidating field in international human rights law, the roots of BHR can be traced back to the Nuremberg Trials and even earlier. Over the past seven decades, BHR norms have progressively evolved from a mere moral claim to the establishment of mandatory legislation surrounding HRDD at domestic, regional, and international levels. A retrospective discussion on the genealogy of BHR is imperative not only for gaining a nuanced understanding of past and present practices in the field but also for better envisioning future actions by drawing insights from past experiences. As such, this chapter begins by offering a concise genealogy of BHR, highlighting the lessons necessary for effectively designing and implementing human rights regulations in GVCs. Subsequently, it delves into the content of the UN Guiding Principles and HRDD, underscoring the significance of referencing the UN Guiding Principles in operationalizing HRDD. This chapter concluded with discussions on the limitations of current legislative practices and academic debates concerning the institutionalization of HRDD.

1. A Brief Genealogy of Business and Human Rights

"Business and Human Rights" is a multifaceted issue and an interdisciplinary research area.[146] Broadly speaking, "business and human rights as a substantive issue goes back forever,"[147] with the Atlantic slave trade being considered an emblematic BHR case. However, the understanding of BHR in this study primarily relies on the evolving process of the UN Guiding Principles and its important precursors. Giving special attention to the UN Guiding Principles is essential because, when discussing BHR today, people are, to a very large extent, referring to the UN Guiding Principles. The EU Fundamental Rights Agency defines BHR as "a common label for the nexus of states and business in relation to human rights, defining what companies and governments should do so businesses do not have a negative impact on human rights, which are an increasingly important aspect of corporate social responsibility or responsible business conduct."[148] One noteworthy advancement in BHR is the expanded scope of corporate responsibility, encompassing both corporate operations

146 An illuminating reading of the Atlantic slave trade from a business and human rights lens, see Denise Wallace, *Human Rights and Business: A Policy-oriented Perspective* (Leiden: Martinus Nijhoff Publishers, 2014), 220-31; Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap*, 17-42 (n.26).

147 John Ruggie, *Sir Geoffrey Chandler Speaker Series*, (11 January 2011): between 2:09 and 2:16, accessed 15 December 2022, www.youtube.com/watch?v=__fhV3j4hlE.

148 EU Fundamental Rights Agency, "Business-related Human Rights Abuse Reported in the EU and Available Remedy, " (12 December 2019): 2-3, accessed 15 December 2022, https://fra.europa.eu/en/publication/2019/business-related-human-rights-abuse-reported-eu-and-available-remedies.

and the actions of a company's business partners in value chains.[149] As a result, BHR serves as a direct response to the under-regulated corporate human rights abuses along the GVCs.[150]

As an academic field, BHR has emerged within a broad social movement that links "business" and "human rights." The various stages of the BHR social movement's growth have centered on transnational production activities and corporate accountability. In general, the evolution of BHR is delineated into four key phases: **precursors** (1945-1995), **beginnings** (1995-2005), **growth** (2005-2011) and **consolidation** (2011-ongoing).[151] As discussed earlier, BHR as a substantive issue spans different periods in human history. For this research, the precursors discussed below include only the legacies of the Nuremberg Trials and Apartheid South Africa. Additionally, certain early international initiatives to regulate foreign direct investment are examined, as they are directly relevant to the modern BHR movement and the regulation of GVCs.

1.1 Precursors (1945-1955)

At the conclusion of the Second World War, several business executives from the chemical and heavy industries were tried for their collaboration with the Nazi regime. Notable trials, including the *Flick* trial, the *I.G. Farben* trial, the *Krupp* trial, and the *Ministries* trial, exemplify how companies were linked to some of the greatest human rights atrocities in history and shed light on the criteria necessary to establish criminal culpability.[152] While the trials did not explicitly attribute culpability to the companies involved, they clarified that legal persons, e.g., TNCs, bear similar obligations to natural persons regarding certain egregious violations of international law. Furthermore, these trials contributed to the extraterritorial jurisdiction of the *Alien Tort Claims Act* of the United States (US),[153] which played a significant role in holding parent companies accountable for human rights abuses committed abroad by their subsidiaries or suppliers during a specific period.[154]

Another seminal precursor to the BHR movement was the fight against the apartheid regime in South Africa in the 1970s. Social activists exerted pressure on

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149 See Salminen and Rajavuori, "Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and A Framework for Analysis," 602-27 (n.142).

150 See Karin Buhmann, Mark B. Taylor, and Elisa Giuliani, "Editorial – Business and Human Rights in Global Value Chains," *Competition & Change* 23, no. 4 (2019): 337-45.

151 See, for instance, Wettstein, *Business and Human Right: Ethical, Legal, and Managerial Perspectives*, 11-21 (n.21).

152 See Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap*, 62-72 (n.26).

153 See Anita Ramasastry, "Corporate Complicity: From Nuremberg to Rangoon-An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations," *Berkeley Journal of International Law* 20 (2002): 91-159.

154 See Mirela V Hristova, "The Alien Tort Statute: A Vehicle for Implementing the United Nations Guiding Principles for Business and Human Rights and Promoting Corporate Social Responsibility," *University of San Francisco Law Review* 47 (2012): 89-108; Beth Stephens, "The Rise and Fall of the Alien Tort Statute," in *Research Handbook on Human Rights and Business*, ed. Surya Deva and David Birchall (Edward Elgar Publishing, 2020), 46-62.

TNCs during this period to refrain from involvement in systematic human rights abuses in South Africa.[155] The *Sullivan Principles* is a representative example, which was proposed in 1977 by Reverend Leon Sullivan and supported by over 200 companies.[156] It outlined a code of conduct for US multinationals operating in South Africa, aiming to eradicate apartheid and improve the living standards of black and non-white locals. The *Sullivan Principles* foreshadowed two crucial insights for the BHR movement and academic discourse afterwards,[157] viz., (1) corporate human rights responsibilities are independent from state obligations;[158] and (2) TNCs bear responsibility for negative human rights impacts in their global production networks, regardless of where such impacts occur.

The 1970s also witnessed profound changes that shaped the ongoing evolution of BHR, including the call for a New International Economic Order and a series of crises, scandals, and conflicts.[159] Among these events, the coup against Salvador Allende in Chile holds particular significance.[160] This coup led to the investigation of U.S. companies for wrongdoing abroad and played a pivotal role in the establishment of the U.S. *Foreign Corrupt Practices Act* (FCPA).[161] Enacted to combat corporate bribery, the FCPA has contributed to global efforts against corporate corruption, required transparency in supply chains, and encouraged the adoption of corporate compliance programmes. The experiences with the FCPA offer valuable lessons for BHR discourse, especially in terms of incentives[162] and treaty processes.[163] Additionally, Salvador Allende's speech at the United Nations in 1972[164] led to the creation of the Commission on Transnational Corporations (UNCTC) in 1974.[165] With the support of Third World

155 See John M Kline, *Ethics for International Business: Decision-making in A Global Political Economy*, Second ed. (Routledge, 2010), 50.

156 See Leon Sullivan, "Agents for Change: The Mobilization of Multinational Companies in South Africa," *Law and Policy in International Bussiness* 15 (1983): 427.

157 See Wettstein, *Business and Human Right: Ethical, Legal, and Managerial Perspectives*, 12-13 (n.21).

158 This reflects the principle of "independence of corporate human rights responsibilities" established by Principle 11 of the UN Guiding Principles.

159 See Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap*, 164-65 (n.26).

160 A more detailed elaboration on the impact of Allende on advancing the realm of BHR, see, Shahd Hammouri, "Revisiting Allende's 1972 Speech at the United Nations General Assembly: Histories repeated with a twist," TWAILR: Reflections 20/2020 (June 2020), accessed 15 December 2022, https://twailr.com/wp-content/uploads/2020/06/Hammouri-Revisiting-Allende.pdf.

161 "The I.T.T. and Chile," *The New York Times* (26 March 1972), accessed 15 December 2022, https://www.nytimes.com/1972/03/26/archives/the-itt-and-chile.html; "Salvador Allende Speech to the United Nations (excerpts)," (4 December 1972), accessed 15 December 2022, https://www.marxists.org/archive/allende/1972/december/04.htm.

162 See Pierre-Hugues Verdier and Paul B Stephan, "International Human Rights and Multinational Corporations: An FCPA Approach," *Boston University Law Review* 101 (2021): 1359-419.

163 See Anita Ramasastry, "Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti-Corruption Movement," in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, ed. Surya Deva and David Bilchitz (Cambridge University Press, 2013), 162-90.

164 Allende depicted a portrait of the role of TNCs in the function of economic colonialization, highlighted the insecurities caused by international law's full-fledged subscription on the public-private divide making multinationals impunity under international law and called for more international efforts to regulate transnational powers in this profound speech. See "Salvador Allende Speech to the United Nations (excerpts)," (n.161).

165 *Group of Eminent Persons's final report, The Impact of Multinational Corporations on the Development Process and on International Relations*, U.N. Doc. E/5500/Add.1 (Part I) (24 May 1974) 13 ILM 800 1974, p.832.

countries, [166] the UNCTC drafted a *UN Code of Conduct on Transnational Corporations* (the draft Code of Conduct) in 1982.[167] The draft Code of Conduct required multinationals to respect human rights and disclose non-financial information. More ambitiously, it proposed to establish an international monitoring body in charge of implementation.

During the zenith of neoliberal globalization championed by Western nations, which vehemently rejected any attempts to impose regulation on TNCs, the draft Code of Conduct was abandoned in 1992.[168] While still rooted in liberalism philosophy, the West published the *OECD Guidelines for Multinational Enterprises* in 1976, establishing voluntary self-regulation guidelines for multinational enterprises. This not only demonstrated the West's staunch opposition to binding rules but also highlighted the North-South divide in regulating transnational businesses.[169] Despite its demise, the draft Code of Conduct has inspired subsequent BHR initiatives, particularly in terms of the concepts such as non-financial disclosure, smart-mix approach, multi-level governance, public-private partnership, and so forth. In addition, the frustrating experience of the draft Code of Conduct illustrates that the current confrontation between the Global North and South on GVC governance has its roots in the germinal stages of BHR. Regrettably, current studies addressing BHR, and CSR more broadly, often fail to integrate the conflicting interests of countries in the North and South with other factors that may influence the effectiveness of implementation, resulting in a lack of systematic analysis.[170] As a result, the "repeated failure of brands, NGOs, government officials, and other actors in the Global North to listen and address the valid CSR (as well as BHR) concerns of suppliers and workers in the Global South" continues to persist.[171]

1.2 The Beginnings (1995-2005)

Around the same time as the campaign against South Africa's apartheid, the conflict between the Western oil giant Shell and Nigerians regarding oil extraction was intensifying. Shell's continuous irresponsible business conduct directly propelled the BHR movements onto the international policy agenda in 1995, which prompted the international community to seriously consider the regulatory framework for globalized

166 See Wettstein, *Business and Human Right: Ethical, Legal, and Managerial Perspectives*, 306 (n.21).

167 *Commission on Transnational Corporations*, U.N. Document E/C.10/1982/6/, 5 June 1982.

168 For a comprehensive review of the reasons for the draft Code of Conduct's failure, see Karl P Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and lessons learned," *The Journal of World Investment & Trade* 16, no. 1 (2015): 11-87.

169 See Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap*, 196-203 (n.26).

170 One highly insightful research project advocating for an integrated approach to evaluate mandatory human rights due diligence laws, while considering the concerns of the Global South, see Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL ," 927-43 (n.116).

171 Peter Lund-Thomsen, *Rethinking Global Value Chains and Corporate Social Responsibility* (Cheltenham: Edward Elgar Publishing, 2022), viii. For a more detailed discussion, see Section 3 of Chapter 7 in this research, especially the discussions under the subtitle "The Need to Give the Third World a Voice."

business practices.[172] In brief, Shell's oil extraction activities in Nigeria, starting in the 1950s, caused severe pollution and harm to the local population, particularly the Ogoni community. The conflict between Shell and Nigerians over oil extraction intensified in the 1990s due to Shell's failure to implement proper environmental protection measures. Following several protests and acts of sabotage by the Ogoni community, Ken Saro-Wiwa, a local leader, along with eight of his supporters, was imprisoned and ultimately executed by the Nigerian government in 1995. Shell was strongly condemned by the local Nigerian population and the international community for its failure to condemn the inhumane execution of Ken Saro-Wiwa by the Nigerian government. Shell was also accused of participating in the government's crackdown and execution.[173] As a result, Shell had to suspend its oil exploration activities in Ogoni. This case serves as a poignant example of the adverse effects powerful multinationals can have on local communities. It also highlights the importance of TNCs securing a "social license to operate" from local communities to ensure the sustainable functioning of their globalized production networks.[174]

The Ogoni case is not only a turning point for Shell but also for the BHR movement. It spurred the international community, particularly the UN human rights mechanisms,[175] to prioritize the regulatory framework for multinational corporations. The UN Sub-Commission on the Promotion and Protection of Human Rights (Sub-Commission) was one of the early UN bodies that systematically researched TNCs' human rights implications.[176] It authorized Prof. David Weissbrodt to prepare "a code of conduct for TNCs based on the human rights standards."[177] After several years of research and consultations,[178] the Sub-Commission submitted the *draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises* (draft

172 See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 15-17 (n.21).

173 See Richard Boele, Heike Fabig, and David Wheeler, "Shell, Nigeria and the Ogoni. A Study in Unsustainable Development: I. The story of Shell, Nigeria and the Ogoni People–environment, economy, relationships: conflict and prospects for resolution 1," *Sustainable Development* 9, no. 2 (2001): 74-86; Gerald Ekenedirichukwu Ezirim, "Multinationals and Adherence to the United Nations' Global Compact: A Focus on Shell Petroleum Development Company in Nigeria," *Journal of Sustainable Development in Africa* 13, no. 3 (2011): 149-63.

174 See Ruggie, *Just Business: Multinational Corporations and Human Rights*, 42 (n.77).

175 Previously, the UN's focus on BHR was primarily the responsibility of the economic sector. For example, the draft Code of Conduct was led by the ECOSOC Commission on Transnational Corporations and the UN Centre on Transnational Corporations. The Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights was one of the first organizations within the UN human rights system to address BHR issues, mainly through concerns about the impacts of TNCs on indigenous land rights. This contributed to the UN human rights mechanisms taking ownership of the issue of BHR issues. As a result, some scholars have noted that indigenous rights serve as "the nexus between human rights and business." See Xiaohui Liang, *Business and Human Rights: From Legal Regulation to Collaborative Governance （工商业与人权：从法律规制到合作治理）* (Beijing: Peking University Press, 2019), 73-77.

176 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *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*, E/CN.4/Sub.2/1997/50, 1997/11, 5 November 1997.

177 UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/1999/9, 12 August 1999, paras 32 & 34.

178 A detailed account of the history of the preparation of draft Norms, see David Weissbrodt and Muria Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," *American Journal of International Law* 97, no. 4 (2003): 901-22.

Norms) to the UN Commission on Human Rights for approval in 2003.[179] However, it was never approved and eventually failed in 2004.[180] Subsequently, the UN Commission on Human Rights was replaced by the UN Human Rights Council (HRC),[181] which has now become a central hub for advancing the BHR agenda.

The draft Norms was the first comprehensive international legally binding norm in the realm of BHR, as it required TNCs to undertake all human rights obligations as states within the company's "sphere of influence."[182] It outlined corporate human rights obligations, inter alia, in Article 15, which required TNCs to adopt, disseminate, and implement internal rules of operation in compliance with the Norms and to report on them periodically. This obligation is comparable to what is now commonly referred to as "human rights due diligence." Moreover, the draft Norms has made BHR agenda a priority in the UN human rights system[183] and contributed to the international acceptance that multinational enterprises should be held accountable for their global operations, at least within their sphere of influence. Importantly, the draft Norms directly contributed to the creation of the post of Special Representative of the Secretary-General on the issue of human rights and transnational corporations, signaling the formative period of the BHR movement.[184]

The contest between the draft Code of Conduct and the OECD Guidelines revealed that the field of BHR was full of fierce confrontations from the very outset, which focused on the oscillation between binding and non-binding initiatives. Similarly, during the preparation of the draft Norms, a non-binding but still vital international norm came into light, i.e., the *UN Global Compact*. The *UN Global Compact* is a voluntary initiative launched by former UN Secretary-General Kofi Annan in 2000. Unlike the Code of Conduct and draft Norms, which pitted business against human rights, Kofi Annan took a different approach that aligned business with human rights.[185] The *UN Global Compact* consists of ten principles regarding human rights, labor,

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179 UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

180 UN Commission on Human Rights adopted a decision in 2004 asserting that the draft Norms "ha[ve] not been requested by the Commission and, as a draft proposal, has no legal standing." UN Commission on Human Rights, *Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, Decision 2004/116, 20 April 2004.

181 UN General Assembly, *Resolution adopted by the General Assembly 60/251. Human Rights Council*, A/RES/60/251, 3 April 2006.

182 According to Article 1 of the draft Norms, both states and corporations are required "to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law."

183 UN Commission on Human Rights was explicit to "[c]onfirm the importance and priority it (draft Norms) accords to the question of the responsibilities of transnational corporations and related business enterprises with regard to human rights", it was also expressive to "[r]equest the Office of the High Commissioner for Human Rights to compile a report (…) for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation." UN Commission on Human Rights, *Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights*, Decision 2004/116, 20 April 2004.

184 See John Gerard Ruggie, "Business and Human Rights: The Evolving International Agenda," *American Journal of International Law* 101, no. 4 (2007): 819-40.

185 This is reflected in his statement, which proposed that "the business leaders gathered in Davos, and we, the United Nations, initiate a global compact of shared values and principles, which will give a human face to the global market." See Press Release, Secretary-General, "Secretary-General Proposes Global Compact on Human Rights, Labor, Environment, in Address to World Economic Forum in Davos," UN Doc.SG/SM/6881, 1 February 1999.

environment, and anti-corruption.[186] Besides the four principles under the auspices of labor, the first two principles commit adhering companies to avoid direct and indirect infringement on human rights, signaling expressively that corporate human rights responsibilities in GVCs go far beyond labor issues. In this aspect, as Florian Wettstein astutely observes, "the UNGC (UN Global Compact) made an important contribution to promoting a more comprehensive understanding of corporate human rights responsibility."[187] Moreover, aiming to foster a corporate culture and business climate that favors human rights by offering a global platform to share good practices and conduct peer learning, the UN Global Compact has received considerable support and is by far the largest international soft-law BHR initiative with more than 21,000 signatory corporate members.[188]

As the draft Code of Conduct and draft Norms were abandoned, and the UN Global Compact developed, the OECD Guidelines underwent progressive revisions to incorporate human rights considerations, emerging as a leading international BHR standard despite not being initially designed as such. Of the successive updates of the OECD Guidelines, the revisions in 1984, 2000, 2011 and 2023 have had the most far-reaching repercussions. Firstly, the 1984 revision established National Contact Points (NCPs) with mandates of "undertaking promotional activities, handling inquiries and for discussions with the parties concerned on all matters related to the Guidelines,"[189] which have become the "tooth" of the OECD Guidelines since 2000. The 2000 revision extended the role of NCPs by setting up a complaint mechanism against multinational enterprises, allowing stakeholders to file "special instances" for resolution. Additionally, the 2000 revision introduced a human rights paragraph in Chapter 2 on General Policies, stipulating that "enterprises should (…) respect the human rights of *those affected by their activities* consistent with the host government's international obligations and commitments."[190] It was the combination of the human rights paragraph and the complaint mechanism administered by the NCPs that transformed the OECD Guidelines a special regime addressing business-related human rights grievances. Then, as detailed in the following section, the 2011 revision explicitly referred to the UN Guiding Principles, becoming an integral component of the latter's institutionalization at the international level. Recently, the OECD updated the Guidelines to comprehensively reflect its evolved understanding of BHR, evident in its renewed title: *OECD Guidelines for Responsible Business Conduct*.[191] Key updates include, but are

186 At its initial stage, the UN Global Compact consisted of three pillars: Human Rights (principles 1 and 2), Labor (principles 3-6) and Environment (principles 7-9). And the tenth principle regarding anti-corruption was added in 2004.

187 Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 213 (n.21).

188 As of 23 January 2023, the number of participants from 162 countries is 21,218. See the homepage of the UN Global Compact, https://www.unglobalcompact.org/.

189 OECD, "The Guidelines for Multinational Enterprises, Second revised decision of the Council", May 1984, para.1.

190 OECD Guidelines, 2000 version, II General Policies, para.2, emphasis added. Available at: https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=daffe/ime/wpg(2000)15/final. Emphasis added.

191 OECD, "OECD Guidelines for Multinational Enterprises on Responsible Business Conduct," (08 June 2023), accessed 19 November 2023, https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htm.

not limited to, the introduction of corporate responsibility concerning climate change and biodiversity, an expanded scope of due diligence covering data gathering and usage, and all forms of corruption, along with the further enhancement of NCPs.[192]

The above analysis demonstrates that the BHR movement has been a priority on the international policy agenda since 1995, with the UN human rights bodies attempting to lead the process. In contrast to the UN human rights bodies, which explored the regulation of corporate human rights violations through binding rules during this timeframe, the OECD and UN Global Compact Network promoted and directed multinational corporations to respect human rights via non-binding and voluntary measures. While these diverse approaches symbolize distinct ideas and perspectives, they share a concern for and demand that TNCs be held accountable for the human rights abuses not only in their own operations but also in the practices of their business partners along a chain. The regulatory experience during the decade of the beginning period has provided a sound foundation for the upcoming formative phase of the BHR movement, which has progressively evolved from a moral philosophy to a transnational norm, even binding rules in different jurisdictions.

1.3 The Formative Period (2005-2011)

The inception of the Special Representative of the UN Secretary-General (SRSG) for human rights and transnational corporations and other business enterprises in 2005 marked a watershed moment for BHR, initiating a period of normalization formation in this field. Professor John Ruggie from Harvard University was appointed as the SRSG and delivered two seminal reports in separate terms. Accordingly, the formative period of BHR can be further divided into two phases: 2005-2008 and 2008-2011, corresponding to the timing of these two reports, namely, the *UN Protect, Respect and Remedy Framewor*k (UN Framework) and the UN Guiding Principles. To avoid repetition, this section primarily deals with the preparation process for the UN Framework and the UN Guiding Principles. The subsequent section delves into the details of the UN Guiding Principles and its kernel, viz., HRDD.

The first phase, spanning from 2005 to 2008, witnessed the publication of the UN Framework, which bridged historical efforts and emerging attempts to tackle corporate human rights abuses. In 2005, John Ruggie accepted the mandate as an SRSG to take stock of the norms and practices related to BHR and clarify the concepts of corporate responsibility and accountability with regard to human rights.[193] Then, in 2008, John Ruggie completed his mission of formulating BHR norms by presenting the UN Framework.[194] During this process, he engaged in extensive discussions with multiple stakeholders and conducted 14 negotiations across five continents. Aside from

192 For a detailed introduction to the updates of the 2023 OECD Guidelines, see "2023 Update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct," (2023), accessed 19 November 2023, https://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm.

193 UN Commission on Human Rights, UN Doc.E/CN.4/2005/L.87, 15 April 2005, para.1.

194 UN Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, para.4.

confirming that "business can affect virtually all internationally recognized rights,"[195] the most significant contribution of the UN Framework is that it clarifies the conceptual relationship between governments and corporations in terms of human rights. This clarification is based on existing international hard and soft norms as well as a transnational approach. In brief, the UN Framework comprises three distinct but interconnected pillars: the state duty to protect (Pillar 1), corporate responsibility to respect (Pillar 2) and (state and companies' responsibilities to ensure) access to remedy (Pillar 3). Nevertheless, these elucidations are presented as overarching principles that require more detailed explanations. As a result, in 2008, the UN HRC unanimously adopted the UN Framework and extended John Ruggie's mandate by three years, charging him with the mission of putting the UN Framework into practice.[196]

The second phase, from 2008 to 2011, marked the establishment of the most pivotal international norm in the field of BHR—the UN Guiding Principles. To address stakeholder concerns and navigate the specific contextual nuances in operationalizing the UN Framework, John Ruggie conducted nearly 50 international consultations, undertook field visits to over 20 countries, initiated pilot programs with companies from various sectors, and engaged in extensive online consultations during his second term.[197] A reward for his efforts was the unanimous adoption of the UN Guiding Principles by the UN Human Rights Council in 2011,[198] representing the first instance where a normative document received endorsement by the UN HRC without undergoing governmental negotiation and facing opposition. This endorsement also "meant that for the first time there was an agreed global standard that spelled out conceptually and practically the responsibilities of both states and corporations in regard to the identification, mitigation, and remediation of corporate human rights impacts."[199] In addition, it bolstered the legitimacy of corporate human rights responsibility by bringing it from a merely social expectation closer to the legal realm,[200] or at least to the realm of soft law.[201] Since then, the UN Guiding Principles have been implemented by state and non-state actors worldwide. By applying Finnemore and Sikkink' theory of norm life cycle,[202] the UN Guiding Principles have

195 Ibid, para.6.

196 UN Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, A/HRC/RES/8/7, 18 June 2008.

197 UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 21 March 2011, paras. 8-11.

198 UN Human Rights Council, *Human Rights and Transnational Corporations and other Business Enterprises*, A/HRC/RES/17/4, 6 July 2011.

199 Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 19 (n.21).

200 See Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap*, 193 (n.26).

201 See John Ruggie, Caroline Rees, and Rachel Davis, "Ten Years After: From UN Guiding Principles To Multi-Fiduciary Obligations," *Business and Human Rights Journal* 6, no. 2 (2021): 180.

202 According to the norm life cycle theory, international norms often go through three stages: norm emergence, norm cascade, and internalization. The first stage involves the creation of a new norm. Subsequently, if the norm gains acceptance from states and non-state actors, it enters the cascade phase. During the phase of cascading, an increasing number of actors adopt and implement the norm, leading to a cascade effect. Ultimately, at the conclusion of the norm cascade, the norm becomes deeply ingrained in the practices and identities of actors, acquiring a taken-for-granted quality without being a subject of broad public debates. Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 887-917.

transitioned from norm emergence to norm cascade.

1.4 The Maturing and Institutionalization Period (2011-ongoing)

In 2011, with the endorsement of the UN Guiding Principles, a Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWG) was created to promote the UN Guiding Principles and provide recommendations for their implementation.[203] The mandate of the UNWG has been renewed in 2014,[204] 2017[205] and 2020,[206] solidifying its position as the foremost global platform for promoting and implementing the UN Guiding Principles. Under the joint leadership of the UNWG and other international members like the EU and OECD, now "the BHR discussion commonly refers to the UNGPs alone."[207] The focus has shifted towards the implementation of the UN Guiding Principles, particularly through the institutionalization of HRDD, as presented below. Such a shift indicates that the BHR movement has transitioned into a phase of maturity and institutionalization.

The institutionalization of BHR mainly refers to the process of integrating corporate human rights responsibility as envisioned by the UN Guiding Principles into the modern functionally differentiated society,[208] particularly the economic system, which for a long time had little to do with human rights. This process demonstrates how the UN Guiding Principles is assimilated into international and national norms, including soft and hard norms. Despite the fact that these international and national norms each have their own emphasis, they collectively recognize the significance of HRDD in operationalizing the UN Guiding Principles. Furthermore, this process indicates that HRDD has become the new lingua franca for addressing corporate human rights abuses in GVCs.[209]

1.4.1 International Practices

First and foremost, since 2011, major international norms addressing corporate human rights responsibility have been updated in alignment with the UN Guiding Principles. The 2011 edition of the OECD Guidelines holds priority in this context, as it "is modeled on the UNGPs and is consistent with them in both content and in

203 UN Human Rights Council, *Human Rights and Transnational Corporations and other Business Enterprises*, A/HRC/RES/17/4, 6 July 2011, para.6.

204 UN Human Rights Council, *Human Rights and Transnational Corporations and other Business Enterprises*, A/HRC/RES/26/22, 15 July 2014, para.10.

205 UN Human Rights Council, *Business and Human Rights: Mandate of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, A/HRC/RES/35/7, 14 July 2017, para.11.

206 UN Human Rights Council, *Business and Human Rights: the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, and Improving Accountability and Access to Remedy*, A/HRC/RES/44/15, 23 July 2020, para.15.

207 Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 193 (n.21).

208 The word "institutionalization" refers to the process of embedding some conception (for example a belief, norm, social role, particular value or mode of behavior) within an organization, social system, or society as a whole.

209 See Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 389-90 (n.118).

language."[210] Through this update,[211] the OECD Guidelines added an entire chapter, i.e., IV. Human Rights, dedicated to human rights, specifying and expanding on references in the General Policies based on the UN Guiding Principles.[212] Thus, implementing the OECD Guidelines and operationalizing NCPs to address special instances concerning corporate human rights abuses is now the duty of OECD member states. Similarly, the UN Global Compact has updated its ten principles and relevant interpretations in line with the UN Guiding Principles,[213] as the latter "provide[s] further conceptual and operational clarity for the two human rights principles championed by the Global Compact."[214] Another generic but related international norm is ISO 26000, which is one of the most widely used and recognized standards formulated by the International Organization for Standardization (ISO).[215] Besides addressing CSR and sustainable development, ISO 26000 does guide various organizations, including businesses, on their human rights responsibilities. Human rights are highlighted as an overarching principle (Clause 4) and a core subject (Clause 6) of social responsibility within ISO 26000. The human rights section of ISO 26000 aligns with the UN Guiding Principles in several aspects, including HRDD,[216] contributing to the integration of the UN Guiding Principles to social responsibility regime. Despite lacking a certification mechanism,[217] ISO 26000 enhances the legitimacy and credibility of the UN Guiding Principles due to ISO's influential role and authority in private global governance.

In addition to these three major international norms with a broad scope of application, the UN Guiding Principles have also been seamlessly integrated into other international norms governing specific issues or industries. For example, global financial industry titans have introduced the UN Guiding Principles to their rules,

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210 Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 207 (n.21).

211 In order to provide practical support to enterprises on the implementation of human rights due diligence and other responsibilities under the OECD Guidelines, a general OECD Due Diligence Guidance for Responsible Business Conduct and several sector-based guidance covering extractive, agricultural, mineral, garment supply chains and financial sector have been developed by the OECD office.

212 Commentary on Human Rights (36) read as "This chapter opens with a chapeau that sets out the framework for the specific recommendations concerning enterprises' respect for human rights. It draws upon the United Nations Framework for Business and Human Rights 'Protect, Respect and Remedy' and is in line with the Guiding Principles for its Implementation." OECD, *OECD Guidelines for Multinational Enterprises*, 2011 Edition, p.31, available at: https://www.oecd.org/daf/inv/mne/48004323.pdf.

213 For instance, the UN Global Compact officially refers to the content of the UN Guiding Principles to elaborate on corporate responsibility to respect human rights (Principle 1) and what constitutes corporate complicity (Principle 2), and both Principles 1 and 2 recommend that signatory companies conduct human rights due diligence. See "The Ten Principles of the UN Global Compact," accessed 15 December 2022, https://unglobalcompact.org/what-is-gc/mission/principles.

214 UN Global Compact and UN OHCHR, "The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments," (June 2014): 2, accessed 15 December 2022, https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FResources%2FGPs_GC+note.pdf.

215 ISO, "Celebrating Human Rights Day," (10 December 2020), accessed 15 December 2022, https://www.iso.org/news/ref2582.html.

216 ISO and OECD, "ISO 26000 and OECD Guidelines: Practical Overview of the Linkages, " (7 February 2017): 13-14, accessed 15 December 2022, https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100418.pdf.

217 ISO, "ISO 26000 Social Responsibility," accessed 15 December 2022, https://www.iso.org/iso-26000-social-responsibility.html.

adopting HRDD as a standard conduct.[218] Among these global financial giants are the Equator Principles, the International Finance Corporation, the World Bank, the European Investment Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank, and the African Development Bank. Likewise, the international sports cycle has also been exposed to the influence of the UN Guiding Principles. For instance, the International Olympic Committee has assimilated the UN Guiding Principles in its reform of the *Olympic Agenda 2020*, integrating HRDD and other mechanisms into its own operations and the "Operational Requirements" of the Host City Contract for the Olympic Games 2024 onwards.[219] Furthermore, the Fédération Internationale de Football Association (FIFA) has established its statutory Human Rights Policy in line with the UN Guiding Principles. FIFA has promised to conduct an in-depth HRDD process, leveraging its business relationships to avoid causing, contributing to, or being directly linked to adverse human rights impacts.[220]

Apart from the aforesaid international soft norms, the UN Guiding Principles has colored international laws and domestic policies and laws. At the international level, international investment law, international arbitration, and the under-negotiated BHR treaty are the telling examples of how the UN Guiding Principles contribute to humanizing the globalized economy. Firstly, since the endorsement of the UN Guiding Principles, international investment law regimes have been infused with human rights standards that go beyond the narrow reference to labor issues. For example, Article 18(1) of the *2019 Model BIT of Belgium and Luxembourg* expressively mandates investors to align their actions with internationally recognized standards applicable to foreign investors, to which the Contracting Parties are a party.[221] Also, the *EU-China Comprehensive Investment Agreement*,[222] launched in 2020, commits to encouraging responsible business conduct in accordance with internationally recognized guidelines and principles, including the UN Guiding Principles (Section IV, Article 2). More importantly, the introduction of the *Hague Rules on Business and Human Rights Arbitration* (the Hague BHR Rules) in 2019,[223] aiming to address the longstanding problem of investor-state dispute settlement mechanisms prioritizing investor protection over human rights,[224] marked a significant watershed in the intersection of

218 UN Human Rights Council, *Guiding Principles on Business and Human Rights at 10: taking stock of the first decade,* A/HRC/47/39, 22 April 2021, para.23.

219 *IOC Moves Forward with Its Human Rights Approach*, 2 December 2020, https://olympics.com/ioc/news/ioc-moves-forward-with-its-human-rights-approach.

220 FIFA, *FIFA's Human Rights Policy* (May 2017 edition), https://digitalhub.fifa.com/m/1a876c66a3f0498d/original/kr05dqyhwr1uhqy2lh6r-pdf.pdf.

221 Full text is available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download.

222 *EU-China Comprehensive Agreement on Investment*, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en.

223 *The Hague Rules on Business and Human Rights Arbitration*, Center for International Legal Cooperation, December 2019, https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

224 A systematic content analysis of 140 known cases under international investment treaties asserts that arbitrators tend to support investors rather than host states, particularly in cases where the investors come from major Western capital-exporting countries. Additionally, this empirical research finds that arbitrators tend to adopt a more conservative approach when dealing with human rights and social issues in international investment arbitration. See

international arbitration and BHR.

The ongoing BHR treaty-making process is a further major development in international law concerning corporate human rights responsibility. In 2014, the UN Human Rights Council adopted a resolution to establish an Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights (OEIGWG).[225] The mandate of the OEIWG is to "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises"[226] (LBI). The OEIGWG has released five treaty proposals since 2018:[227] a Zero Draft in 2018, a Revised Draft in 2019, a Second Revised Draft in 2020, a Third Revised Draft in 2021, and an Undated Draft in 2023 (Table 9). While these drafts may not directly address corporate human rights responsibilities, they obligate states to put in place domestic laws and regulations requiring companies to undertake HRDD. Both the experiences from the international treaty-making processes and the zigzag journey of the negotiations of the current BHR LBI indicate the challenges in reaching a BHR LBI in the foreseeable short term. Nevertheless, the launch of the BHR treaty process signals a significant moment in the norm cascade of the UN Guiding Principles. Chapter 6 of this research will further elaborate on the content and process of such a BHR LBI.

1.4.2 Domestic Practices

At the domestic level, states are implementing the UN Guiding Principles primarily through public policies and domestic legislation. The proliferation of National Action Plans on Business and Human Rights (BHR NAP) is the most remarkable development in domestic BHR policy since 2011. As of November 2023, thirty countries have adopted a BHR NAP or incorporated the UN Guiding Principles into the general National Human Rights Action Plans; twenty-one countries are in the process of drafting or initiating to draft a BHR NAP.[228] The majority of BHR NAPs either require or encourage business entities to fulfil human rights responsibilities, with a special emphasis on HRDD.[229] For instance, *Italy's Second National Action Plan on Business and Human Rights (2021-2026)* makes the "strengthening of the process to outline a regulatory framework for HRDD, in accordance with international standards and developments in the EU to identify, prevent and mitigate risks and manage eventual

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Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration," 211-68 (n.95).

225 UN Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9, 14 July 2014.

226 Ibid, para.1

227 Full text of all BHR Treaty drafts is available at: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

228 The statistics are the cross-checked results based on the information provided by the United Nations Human Rights Office of the High Commissioner and National Action Plans on Business and Human Rights websites, available at: https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx/; https://globalnaps.org/.

229 See Zhuolun Li, "Operationalising the UN Guiding Principles on Business and Human Rights through Human Rights Due Diligence: A Critical Assessment of Current States Practices," *Academic Journal of Interdisciplinary Studies* 11, no. 4 (2022): 11-12.

human rights violations by business companies" the first national priority.[230] China promises to "encourage Chinese businesses to abide by the UN Guiding Principles on Business and Human Rights in their foreign trade and investment, to conduct due diligence on human rights, and to fulfil their social responsibility to respect and promote human rights."[231]

The second noteworthy trend at the domestic level is the rise of domestic mandatory disclosure laws and mHRDD laws.[232] While both types of domestic laws serve as responses to operationalize the UN Guiding Principles, they differ primarily in the obligations they impose on companies. Briefly speaking, mandatory disclosure laws require targeted business entities to provide transparency regarding certain human rights issues (e.g., modern slavery, child labor) along supply chains by reporting on actions they have taken or not to combat human rights abuses. In terms of HRDD, mandatory disclosure laws generally do not impose substantive obligations on companies to identify, prevent, mitigate, and eventually address human rights abuses. Instead, these laws mandate companies to report to the public whether they have undertaken HRDD or similar risk management measures. The rationale of mandatory disclosure laws aligns with a liberal paradigm, believing that the competitive market and autonomous economic actors play a determinant role in defining the parameters for corporate human rights responsibility, and that any irresponsible behavior will be corrected by private economic decisions.[233] The *UK Modern Slavery Act of 2015*,[234] the *Australia Modern Slavery Act of 2018*,[235] the *Canada Fighting Against Forced Labor and Child Labor in Supply Chains Act of 2023*[236] are some emblematic cases of mandatory disclosure laws.

In contrast, mHRDD laws, the focal point of this research, obligate companies to substantively put in place HRDD processes for their operations and entities within the supply chain in various ranges. Non-compliance by companies may incur civil, administrative and/or criminal sanctions. Examples of such legislation include, but are

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230 Comitato Interministeriale per i Diritti Umani, "Second National Action Plan on Business and Human Rights (2021-2026)," (2021): 11, https://cidu.esteri.it/comitatodirittiumani/resource/doc/2021/12/secondo_pan_bhr_en.pdf.

231 The State Council Information Office of the People's Republic of China, "Human Rights Action Plan of China (2021-2025)," (2021): 44, https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/2022-11-28/Human-Rights-Action-Plan-of-China-2021-2025.pdf.

232 A general introduction to mandatory disclosure laws and mHRDD laws, see Ludovica Chiussi Curzi, *General Principles for Business and Human Rights in International Law* (BRILL, 2020), 250-56. For a more general comparative analysis of regulating human rights due diligence, see Heckendorn Urscheler and Fournier, *Regulating Human Rights Due Diligence for Corporations* (n.120).

233 See Maria-Therese Gustafsson, Almut Schilling-Vacaflor, and Andrea Lenschow, "The Politics of Supply Chain Regulations: Towards Foreign Corporate Accountability in the Area of Human Rights and the Environment?," *Regulation & Governance* 17 (2023) no.4: 5-9.

234 *An Act to make provision about slavery, servitude and forced or compulsory labor and about human trafficking, including provision for the protection of victims; to make provision for an Independent Anti-slavery Commissioner; and for connected purposes*, https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted.

235 *An Act to require some entities to report on the risks of modern slavery in their operations and supply chains and actions to address those risks, and for related purposes*, https://www.legislation.gov.au/Details/C2018A00153.

236 *An Act to enact the Fighting Against Forced Labor and Child Labor in Supply Chains Act and to amend the Customs Tariff*, https://www.parl.ca/DocumentViewer/en/44-1/bill/S-211/royal-assent.

not limited to, the *French Duty of Vigilance Law of 2017*, the *Dutch Child Labor Due Diligence Act of 2019*, the *German Supply Chain Act of 2021*, the *Norwegian Transparency Act of 2021*, and the Swiss HRDD legislation. Given the optimistic outlook and more sophisticated legislative techniques of mHRDD laws, they are regarded as the "2.0 version" of BHR laws.[237] Despite evident disparities, both mandatory disclosure laws and mHRDD laws are characterized by their "Western origins" and extraterritorial implications,[238] regulating not only domestic companies but also business entities along the GVCs. In this connection, some scholars term both legislations "global supply chain regulations" or "transnational sustainability laws."[239]

The legislative bandwagon of mandatory disclosure laws and HRDD laws also occurs at the EU level, which is acting as a "global leader on Responsible Business Conduct and a frontrunner in implementing the UN Guiding Principles on Business and Human Rights."[240] In addition to encouraging its member states to establish BHR NAPs,[241] EU has adopted, updated, and is considering various BHR laws. Notably, the *Non-Financial Reporting Directive of 2014* and its successor, the *EU Corporate Sustainability Reporting Directive of 2022*,[242] hold significance in the realm of mandatory disclosure laws. As for mHRDD laws, predating the adoption of the UN Guiding Principles, the EU had enacted the *EU Timber Regulation of 2010*,[243] which took effect in March 2013. This Regulation requires operators who place timber and timber products on the EU internal market to establish or utilize a due diligence system addressing the risk of illegal logging or trading a timber. Although preceding the UN Guiding Principles, the European Commission asserts that it is "the first legal instrument at European Union level which includes mandatory due diligence, a key principle for corporate sustainable responsibility in line with the United Nations Guiding Principles on Business and Human Rights."[244] The *EU Conflict Minerals*

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237 Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 413 at footnote 173 (n.118).

238 See Lichuma, "(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains," 497-532 (n.140).

239 See Michael Rawling, "Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment," 660-77 (n.32); Salminen and Rajavuori, "Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and A Framework for Analysis," 602-27 (n.142).

240 See "Business and human rights: Upholding Human Rights Is a Responsibility of All Actors of Society, Including Business Enterprises.," European Union External Action, updated 28 September 2021, https://www.eeas.europa.eu/eeas/business-and-human-rights_en.

241 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, European Commission (Brussels, 15 October 2011), 14, https://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf.

242 *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 L 322, 16 December 2022, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022L2464.

243 *Regulation (EU) No 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 L 295, 12 November 2010, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R0995.

244 *Report from the Commission to the European Parliament and the Council. Regulation (EU) No 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 (the EU Timber Regulation) Biennial report for the period March 2015–*

Regulation of 2017 is another example of mHRDD laws, concentrating specifically on "conflict minerals," such as tin, tantalum, tungsten, and gold.

More importantly, as a response to calls from member states, business organizations, and civil society, the European Parliament issued a recommendation on a Corporate Due Diligence and Corporate Accountability Directive in 2021.[245] Subsequently, in 2022, the European Commission proposed to adopt the EU CSDDD. These initiatives position the EU as a de facto leader in legislating mHRDD along GVCs. As of December 2023, the legislative process for the EU CSDDD is in the trilogue among the European Commission, the Council, and the Parliament. Chapter 5 of this research provides further insights into this crucial EU BHR instrument.

In summary, emerging from the ash of the Second World War, BHR study and movement, spanning the beginnings and formative periods, have now entered a maturing phase characterized by the "irresistible rise" of HRDD norms.[246] More recently, there has been a surge in mHRDD norms at domestic, regional (EU), and international levels. This ongoing evolution contributes to solidifying the idea that business actors should bear human rights responsibilities not only for their own operations but also for the activities of their business partners in GVCs. Likewise, it also demonstrates that there are many ways to implement the UN Guiding Principles and HRDD. The persistent coexistence of and oscillation between voluntary and mandatory approaches in historical and current practices underscores the inherent values and contributions of different methods. Therefore, it is imperative to acknowledge the potential of HRDD to humanize GVCs while recognizing the diversity of approaches, including various paths to legislating HRDD, in the journey towards institutionalizing HRDD. More significantly, as proved by the various efforts to operationalize the UN Guiding Principles through HRDD, regardless of the approach or path chosen, the UN Guiding Principles should be a common starting point for policymakers worldwide.

2. The UN Guiding Principles and Its Kernel

As elaborated above, the UN Guiding Principles stand as a landmark and internationally authoritative norm in the realm of BHR. Bearing this significance in mind, this section aims to elucidate how the UN Guiding Principles takes on a transnational approach to tackle human rights dilemmas in GVCs in general and by delving into its core elements: HRDD. In essence, built on the three pillars established by the UN Framework, the UN Guiding Principles adopts a transnational approach. This approach not only acknowledges that all states and all business enterprises should

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February 2017, EUR-Lex (2018), the fourth paragraph of "2. Background", https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:668:FIN.

245 *European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability*, European Parliament (2021), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf.

246 See Holly Cullen, "The Irresistible Rise of Human Rights Due Diligence," *The George Washinton International Law Review* 48 (2016): 743-80.

bear their respective human rights responsibilities but also requires all types of businesses to assume appropriate responsibility for their own activities and those within their supply chains. Furthermore, the UN Guiding Principles advocate for a smart-mix approach, including mandatory and voluntary, international, and national, to address systemic human rights challenges in GVCs. This penetrative and holistic governance approach is necessary for dealing with the intricate human rights problems in GVCs, as governance gaps exist at the corporate, industry, national, and international levels, as exemplified by the Rana Plaza case in Chapter 1. These intertwining governance gaps require collective and systematic solutions. Importantly, the principles and mechanisms envisioned by the UN Guiding Principles are not arbitrarily devised; they are the result of years of extensive global research and consultation, reaffirming existing international norms and the practices of both states and corporate actors.

First of all, Principles 1 to 10 pertain to the state's duty to protect human rights (Pillar One). These principles reaffirm the state's duty to respect, protect, and fulfil human rights under international human rights law. The term "protect" means that states must take measures to protect against human rights abuses within their territory and/or jurisdiction by third parties, including businesses. These measures encompass both preventive and remedial measures (Pillar Three). The state's failure to act in any aspect may constitute a violation of international human rights law. With respect to the preventive obligation, states should explicitly convey their basic expectations for businesses to respect human rights throughout their operations. This can be achieved through various means, such as policies (e.g., BHR NAP), legislation, and regulations. At the same time, the scope of state action is not limited to the territory of a country. Subject to the principles of international law, a government should not only engage in international cooperation to ensure that businesses respect human rights but also take measures with extraterritorial effects,[247] where appropriate, to ensure that its own businesses' extraterritorial activities respect human rights.

Meanwhile, a government should ensure the coherence of internal policies related to corporate human rights responsibility and maintain sufficient policy space to fulfil its human rights obligations. To elaborate, governments should thoroughly assess potential limitations on their capacity to fulfil human rights obligations when engaging in bilateral investment treaties, free trade agreements, or investment project contracts. This assessment is necessary to avoid compromising human rights objectives for the sake of economic interests, and thus prevent violations of international human rights law. Similar considerations apply to the formulation and implementation of multilateral agreements, such as those within the World Trade Organization (WTO), when states are members thereof. Although Pillar One does not explicitly require states to encourage or

247 Extraterritorial effects in the realm of BHR can generally be found in two scenarios: (1) domestic measures with extraterritorial implications, and (2) direct extraterritorial jurisdiction. Domestic measures with extraterritorial implications are domestic norms adopted by a state to regulate domestic actors, but with the intention of shaping their conduct and that of their subsidiaries abroad. Most mHRDD laws discussed in this research are within this ambit. Direct extraterritorial jurisdiction includes measures adopted by a state to directly govern the conduct of an actor on foreign territory. The latter is much more offensive than the former, as it may constitute a violation of the sovereignty of another states. See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 229-33 (n.21).

mandate business entities to undertake HRDD, this requirement is apparent not only from a coherent reading of the UN Guiding Principles[248] but also from current international practices. On the one hand, as subsequently introduced, the core element of corporate human rights responsibility is HRDD. In this connection, the state's duty to foster business respect for human rights includes promoting corporate HRDD. On the other hand, recent international practices also affirm that "imposing human rights due diligence on companies is progressively growing into an acquis of the state duty to take positive measures to prevent human rights violations by companies under its jurisdiction."[249] Even some argue that the irresistible rise of HRDD norms at different levels indicates the consolidating feature of HRDD as an emerging customary international law rule.[250] It is, therefore, evident that all countries, including both home and host states, should implement measures to prevent business-related human rights abuses in GVCs, particularly measures to institutionalize HRDD.

Then, Principles 11 to 24 deal with the corporate responsibility to respect human rights (Pillar Two). On the whole, Pillar Two makes it clear that all types of business enterprises, regardless of their size, industry, location, ownership, and structure, have a responsibility to respect human rights within their own operations and supply chains, rather than merely making commitments to do so. This responsibility stems primarily from "a global standard of expected conduct for all business enterprises" and is independent from states' human rights obligations. Thus, both lead firms and suppliers have to fulfil human rights responsibilities. The standard of such responsibilities is not based on the policies and legal provisions of the country where they are located but grounded in internationally recognized human rights standards. Specifically, corporate responsibility to respect human rights includes adopting a policy commitment, performing HRDD, and ensuring effective remediation.

Of particular significance is the notion of HRDD, i.e., "a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks."[251] It is an ongoing and context-dependent process that all business entities are expected to conduct to fulfil their responsibility to respect human rights. It requires all business enterprises to: (1) assess actual and potential adverse human rights impacts; (2) integrate and act on the findings; (3) follow up on responses; and (4) account for how identified impacts are addressed. Given its merits in materializing corporate human rights responsibility and enabling a reflexive approach to addressing human rights

248 The third paragraph of the General Principles states that "[t]hese Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objectives of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization." See, General Principles, UN Guiding Principles.

249 See Curzi, *General Principles for Business and Human Rights in International Law*, 251 (n.232). Also see Section 1.3 of Chapter 3 in this research, which addresses the normative quality of HRDD as a state's duty to protect human rights.

250 See Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance," 226-32 (n.144).

251 UN Human Rights Council, *Business and Human Rights: "Towards Operationalizing the 'Protect, Respect and Remedy' Framework,"* A/HRC/11/13, 22 April 2009, para.71.

problems in GVCs,[252] HRDD is considered the kernel of the UN Guiding Principles and the key to its implementation. As introduced above, states are currently institutionalizing HRDD to implement the UN Guiding Principles through BHR-NAP, international soft norms and industrial initiatives, international laws, and domestic HRDD laws. It is foreseeable that HRDD may serve as the cornerstone of the emerging GVC regulations. Such regulations are crucial for ensuring that human rights and economic development progress in tandem, rather than at the expense of each other, in the globalized world economy. Therefore, while HRDD should not be understood as the whole universe of corporate human rights responsibility,[253] it represents a tangible and immediate action that can be taken right now and in the short term to reshape business practices.

Pillar Three, encompassing Principles 25-31, is dedicated to the obligations of states and the responsibilities of business entities to ensure effective access to remedy. This is not only a logical extension of the state's duty to protect human rights but also an essential component of corporate responsibility to respect human rights. It proposes a multi-level and systematic solution to remedy, viz., state-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state-based grievance mechanisms. State-based judicial mechanisms play a fundamental role in guaranteeing access to remedies. In addition, the UN Guiding Principles recognizes the potential role of state-based non-judicial grievance mechanisms, provided they are mediation-based, adjudicative, or follow other culturally appropriate and rights compatible processes. Furthermore, the UN Guiding Principles require non-state actors, including business enterprises, to establish operational-level grievance mechanisms, e.g., NCPs, directly accessible to individuals and communities adversely impacted by the enterprises. However, as a set of overarching principles, the UN Guiding Principles does not provide detailed guidance on all types of remedial measures. Instead, it sets out effectiveness criteria for non-judicial grievance mechanisms, including legitimacy, accessibility, predictability, equity, transparency, rights-compatibility, and a source of continuous learning. It also underscores that operational-level grievance mechanisms should be based on engagement and dialogue.

In sum, the UN Guiding Principles employs a systematic approach to tackle human rights challenges in GVCs. It not only serves as a "global authoritative standard on business and human rights"[254] but also offers a solid groundwork for the institutionalization of HRDD at domestic, regional, and international levels. As the institutionalization of HRDD is still in its early stages, there is an urgent need to conduct a normative analysis based on the UN Guiding Principles to provide widely recognized guidance for future practices. This is particularly relevant for mHRDD, which may

252 See Sang Soo LEE, "Reflexive Law Approach to Business and Human Rights: Cases in France and Korea," *법과 기업 연구 (Law and Business Studies)* 9, no. 3 (2019): 3-33.

253 See Quijano and Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?," 247 (n.118).

254 International Bar Association, "IBA Practical Guide on Business and Human Rights for Business Lawyers," (28 May 2016): 13, accessed 15 December 2022, https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4.

impact states, individuals, suppliers, and others along GVCs, potentially causing confrontations at different levels. A shared normative framework based on the UN Guiding Principles may help reduce the risk of confrontation and enhance the legitimacy of mHRDD laws. Additionally, the adequate complexity of GVCs cannot be overlooked, particularly the power asymmetries between various actors, as seen in the case study on the Rana Plaza tragedy. Neglecting this complexity may affect the outcome of BHR regulation.

PART II FORMULATING THE THEORETICAL FOUNDATION

CHAPTER 3 A FRAMEWORK FOR EVALUATING MANDATORY HUMAN RIGHTS DUE DILIGENCE LAWS

Since the adoption of the UN Guiding Principles in 2011, HRDD has become a common currency in the realm of business and human rights. A notable progress during and after the first decade of the UN Guiding Principles is the uptake of mHRDD laws at domestic, regional, and international levels. The variations in these legislative practices concerning their ambit, scope, enforcement, motivations, and other aspects highlight the need for a holistic comparison. Positioned at the crossroads of further legislating HRDD, such a holistic comparison is not only imperative for a nuanced understanding of different legislative practices but also for informing future legislation on how to become more ambitious instead of half-hearted. An evident-based analytical framework is a precondition for conducting vertical comparisons of various legislative practices in the domestic, regional, and international spheres. To establish such a framework, Section 1 of this chapter explores the normative quality of HRDD and its potential to mitigate the accountability gap in GVCs. Subsequently, building on the normative interpretation of the UN Guiding Principles and the current discussion of the "effectiveness" of HRDD, Section 2 defines the procedural and substantive parameters for comparing mHRDD laws. Section 3 concludes this chapter by formulating an analytical framework for evaluating mHRDD laws.

1. Decoding Human Rights Due Diligence

Characterized as "a new global orthodoxy for responsible corporate behavior,"[255] HRDD is widely regarded as an innovation of the UN Guiding Principles that creatively links "human rights" and "due diligence" to operationalize corporate human rights responsibility. Despite the novelty of the HRDD concept,[256] it is important to note that due diligence itself is not a recent notion. Indeed, lawyers have employed due diligence as a legal tool, and business professionals have utilized it as a risk management mechanism for several decades. The evolution of due diligence has given rise to HRDD as a specific application within this broader concept. To comprehend the distinct features and potential of HRDD as a tangible instrument for reshaping business conduct, an overview of due diligence becomes imperative.

1.1 Due Diligence in Domestic Laws and International Legal Order

In the law discipline, due diligence "is common to the majority of legal systems and

255 See Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance," 225-47 (n.144).

256 However, broadly speaking, ideas akin to HRDD can be traced back to Article 15 of the draft Norms, as discussed in Section 1.2 of Chapter 2 above.

is a feature of numerous primary rules across different branches of international law."[257] The concept of due diligence has historical roots, extending back to the Roman Law notion of the *bonus pater familias* ("good family father").[258] The term itself is derived from the Latin word *diligentia,* which can be interpreted as a "care or circumspection."[259] Nowadays, due diligence is commonly understood as "the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."[260]

At the domestic level, due diligence is closely associated with the tort of negligence, which means acting without the care or diligence required to avoid harming others.[261] In this connection, a company's failure to exercise due diligence may constitute a violation of its duty of care under tort law.[262] The concept of due diligence in the contemporary legal context was arguably first introduced by American securities law, operating within the framework of "reasonable investigation."[263] The *Securities Act of 1933* imposes strict civil liability on specific individuals for disseminating false statements and omitting significant information in a securities registration statement. Nevertheless, an exemption is provided in cases where a "reasonable investigation" has been conducted, with the relevant standard of reasonableness being that of a "prudent man in the management of his property."

Due diligence has been gradually applied to other domestic laws, such as anti-corruption, labor, commercial, and environmental law. Provisions regarding due diligence in these laws oftentimes serve as a statutory defense for companies, functioning not only as a basis for regulatory approval but also as a requirement for engaging in government business.[264] Under such provisions, companies can defend themselves against lawsuits or criminal charges by demonstrating that the alleged offenses occurred despite them having done everything that could be reasonably expected to prevent such harm from occurring.[265] In judging whether a defendant has behaved diligently or negligently, the determinant is whether the defendant has met a standard of expected conduct, which in turn is an objective standard as well as a factual

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257 Curzi, *General Principles for Business and Human Rights in International Law*, 240 (n.232).

258 Ibid, p.241.

259 Anne Peters, Heike Krieger, and Leonhard Kreuzer, "Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates," in *Due Diligence in the International Legal Order*, ed. Heike Krieger, Anne Peters, and Leonhard Kreuzer (Oxford University Press, 2020), 2.

260 Garner, Bryan A. (2000). Black's law dictionary, 368.

261 See Cees Van Dam, "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* 2, no. 3 (2011): 237; Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 142-43 (n.21).

262 See Curzi, *General Principles for Business and Human Rights in International Law*, 249 (n.232).

263 See Selvaratnam Shamistha, "The Rise of Human Rights Due Diligence (part I): A Short Genealogy, " *Doing Business Right Blog*, Asser Institute, (1 April 2019), accessed 20 December 2022, https://www.asser.nl/DoingBusinessRight/Blog/post/the-rise-of-human-rights-due-diligence-part-i-a-short-genealogy-by-shamistha-selvaratnam.

264 A group of eminent legal scholars around the world conduct mapping-up research on the regulatory due diligence mechanisms adopted by selected major countries. The four types of due diligence mechanisms have been identified involve: due diligence requirement as a matter of regulatory compliance, criteria for companies to obtain incentives and benefits from government, a tool of transparency and disclosure mechanisms, and a combination of one or more of these approaches. See Schutter et al., *Human Rights Due Diligence: The Role of States* (n.120).

265 See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 143 (n.21).

issue. Simply put, the evaluation of what is "due" depends on "the (legitimate) expectations directed at the relevant actor's behavior" that rely on "factors attached to the actor itself (notably its capacities), and arise from the social, political, and legal context."[266] Consequently, due diligence is widely recognized as a risk mitigation instrument for both natural and legal persons to minimize or avoid legal liabilities in the contemporary legal system. Meanwhile, due diligence has also been used as a legal and regulatory technique by states to hold business enterprises accountable.

Due diligence has also been absorbed by international law and has become a fundamental principle of the international legal system.[267] Within the domain of international law, due diligence primarily addresses the obligations of states, as states have traditionally been the central and primary subjects of international law. The *Corfu Channel* case established the essential content of due diligence in international law. In this case, the International Court of Justice (ICJ) asserted "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[268] Afterwards, due diligence in international law has been constructed as "an obligation of conduct, according to which the state has a duty to take all the necessary measures to prevent or react to a specific act or omission."[269] In other words, due diligence "has been defined to mean what a responsible government should do under normal conditions in a situation with its best practicable and available means, with a view to fulfilling its international obligation,"[270] such as the obligations to protect human rights.

Despite its omnipresence in international law,[271] including but not limited to international environmental law, international human rights law, international economic law, and the emerging international law of cyberspace, "due diligence is among the most ambiguous terms in international law."[272] The ambiguity is evident both in terms of the terminology used and the associated requirements. On the one hand, rather than being explicitly used in treaty provisions, "due diligence" is normally implicitly rephrased to "all appropriate measures," "all appropriate and effective measures," "all measures necessary," "appropriate efforts," "due regard," and similar terms in international legal instruments.[273] On the other hand, it seems challenging to fully

266 Peters, Krieger, and Kreuzer, "Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates," 2 (n.259).

267 See International Law Association, "ILA Study Group on Due Diligence in International Law, Second Report," (July 2016), esp. Part 1, accessed 20 December 2022, https://www.ila-hq.org/en_GB/documents/draft-study-group-report-johannesburg-2016.

268 *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), [1949] ICJ Rep 4.

269 Curzi, *General Principles for Business and Human Rights in International Law*, 242 (n.232).

270 Hanqin Xue, *The Doctrine of Due Diligence and Standard of Conduct* (Cambridge University Press, 2003), 163.

271 For an authoritative examination that identifies a common content, scope, and function of due diligence across various subjects of international law, see Krieger, Peters, and Kreuzer, *Due Diligence in the International Legal Order* (n.115).

272 Maria Monnheimer, *Due Diligence Obligations in International Human Rights Law* (Cambridge: Cambridge University Press, 2021), 4.

273 A comprehensive overview of the usage of different terms of "due diligence" in international law with selected examples, see Peters, Krieger, and Kreuzer, "Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates," 9-11 (n.259).

define ex ante what concrete obligations “due diligence” should contain, as “the requirements of due diligence are context-dependent, often highly discretionary.”[274] However, the ideas concerning states’ due diligence obligations and responsibilities are somewhat clear. As for obligation, despite the likely unattainability of “optimal” diligence, two broad categories of state due diligence obligations have been delineated.[275] The first category is linked to a state’s institutional capacity. It conveys the requirement for states to implement legislative or administrative safeguard measures and appropriate monitoring mechanisms. The second is a kind of procedural obligation that demands states undertake activities such as notification, consultation, risk assessments, warnings, public explanations, or feasible precautions. In addressing responsibility, the breach of due diligence obligations (primary rules) under international law may trigger state responsibility (secondary rules). Typically, states are obliged to remove the consequences of the violation and restore the situation to what would have existed if the infringement had not taken place.[276] These normative implications have shaped Pillar One of the UN Guiding Principles as discussed below.

1.2 Due Diligence in Business Practice

Besides the traditional understanding of due diligence as a legal technique, due diligence is also familiar to business actors as a means of corporate governance, risk management, and business planning.[277] Business decision-making processes, such as joint ventures, mergers and acquisitions, partner selection, choice of jurisdiction, asset transactions, and sales, frequently involve the application of due diligence. More recently, due diligence has expanded its scope to encompass broader areas of corporate operations, such as reputation,[278] charity,[279] climate change,[280] privacy and data protection,[281] and human rights. Although the contexts of due diligence are diverse, “[essentially] in all such situations there will be: the transfer of assets from one party to another or the creation of obligations; the existence of risks that may affect the future

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274 Peters, Krieger, and Kreuzer, "Due Diligence in the International Legal Order: Dissecting the Leitmotif of Current Accountability Debates," 12 (n.259).

275 Ibid.

276 For a discussion of the consequences of violating the due diligence principle in international law, see Joanna Kulesza, *Due Diligence in International Law* (Brill Nijhoff, 2016), 270-75.

277 See in general, Linda S Spedding, *Due Diligence Handbook: Corporate Governance, Risk Management and Business Planning* (Elsevier, 2009).

278 Ibid, Chapter 7.

279 Ibid, Chapter 17.

280 Climate due diligence is gaining prominence as a corporate risk management process and a legal requirement in certain jurisdictions, such as France and the European Union. See Chiara Macchi, "The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of ‘Climate Due Diligence’," *Business and Human Rights Journal* 6, no. 1 (2020); Andreas Hösli and Rolf H. Weber, "Climate Change Reporting and Due Diligence: Frontiers of Corporate Climate Responsibility," *European Company and Financial Law Review* 18, no. 6 (2021); Annalisa Savaresi and Joana Setzer, "Rights-based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers," *Journal of Human Rights and the Environment* 13, no. 1 (2022); Christina Voigt, "The Climate Change Dimension of Human Rights: Due Diligence and States' Positive Obligations," *Journal of Human Rights and the Environment* 13 (2022).

281 Isabel Ebert, Isabelle Wildhaber, and Jeremias Adams-Prassl, "Big Data in the workplace: Privacy Due Diligence as a Human Rights-based Approach to Employee Privacy Protection," *Big Data & Society* 8, no. 1 (2021); Lottie Lane, "Artificial Intelligence and Human Rights: Corporate Responsibility in AI Governance Initiatives," *Nordic Journal of Human Rights* 41, no. 3 (2023).

value of such assets or obligations; the need to apportion the risks between the parties."[282] Thus, in a business context, due diligence is commonly perceived as "a process of investigation conducted by a business to identify and manage commercial risks"[283], especially the "risk in a company's own interest."[284]

Given that human rights challenges can pose material risks for a company and involve issues of responsibility allocation, as illustrated by the Ogoni case and the Nike case above, they warrant the same level of due diligence applied to commercial risks.[285] Although the "business case" for HRDD is evident,[286] not all enterprises have adequately recognized the value of human rights. Additionally, as seen in the case study on the Rana Plaza tragedy, TNCs usually have strong leverages to avoid materializing human rights risks by either transferring the risks and compliance burdens onto suppliers or capturing governments. Therefore, it is imperative to clarify the normative quality of HRDD as a state duty to protect human rights, thereby invoking more proactive state actions to ensure corporate HRDD practices.

1.3 Human Rights Due Diligence as a State Duty to Protect

The examination of due diligence in both legal and commercial contexts revelas that the amalgamation of "human rights" and "due diligence" was a deliberate and strategic maneuver orchestrated by John Ruggie. By capitalizing on the prevalent practice of due diligence in the legal and commercial spheres, the challenging tasks of introducing new concepts and convincing states and businesses to adopt them could be bypassed. This approach thus facilitates the widespread adoption of the concept of HRDD in the realm of BHR. Moreover, it offers a common currency "that all stakeholders such as states, business enterprises, CSOs (civil society organizations), trade unions and lawyers are able to speak the same language when having conversations about the human rights responsibility of business."[287]

Despite many efforts made by other non-state actors to operationalize HRDD, states still play a key role in this regard. This assertion is grounded in various considerations. Firstly, from a pragmatic perspective, without proper government regulation, strong economic motivations may drive businesses to engage in mere "cosmetic compliance"

282 Spedding, *Due Diligence Handbook: Corporate Governance, Risk Management and Business Planning*, 6 (n.277).

283 Jonathan Bonnitcha and Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights," *European Journal of International Law* 28, no. 3 (2017): 901.

284 Olga Martin-Ortega, "Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?," *Netherlands Quarterly of Human Rights* 32, no. 1 (2014): 51.

285 UN Human Rights Council, *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development. Business and Human Rights: Towards Operationalizing the "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*, A/HRC/11/13,22 April 2009, para.77-79.

286 See Güler Aras, "The Business Case for Taking Human Rights Obligations Seriously," in *Duties Across Borders: Advancing Human Rights in Transnational Business*, ed. A. Andreassen Bard and Khanh Vinh Vo (Intersentia, 2016), 91-108.

287 Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 395 (n.118).

with HRDD.[288] Similarly, the absence of government regulation may lead to inconsistent business practices, ad hoc implementation of standards, and insufficient incentives for altering company behavior.[289] Thus, states "remain of critical importance" for making human rights governance effective in GVCs.[290] Also, from a normative angle, protecting human rights from corporate abuses is inherently a component of a state's duty under international human rights law. More importantly, the overemphasis on corporate human rights responsibility may divert attention from the state's human rights obligations. States might "outsource" human rights obligations, which typically should not be outsourced, to business entities, posing considerable risks to rights holders,[291] or exploit irresponsible businesses as a shield to evade state responsibility. Therefore, placing more emphasis on the state's duty to protect human rights in GVCs holds paramount significance.

States, as the primary duty-bearers of international human rights law, shoulder the obligation to respect, protect, and fulfill human rights.[292] The duty to protect human rights is a positive obligation, necessitating states to "take measures to prevent and repress violations, irrespective of whether they are committed by state or NSAs (non-state actors), and provide adequate remedies in case of breach."[293] For instance, in *Armed Activities on the Territory of Congo*, the ICJ found Uganda internationally responsible not only for the acts and omissions of its own military forces but also for "any lack of *vigilance in preventing violations* of human rights (…) *by other actors* (…)."[294] Similarly, the ICJ affirmed that state "responsibility is (…) incurred if the State manifestly failed to take all measures to prevent"[295] the human rights violations. Because it may be impossible to prevent certain violations, the duty to protect entails a positive duty of conduct, rather than a duty of result.[296] It suggests that states may incur international responsibility not directly for the wrongdoings of third parties but for the failure to take appropriate steps, i.e., due diligence, to prevent or redress such actions or harm. Thus, in the international human rights regime, due diligence is both employed to "describe the standard of conduct necessary to comply with a duty to protect"[297] as

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288 See Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance," 221-47 (n.144).

289 See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 172-83 (n.21).

290 Ibid, 173-74.

291 For an in-depth analysis of how states outsource human rights regulation to corporations in global supply chains and the risks therefrom, see Galit Sarfaty, "Shining Light on Global Supply Chains," *Harvard International Law Journal* 56 (2015): 419-62.

292 The tripartite typology was originally introduced by Henry Shue, it was then elaborated and developed by Asbjørn Eide. See, Economic and Social Council, *Report on the Right to Adequate Food as a Human Right by Special Rapporteur Asbjørn Eide of 7 July 1987*, UN Doc. E/CN.4/Sub.2/1987/23, 24. A general introduction, see Monnheimer, *Due Diligence Obligations in International Human Rights Law*, 51-52 (n.272).

293 Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (Cambridge University Press, 2013), 217.

294 *Armed Activities on the Territory of Congo*, 179, Judgement of 19 December 2005. Emphasis added.

295 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections) [1996] ICJ Rep 595, para 430.

296 See Robert Jennings and Arthur Watts, *Oppenheim's International Law. Volume I: Peace* (Oxford University Press, 2008), 549.

297 Björnstjern Baade, "Due Diligence and the Duty to Protect Human Rights," in *Due Diligence in the International Legal Order*, ed. Heike Krieger, Anne Peters, and Leonhard Kreuzer (Oxford University Press, 2020), 92.

well as to "determine whether positive human rights obligations, (…) have been complied with."[298] Phrase it differently: due diligence is not only a means for states to fulfil the duty to protect but also a criteria for measuring states' fulfilment.[299] As one scholar aptly put it, due diligence "constitutes the backbone of the state duty to protect human rights."[300]

The ambiguities surrounding due diligence in international law also apply to international human rights law. Following the principles of due diligence in general international law, a state's HRDD requires all its organs to act diligently to prevent human rights violations by third parties.[301] Some UN human rights treaty bodies have solidified the state's duty to protect human rights in the business context.[302] For instance, the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) highlighted that "(…) States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."[303] In the same regard, the Human Rights Committee confirmed that states could violate their obligations if they fail "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."[304] The Committee on the Rights of the Child (CRC) also elaborated that "States should require businesses to undertake child-rights due diligence."[305] Likewise, the Committee on Economic, Social and Cultural Rights (CESCR) has clarified the specific aspects of the state's duty to protect with regard to business conduct in its General Comment. Among other things, this General Comment acknowledges that states bear a "positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence (…)."[306]

Therefore, although due diligence in international law is vague and ambiguous, recent developments in the international human rights regime, particularly in the realm of BHR, substantiate that "imposing human rights due diligence on companies is progressively growing into an acquis of the state duty to take positive measures to prevent human rights violations by companies under its jurisdiction."[307] Hence, from a BHR discourse, the implementation of corporate HRDD is not only the kernel of corporate human rights responsibility but also a cornerstone of a state's duty to protect in the globalized business context. In this aspect, the UN Guiding Principles offers an

298 Baade, "Due Diligence and the Duty to Protect Human Rights," 97 (n.297).

299 See Bantekas and Oette, *International Human Rights Law and Practice*, 217 (n.293).

300 Curzi, *General Principles for Business and Human Rights in International Law*, 243 (n.232).

301 Ibid, 155-72.

302 Ibid, 243.

303 CEDAW, *General Recommendation 19: Violence Against Women*, UN Doc A/47/38, 30 January 1992, para 9.

304 Human Rights Committee, *General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc ICCPR/C/21/Rev.1/Add.13, 26 May 2004, para 8.

305 CRC, *General Comment No 16 (2013) on State Obligations regarding the Impact of the Business Sector on Children's Rights*, UN Doc CRC/C/GC/16, 17 April 2013, para 62.

306 CESCR, *General Comment No 24: 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 16.

307 Curzi, *General Principles for Business and Human Rights in International Law*, 251 (n.232).

internationally recognized normative framework, as seen in Chapter 2 above, providing general principles and operational rules for states to foster and require companies under their jurisdictions to put HRDD in place. This should further constitute a common starting point for institutionalizing HRDD, particularly enacting mHRDD laws.

2. Defining Parameters for Measuring Mandatory Human Rights Due Diligence Laws

2.1 Rationales for Treating the UN Guiding Principles as a "Foundation"

During the ongoing critical discussions on the institutionalization of HRDD, scholars have expressed concerns about the inherent limitations of HRDD per se and the associated risks of legislating mHRDD laws based on the UN Guiding Principles. For example, Bonnitcha and McCorquodale critique the UN Guiding Principles for characterizing HRDD both as a standard of conduct to fulfil a responsibility and as a process to manage human rights risks. This, they argue, has led to confusion regarding when and whether businesses should be obligated to remedy human rights infringements.[308] Likewise, Fasterling challenges the conceptual shortcomings of HRDD, asserting that it muddles human rights risks with social risks, thus impeding the integration of human rights risks into broader corporate risk management systems.[309] Adding to the debate, Landau identifies features such as a high level of ambiguity and an emphasis on process over outcome that may render cosmetic compliance "not only possible but likely."[310] While acknowledging the value addition of enacting mHRDD laws, Deva observes multiple limitations in HRDD, spanning conceptual, operational, and structural aspects.[311] Moreover, recent studies argue that HRDD is not the sole obligation for both states and corporations in the realm of BHR,[312] advocating for a stride "beyond human rights due diligence."[313]

While admitting the validity of these accusations, it is essential to recognize that there is no flawless norm. The rapidly evolving landscape makes it challenging for policymakers to envision a perfect framework. Crucially, during the early stages of legislating mHRDD, the continuous generation of suspicions, doubts, and challenges, rather than consolidating consensus, may give rise to overly intricate theoretical debates

308 See Bonnitcha and McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights," (n.283).

309 See Bjorn Fasterling, "Human Rights Due Diligence as Risk Management: Social Risk versus Human Rights Risk," *Business and Human Rights Journal* 2, no. 2 (2017): 225-47.

310 Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance," 263 (n.144).

311 See Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 398-404 (n.118).

312 See, for instance, David Bilchitz, *Fundamental Rights and the Legal Obligations of Business* (Cambridge: Cambridge University Press, 2021); Surya Deva, "COVID-19, Business, and Human Rights: A Wake-Up Call to Revisit the "Protect, Respect and Remedy" Framework?," *International Community Law Review* 23, no. 5 (2021).

313 The editorial for a special issue of the Business and Human Rights Journal provides a comprehensive overview of this debate, see Surya Deva, Anita Ramasastry, and Florian Wettstein, "Beyond Human Rights Due Diligence: What Else Do We Need?," *Business and Human Rights Journal* 8, no. 2 (2023).

that impede the transition of the UN Guiding Principles from a phase of norm cascade to internalization. Two notable clues to these risks include the active engagement of corporations in legislative discussions, leading to delays in legislative procedures and the dilution of mHRDD laws;[314] and the intentional intervention of state actors in the negotiation of a BHR LBI to impede its advancement.

Hence, this research advocates for reflecting on how to incorporate the UN Guiding Principles in the formulation of mHRDD laws, cementing its authority rather than problematizing it by invoking more challenges and doubts. In other words, situated at the crossroads, a smart action is to consolidate the role of the UN Guiding Principles in legislating mHRDD laws instead of weakening them. However, this stance does not suggest a rigid adherence to the UN Guiding Principles. Rather, it involves necessary considerations regarding the complexity of human rights governance in GVCs and the substantial scholarly debates. Additionally, it is impractical to cover every aspect of the UN Guiding Principles and scholarly discussions concerning mHRDD laws in a single study. Therefore, it is wise to concentrate on the most crucial aspects. Bearing this in mind, Section 2.2 identifies key procedural and substantive parameters for evaluating mHRDD laws based on the UN Guiding Principles. Section 2.3 supplements these with insights from valuable academic discussions and lessons from the Rana Plaza incident, thereby refining the analytical framework.

2.2 Explanations of the Procedural and Substantive Parameters

The UN Guiding Principles, built on the UN Framework, articulates both procedural and substantive parameters to guide state actors in preventing human rights violations by corporations. Pillar One concerns what states should do to ensure corporate respect for human rights, which largely depends on the effective implementation of HRDD. The principles conveyed in Pillar One essentially reiterate and clarify the legally binding state duty to protect the human rights of individuals for whom they are responsible under international law—a duty of conduct rather than a result. Consequently, Pillar One could be read as a set of procedural parameters concerning states' duty to require, support, and encourage business entities to conduct HRDD.

Pillar Two addresses corporate responsibilities to respect human rights. While it ostensibly focuses on corporations, Pillar Two also indicates how states should require or encourage businesses to undertake HRDD. For the purpose of this research, Pillar Two is understood as what legislators need to take into account when designing mHRDD laws. This understanding is grounded in the recognition that it is unrealistic to expect that companies will voluntarily implement HRDD in accordance with the UN Guiding Principles, given the failure, or at least ineffectiveness, of the voluntary and self-regulation measures in the CSR regime.[315] Therefore, Pillar Two can be regarded

314 See discussions on the background of each domestic mHRDD law in Chapter 4 of this research.

315 See Anita Ramasastry, "Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability," *Journal of Human Rights* 14, no. 2 (2015): 237-59.

as establishing the substantive parameters defining the state's duty to protect human rights in the business context.

Pillar Three focuses on the obligations and responsibilities of states and business entities to ensure effective access to remedies—an extension of the states' duty to protect human rights and corporate HRDD. Hence, Pillar Three comprises procedural and substantive parameters for measuring the states' HRDD implementation in a business context. In keeping with this understanding, the 31 foundational and operational principles in the UN Guiding Principles are categorized into four procedural and six substantive parameters, as explained in the next section and outlined in Table 2 below. These ten parameters are the manifestation of what states should do according to the UN Guiding Principles to protect the human rights of individuals from corporate abuse. They establish the fundamental criteria and considerations for enacting mHRDD laws. As such, they constitute the normative foundation for an assessment of mHRDD laws.[316]

2.2.1 Procedural Parameters

Based on existing international law, the UN Guiding Principles affirms that "[t]he State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuses can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse."[317] It clarifies that "[w]hile States generally have discretion in deciding upon these steps, they should consider the full range of permissible *preventative* and *remedial* measures, including policies, legislation, regulation and adjudication."[318] Hence, it can be inferred that while states enjoy a margin of appreciation in meeting their obligations to protect human rights from corporate abuse, there are certain baseline requirements elucidated in the first ten principles (Pillar One) of the UN Guiding Principles. These and principles 25–27 (pertaining to state-based remedial mechanisms) constitute what is defined here as the procedural parameters of the state duty to protect: (1) a smart-mix approach, (2) policy coherence, (3) extraterritorial regulation, and (4) remedial mechanisms.

(1) **A Smart-mix Approach**: The UN Guiding Principles introduces an overarching notion of "a smart mix of measures" (a smart-mix approach) to guide states in fulfilling their positive duty to protect human rights in the business context. According to Principle 3 and its Commentary, states should "consider a smart mix of measures—national and international, mandatory and voluntary—to foster business respect for human rights." This implies that states must leverage

316 Surya Deva, a prominent legal scholar specializing in BHR and a former member of the UNWG, has adopted a comparable approach in formulating an analytical framework for evaluating mHRDD laws. Rooted in a critical examination of HRDD, his article comparing major mHRDD laws serves as a significant source of inspiration for this research. See Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 398-414 (n.118). See also Section 3 below.

317 Commentary to Principle 1, UN Guiding Principles.

318 Ibid. Emphasis added.

their full regulatory toolkit to promote corporate human rights responsibility. Mandatory measures may take the form of legislation or policy. In this regard, states can adopt domestic law to establish human rights standards for businesses in their jurisdiction. Alongside the emerging mHRDD laws considered in this study, laws addressing non-discrimination, labor issues, environmental protection, contract, and property also shape business behavior.

Incentive or deterrent policies are also important in fostering corporate human rights responsibility. Public procurement and export credit mechanisms are potential options through which the government can promote responsible business conduct.[319] Likewise, government-supported practical guidelines are also essential, providing clarity on expected outcomes, facilitating corporate compliance, and fostering peer learning among businesses.[320] However, the willingness and capacity of governments to regulate corporate human rights responsibility vary, and voluntary measures may go some way toward mitigating the accountability gap in GVCs. For example, multi-stakeholder initiatives can be employed to define human rights standards in a specific context and establish operational guidelines and monitoring mechanisms for business practices.[321] Furthermore, as illustrated by the Rana Plaza tragedy, corporate human rights abuses in GVCs are a global challenge and can only be addressed through transnational efforts. Despite the inclusion of extraterritorial jurisdiction in some domestic laws, integrating international rules into domestic legal systems remains a crucial task in humanizing GVCs; these rules, which reflect global political consensus, include the BHR LBI, the OECD Guidelines and so on.[322] Adopting a smart-mix approach holds crucial weight in the evaluation of a state's compliance with its duty to protect human rights.

(2) **Policy Coherence**: Anticipating inevitable national policy conflicts, the UN Guiding Principles requires that state actors "make difficult balancing decisions to reconcile different societal needs" by ensuring both vertical and horizontal policy coherence.[323] Indeed, "'[b]usiness and human rights' is a vast field touching upon almost anything that one could think of—from footballs to free trade, pollution to prostitution, torture to terror, oil spills to outsourcing, child lab[o]r to climate change, sweatshops to surveillance, extraterritoriality to employment, investment to Internet censorship, due diligence to discrimination, corruption to conflict minerals, and poverty to privacy."[324] As a result, "the state duty to protect human rights from corporate abuse does not concern one

319 See Bernaz, *Business and Human Rights: History, Law and Policy-Bridging the Accountability Gap*, 245-52 (n.26).

320 Commentary to Principle 3, UN Guiding Principles.

321 See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 221-24 (n.21).

322 See Bilchitz, "The Necessity for a Business and Human Rights Treaty," 203-27 (n.134).

323 Commentary to Principle 8, UN Guiding Principles.

324 Surya Deva, "Business and Human Rights, or the Business of Human Rights. Critical Reflections on Emerging Themes," in *Duties Across Borders: Advancing Human Rights in Transnational Business*, ed. A. Andreassen Bard and Khanh Vinh Vo (Intersentia, 2016), 23-38.

particular government department or ministry only, but must also inform a plethora of different policies across different departments."[325]

Vertical policy coherency entails states putting in place the laws, policies, and processes necessary to fulfil their obligations under international human rights law. An effective practice in this context is incorporating human rights clauses into bilateral investment and trade agreements. This is particularly crucial, given that "the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so."[326] The regulatory capture and chill seen in the Rana Plaza case also underscore the need for such vertical incorporation.[327] Furthermore, Principle 10 clarifies that "[c]ollective action through multilateral institutions can help States level the playing field with regard to business respect for human rights." Thus, when states engage in multilateral institutions, such as the World Trade Organization, the Group of 20 (G20), and the Regional Economic Comprehensive Partnership, they are expected to retain their human rights obligations and actively uphold human rights values in designing and implementing relevant rules.

In terms of horizontal policy coherence, the UN Guiding Principles explicitly points out that states should ensure "(…) departments and agencies, at both the national and subnational levels, that shape business practices (…) to be informed of and act in a manner compatible with the Governments' human rights obligations."[328] The adoption of an overarching national policy, like the BHR NAPs, is a practical step that allows states to clearly communicate their stance on BHR issues, facilitating vertical and horizontal policy coherence. Additionally, Principle 3 highlights the need for states to ensure policy coherence to support businesses in respecting human rights in conflict-affected areas, for example, Gaza and other areas affected by the Israel-Palestine conflict.

(3) **Extraterritorial Regulation**: The stark accountability gap in GVCs is exacerbated by the mismatch between globalized businesses and geographically limited jurisdictions. One way to address this incongruity is to use the "long arm" of domestic law to regulate the extraterritorial activities of businesses. In this connection, extraterritorial jurisdiction, defined as "the exercise of sovereign power or authority by a State outside of its territory,"[329] becomes crucial considering "(…) the growing number of multinational corporations; (c) the globalization of world economy (…)."[330] This implies the need for approaches that allow certain measure of extraterritoriality.

325 Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 187 (n.21).

326 Commentary to Principle 9, UN Guiding Principles.

327 See Section 2.3.3 in Chapter 1 of this research.

328 Commentary to Principle 8, UN Guiding Principles.

329 International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-eight Session*, A/61/10, 2006, Annex V Extraterritorial Jurisdiction, para 4.

330 Ibid, para.1.

Generally speaking, the application of extraterritorial jurisdiction may lead to sovereignty-related tensions between states;[331] the territoriality principle continues to serve as the primary foundation of jurisdiction in international law. However, in reality, not all measures involving extraterritoriality necessarily fall under the category of extraterritorial jurisdiction. Likewise, not all instances of extraterritorial jurisdiction result in negative consequences or confrontations. The UN Guiding Principles takes a prudent approach to extraterritorial jurisdiction, which is reflected in the reiteration of the existing international principle of extraterritorial jurisdiction, viz., "[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis."[332]

What is apparent, however, is that the UN Guiding Principles has an affirmative approach toward extraterritorial measures, if not direct jurisdiction. The Commentary to Principle 2 explicitly conveys strong policy reasons for home states to establish an expectation that businesses respect human rights wherever they operate.[333] However, to avoid sensitivity around the term "extraterritorial jurisdiction," the UN Guiding Principles differentiates between "domestic measures with extraterritorial implications" and "direct extraterritorial legislation and enforcement." In contrast to the latter, "domestic measures with extraterritorial implications" will not necessarily give rise to sovereign conflicts, as they "aim at the regulation or adjudication of the conduct of parent companies, which are incorporated in the home state," rather than directly "telling other countries how they ought to treat their own companies."[334] Under the UN Guiding Principles, states are expected to adopt actions that reflect a certain measure of extraterritoriality to uphold human rights in GVCs.[335] These domestic measures with extraterritorial implications should fully respect the sovereignty of other countries and be proportionate to the intended aims to avoid the fragmentation and tensions in the emerging mHRDD

331 For a discussion of the criticisms and rebuttals surrounding extraterritorial measures in the realm of BHR, see, Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 292-96 (n.21).

332 Commentary to Principle 2, UN Guiding Principles.

333 "There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad," which "include ensuring predictability for business enterprises by providing coherent and consistent messages and preserving the State's own reputation." Commentary to Principle 2, UN Guiding Principles.

334 See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 293 (n.21).

335 An interpretation of Principle 2 holds similar ideas by noting that "This (Principle 2) implies that transnational corporations, and companies with global supply chains, especially, ought to be addressed by their home States on the need to respect human rights in relation to situations, events and rights holders located in other States." See Methven O'Brien Claire, "Guiding Principle 2: Expecting Business to Protect Human Rights," in *The UN Guiding Principles on Business and Human Rights: A Commentary*, ed. Barnali Choudhury (Glasgow: Edward Elgar, 2023), 26.

regime,[336] since “what is effective is not necessarily fair and legitimate.”[337]

(4) **Remedial Mechanisms**: The state’s duty to protect against human rights abuses by third parties entails preventive and remedial measures. Principle 25 articulates that “[a]s part of their duty to protect against business-related human rights abuses, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.” The subsequent Commentary emphasizes that “[u]nless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.” In this context, Principles 26–27 define state-based judicial mechanisms as well as state-based non-judicial grievance mechanisms, which are the foundation of a broader universe of remedies. Although states are not obliged to guarantee a beneficial outcome for individuals whose rights are violated by corporations, the UN Guiding Principles clarifies the criteria for state-based remedial mechanisms, given that the duty to protect is an obligation of conduct.

Principle 26 recognizes that “[e]ffective judicial mechanisms are at the core of ensuring access to remedy.” The failure of judicial organs to offer a remedy may profoundly impact victims’ access to justice in BHR-related cases, as exemplified by the Rana Plaza tragedy. Thus, states are exhorted to refrain from creating obstacles to the presentation of legitimate cases before the courts. Similarly, states should ensure that justice is not obstructed by corruption within the judicial system and remains free from the economic and political influence of other state agents and business entities. Furthermore, it is imperative that states remove any legal, practical, or procedural barriers that may impede individuals’ access to judicial remedies: “[m]any of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise.”[338] Insufficient efforts by the state to address these barriers may exacerbate the existing asymmetry, depriving victims of judicial recourse.

Principle 27 highlights the importance of state-based non-judicial grievance mechanisms, which are indispensable in a comprehensive state-based system to tackle business-related human rights abuses. Examples of state-based non-judicial grievance mechanisms include labor tribunals, national human rights institutions, ombudsman offices, and the NCPs under the OECD Guidelines. In

336 Chapter 7 of this research provides more in-depth discussions on the extraterritorial implications of mHRDD laws and presents possible solutions to address relevant concerns.

337 Cedric Ryngaett et al., "Accountability, International Business Operations, and the Law: the Way Forward," in *Accountability, International Business Operations, and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains*, ed. Liesbeth Enneking et al. (London: Routledge, 2020), 291.

338 Commentary to Principle 26, UN Guiding Principles.

addition to the general requirements for state-based judicial mechanisms, the UN Guiding Principles emphasizes that state-based non-judicial grievance mechanisms "may be mediation-based, adjudicative or follow other culturally appropriate and rights-compatible processes—or involve some combination of these—depending on the issues concerned, any public interests involved, and the potential needs of the parties."[339]

Finally, states are urged to facilitate access to effective non-state-based grievance mechanisms that address corporate human rights abuse, aligning with Principle 28. Operational-level grievance mechanisms administered by a business entity alone or in collaboration with stakeholders are recognized as crucial non-state-based mechanisms, as further discussed in the following section. States should consider endorsing actions that promote non-state-based grievance mechanisms to ensure access to remedies. Other types are regional and international human rights bodies, such as the European Court of Human Rights [340] and the Inter-American Court of Human Rights. [341] Hence, channeling state-based mechanisms and facilitating non-state-based grievance mechanisms serves as another point of reference in evaluating whether a state has fulfilled its duty to protect human rights, inter alia, legislating mHRDD, in the globalized business context.

2.2.2 Substantive Parameters

Substantive respect for human rights in the business context depends on corporate compliance with HRDD in accordance with the UN Guiding Principles. In addition to the requirements discussed above, states should consider the substantive parameters reflected in the UN Guiding principles, viz., how companies should implement HRDD. Pillar Two (Principles 11 to 24) of the UN Guiding Principles concerns corporate human rights responsibility, with the key concept being HRDD, an ongoing and context-dependent process designed to identify, prevent, mitigate, and account for how businesses address adverse human rights impacts.

Principle 17 outlines that HRDD involves assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. In a broader sense, HRDD should include corporate policy commitments to respect human rights; these could be understood as a "constitution" guiding corporate behaviors in a human rights-friendly manner. Likewise, remediation should be considered an integral extension of HRDD, since "[e]ven with the best policies and practices, a business enterprise may cause or contribute to an

339 Commentary to Principle 27, UN Guiding Principles.

340 For a lucid analysis of the European Court of Human Rights' role in enforcing the state duty to protect human rights against corporations, see Marco Fasciglione, "Enforcing the State Duty to Protect under the UN Guiding Principles on Business and Human Rights: Strasbourg Views," in *Business and human rights in Europe*, ed. Angelica Bonfanti (Routledge, 2018), 37-47.

341 See María Carmelina Londoño-Lázaro, Ulf Thoene, and Catherine Pereira-Villa, "The Inter-American Court of Human Rights and Multinational Enterprises: Towards Business and Human Rights in the Americas?," *The Law & Practice of International Courts and Tribunals* 16, no. 3 (2017): 437-63.

adverse human rights impact that it has not foreseen or been able to prevent."[342]

Based on the interpretation of the principles in Pillars Two and Three, this research identifies six elements that must be present for the effective implementation of corporate HRDD: (1) an ongoing process, (2) broad coverage, (3) contextual particularity, (4) top-management endorsement, (5) stakeholder participation, and (6) operational-level grievance mechanisms.

(1) **Ongoing Process**: HRDD is not a one-off "tick-the-box" exercise; rather, it is a continuous cycle that recognizes "human rights risks may change over time as the business enterprise's operations and operating context evolve."[343] Businesses thus need to engage in an ongoing "assessing-integrating-tracking-communicating" loop to address human rights risks effectively. This continuous process should commence in the initial stages of developing a new business activity or relationship, "given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements and may be inherited through mergers or acquisitions."[344] Furthermore, because of its ongoing nature, HRDD requires dedicated substantive resources and the company's collaboration with stakeholders, such as external human rights experts, civil society organizations, and affected communities, is vital, as is the buy-in of top management and shareholders to the HRDD process. While, HRDD could be incorporated into a company's broader risk-management systems, and this would likely save some costs, a rights-holder-centered approach remains essential,[345] as human rights risks differ from other corporate risks.[346]

(2) **Broad Coverage**: HRDD, characterized as "a global standard of expected conduct for all business enterprises,"[347] is applicable to all types of businesses, covering a wide range of human rights issues and entailing a range of responsibilities. Principle 14 of the UN Guiding Principles is significant because it confirms that corporate responsibility to respect human rights applies fully and equally to all enterprises, regardless of their size, sector, operational context, ownership, and structure. Indeed, "the corporate responsibility to respect human rights applies to *each* and *every* company along the supply chain."[348] Accordingly, the UN Guiding Principles explicitly prohibits companies from unequally and coercively transferring human rights responsibilities to other companies; the cost-transfer practice hidden behind claims of sustainable fashion in the Rana Plaza case study is an illustrative example. Hence, any regulatory initiative must tackle this problem to be effective.

342 Commentary to Principle 22, UN Guiding Principles.

343 Principle 17, UN Guiding Principles.

344 Ibid.

345 Ibid.

346 See Fasterling, "Human Rights Due Diligence as Risk Management: Social Risk versus Human Rights Risk," 225-47 (n.309).

347 Commentary to Principle 11, UN Guiding Principles.

348 Justine Nolan, "Human Rights and Global Corporate Supply Chains: Is Effective Supply Chain Accountability Possible?," in *Building A Treaty on Business and Human Rights: Context and Contours*, ed. Surya Deva and David Bilchitz (Cambridge University Press, 2017), 245. Emphasis added.

Businesses are also urged to consider internationally recognized human rights when conducting HRDD, as "business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights."[349] Principle 12 stipulates that "internationally recognized human rights" should be "understood, at a minimum, as those expressed in the International Bill of Human Rights[350] and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work". These principles and rights, referred to as the "minimum standards," address concerns related to systematic human rights abuses resulting from business activities in GVCs and establish a baseline for businesses to meet their human rights responsibilities. Regarding these baseline standards, Principle 12 expands on the assertion in Principle 11 of the independence of corporate human rights responsibilities from state human rights obligations. It does so by emphasizing that corporations must both adhere to domestic legal requirements and fulfil their responsibilities in accordance with internationally recognized human rights. In situations where local law contradicts international human rights standards, businesses are obliged to "[s]eek ways to honor the principles of internationally recognized human rights" and "ensure that they do not exacerbate the situation."[351]

Businesses must consider potential and actual human rights risks,[352] prevent and remediate human rights risks resulting from their own operations and commercial relationships, and refrain from impeding the state's ability to respect, protect, and fulfil human rights. In this regard, Principle 13 defines the scope of HRDD as including the risks caused or contributed to by a company's operations and those indirectly associated with its activities, products, or services through corresponding business relationships. These associated risks are identified as supply chain risks and have become an important aspect of emerging mHRDD laws.[353] Then, Principles 19 and 22 delineate the actions to be taken by businesses to address different types of risks. For human rights risks resulting from a company's own activities, it should cease the infringement and offer or cooperate in remediation. When addressing the human rights risks to which a company contributes, it should take similar actions and then use its leverage to mitigate the risks. When a company is considered directly linked to a particular human rights violation, it should use its leverage to address such violations. In this context, "leverage" is defined as "the ability to effect change in the wrongful practices of an entity that causes a harm."[354] Hence, tailoring corporate human rights responsibilities based on the extent of a company's involvement in human rights abuses is crucial. This approach guarantees

349 Commentary to Principle 12, UN Guiding Principles.

350 The International Bill of Human Rights offers an authoritative list of the core internationally recognized human rights. It contains the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

351 Ibid, Principle 23 and its Commentary.

352 Ibid, Commentary to Principle 19.

353 See Salminen and Rajavuori, "Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and A Framework for Analysis," 602-27 (n.142).

354 Commentary to Principle 19, UN Guiding Principles.

that companies assume responsibilities for human rights abuses in the GVCs proportionate to their "contribution" to such abuses.

Leveraging the purchasing and bargaining power of multinationals over their suppliers to cascade HRDD to GVCs is a viable and common strategy to mitigate the governance gap.[355] However, all businesses have a share of human rights responsibility, and the cascading of HRDD should not be exploited by lead firms to shift the burden of human rights responsibility to their suppliers.[356] Importantly, as a tangible mechanism for implementing the principle of "do no harm," HRDD requires that businesses refrain from violating human rights, both directly and indirectly, and that they do not undermine the state's capacity to meet its human rights obligations.[357] In this context, businesses, especially TNCs, should avoid corrupting governments in host countries and refrain from provoking a "regulatory chill" in the realm of international investment law. For legislators and policymakers, it is imperative to relocate human rights values in domestic and international policy spaces, as discussed in relation to policy coherence.

(3) **Contextual Particularity**: Contextual particularity serves as a substantive parameter for measuring the implementation of HRDD and as a buffer for the pressure of the human rights responsibility placed on businesses. The acknowledgment that every business in GVCs shares human rights responsibility is complemented by the recognition that companies from different sectors encounter varying human rights risks. Even corporations within the same industry but in different countries or regions may encounter a range of human rights challenges.[358] Likewise, corporations of various sizes, operational contexts, and other factors may possess different abilities to carry out HRDD. In response, the UN Guiding Principles acknowledges that the HRDD process, including policy commitments and remediation,[359] should be adaptable to a company's size, sector, structure, and operational setting,[360] as well as the severity of its human rights consequences.[361] In this respect, the UN Guiding Principles pinpoints the need for small and medium-sized enterprises (SMEs) to conduct HRDD in a manner proportionate to their capacity and the severity of their human rights impacts.[362] Conversely, large enterprises, particularly those with a strong connection to the government or that are state-owned,[363] should assume greater responsibility for upholding human rights. At the very least, large enterprises should refrain from exploiting their

355 Most multinationals headquartered in developed countries are also the lead firms in global supply chains, coordinating worldwide production overwhelmingly by setting rules and standards by which all other enterprises must operate. See Rawling, "Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment," 660-77 (n.32).

356 See also Chapter 7 of this research.

357 Commentary to Principle 11, UN Guiding Principles.

358 Ibid, Commentary to Principle 23.

359 Ibid, Principle 15.

360 Ibid, Principle 17(b).

361 Ibid, Principle 14 and its Commentary.

362 Ibid, Commentary to Principle 14.

363 Principles 4-6 and corresponding commentaries, UN Guiding Principles.

dominant position and leverage when carrying out HRDD.

Contextual particularity also necessitates that companies consider compliance with additional human rights standards ("additional standards") that go beyond the "minimum standards" but can impact the effectiveness of HRDD. The UN Guiding Principles instructs businesses to account for the specific needs of individuals in certain groups or populations, such as "indigenous peoples; women; national or ethnic, religious, and linguistic minorities; children; persons with disabilities; and migrant workers and their families."[364] Similarly, Principle 3, although included in Pillar One, underlines the importance of factoring in the specific context of conflict-affected areas when conducting HRDD. The international human rights regime, including, for example, the UN bodies and regional human rights systems, contains a wide range of human rights instruments specifically related to the groups, individuals, and conflict contexts mentioned.

Unlike the "minimum standards" that are applicable to all business enterprises, the "additional standards" are applicable on a case-by-case basis, contingent on the contextual particularities of a company. Finally, contextual particularity allows businesses to "prioritize actions to address actual and potential adverse human rights impacts, because "[w]hile business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously."[365] The same consideration applies to the mapping of risks in an entity's value chain. Of note, the Commentary to Principle 17 states that "[w]here business enterprises have large numbers of entities in their value chains (…), [they] should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence."

(4) **Top-management Endorsement**: Support and buy-in from a company's senior management are critical to successful HRDD, especially given its resource-intensive and interdepartmental nature. For example, the Rana Plaza tragedy case study underscores the significance of top-level decision-making in responding to human rights risks. Even when these risks are exposed, decisions made by a company's senior management can address or contribute to the tragedy. Scholars have explicitly noted that "the effectiveness of human rights due diligence is in many respects dependent upon the moral commitment of the corporation and its managers."[366] In line with this, Principle 16 requires an overarching policy commitment from businesses that is approved at the most senior level. Beyond raising awareness of human rights throughout the organization and fostering a corporate ethos that respects human rights, such a policy commitment guides the establishment and operation of a company's HRDD. More importantly, top-

364 Ibid, Commentary to Principle 3.

365 Ibid, Principle 24 and its Commentary.

366 Björn Fasterling and Geert Demuijnck, "Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights," *Journal of Business Ethics* 116, no. 4 (2013): 812.

management endorsement facilitates the effective integration of human rights risk assessment into internal company functions and departments, allowing appropriate responses to identified risks.[367]

(5) **Stakeholder Engagement**: The involvement of stakeholders is important for HRDD, both in terms of the process and the result. While businesses are accustomed to due diligence practices in a commercial context, HRDD is more complex and opaquer. The normative parameters established by the UN Guiding Principles, such as an ongoing process, broad coverage, and contextual particularity, require dedicated procedures for implementing HRDD that are of high standard. At the same time, HRDD is intended to identify the actual or potential impact of a company's actions on rights holders, making it difficult for companies to properly obtain the information from and respond to the demands of affected groups without sufficient engagement with them. However, from a results-oriented perspective, working closely with stakeholders can reduce information costs, help companies identify and respond more effectively to human rights risks, and facilitate and enhance their image and reputation as responsible. Hence, the effective implementation of HRDD requires that companies sincerely cooperate with stakeholders in assessing impacts, integrating findings, tracking responses, and communicating responses, as well as making policy commitments and providing remedies.

The UN Guiding Principles correctly acknowledges the importance of stakeholders in HRDD, even though the term is not well defined. For example, Principle 16 asks businesses to ensure that their policy commitments are "informed by relevant internal and/or external expertise." Given that companies may lack dedicated in-house human rights expertise,[368] they should consult with external actors, including human rights experts or investors, government departments, and affected groups. The Commentary to Principle 18 picks up on this, underscoring the importance of direct communication with affected people to obtain reliable and comprehensive information in assessing human rights risks. In cases where direct communication is impossible, businesses "should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society."

Verification of measures to address adverse human rights impacts is dealt with in Principle 20, which requires businesses to "[d]raw on feedback from both internal and external sources, including affected stakeholders." Principle 21 addresses how a company should account for its assessment of and response to human rights risks noting that corporate human rights reporting "can take a variety of forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports." This principle also suggests the importance of independent verification in strengthening the content and credibility of human rights reporting.

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367 Principle 19 and its Commentary, UN Guiding Principles.

368 See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 146 (n.21).

Businesses are also advised to collaborate with stakeholders in risk mitigation and remediation, especially in the administration of operational-level grievance mechanisms, as discussed below.

(6) **Operational-level Grievance Mechanisms**: Responsible businesses should establish an operational-level mechanism for addressing grievances. This mechanism functions as both an ex-ante preventive measure and an ex-post remedial measure. A well-functioning operational-level grievance mechanism may (a) "support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence" and (b) "make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating."[369]

In most cases, operational-level grievance mechanisms are made available to individuals and communities potentially affected by a business, providing them with direct access to redress. These mechanisms are commonly run independently or in partnership with other entities, such as relevant stakeholders. In this regard, Principle 30 notes that industry, multi-stakeholder, and other collaborative initiatives based on respect for human rights can be adopted to improve the effectiveness of a company's own mechanisms.

Moreover, recognizing that "[a] grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it, and are able to use it,"[370] Principle 31 sets out eight criteria for non-judicial grievance mechanisms, including those at the operational level. A well-functioning non-judicial grievance mechanism should be legitimate, accessible, predictable, equitable, transparent, and rights-compatible, enable continuous learning, and be based on engagement and dialogue with relevant stakeholders. The last criterion, in particular, addresses mechanisms at the operational level, requiring businesses to "consul[t] the stakeholder groups for whose use they are intended on their design and performance, and focus on dialogue as the means to address and resolve grievances." This criterion matters because "a business enterprise (alone) cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome."[371] Ensuring that an operational-level grievance mechanism is built into corporate HRDD is thus essential for any BHR regulation.

It is clear that due diligence is a common practice for states and business enterprises. The combination of "human rights" and "due diligence" bridges the public/private divide in upholding human rights in GVCs, where transnational efforts are essential. While there is some ambiguity in the concept of due diligence in international law, it represents a significant tool for states to fulfill their duty to protect under international human rights law. The UN Guiding Principles, grounded

369 Commentary to Principle 29, UN Guiding Principles.

370 Ibid, Commentary to Principle 31.

371 Ibid.

in existing international norms, clarify what this duty entails in a world where "trade has been globalized—justice not yet."[372]

Accordingly, states can refer to the procedural and substantive parameters (Table 2) to ensure business enterprises conduct HRDD. These parameters are also applicable to the formulation of mHRDD laws. However, there are factors that may impede the implementation of HRDD that are not explicitly noted by the UN Guiding Principles. Power asymmetries among states and business actors in GVCs and systematic inequality within the existing international legal order are cases in point. Despite these omissions, the UN Guiding Principles offers a shared foundation for practitioners and scholars to further contemplate the parameters and characteristics of an effective mHRDD regime.

Table 2 Parameters of State Duty to Protect as per the UN Guiding Principles[373]

Procedural Parameters		Substantive Parameters	
1	A Smart-mix Approach	5	Ongoing Process
2	Policy Coherence	6	Broad Coverage
3	Extraterritorial Regulation	7	Contextual Particularity
4	Remedial Mechanisms	8	Top-management Endorsement
		9	Stakeholder Participation
		10	Operational-level Grievance Mechanisms

2.3 Replenishing the Parameters

2.3.1 Exploring the "Effectiveness" of Human Rights Due Diligence

Formulating an all-encompassing and impeccable standard for comparing mHRDD laws appears daunting. This challenge persists despite groundbreaking global normative frameworks like the UN Guiding Principles. Scholarly discussions on the effectiveness of HRDD have the potential to complement and complete the proposed parameters (Table 2) to rectify notable deficiencies. This section delves into the academic debates on the effectiveness of HRDD in the interests of incorporating additional procedural and substantive indicators before assessing the final evaluation framework.

The concept of "effectiveness" has been the subject of extensive debate within the legal community, specifically among researchers in the socio-legal field. In a broad sense, the effectiveness of a law is determined by the degree of alignment between its intended objectives and the outcomes it generates. Accordingly, "legal effectiveness research begins by identifying the goals of legal policy and moves to assess its success or failure by comparing the goals with the results produced."[374] However, in practice, assessing legal effectiveness is often complicated. Regardless of the methods employed,

372 Van Dam, "Tort Law and Human Rights: Brothers in Arms on the Role of Tort Law in the Area of Business and Human Rights," 221 (n.261).

373 This table is originally formulated by this research based on the discussions in Section 2.2 above.

374 Austin Sarat, "Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition," *Legal Studies Forum* 9 (1985): 23.

an inquiry into the effectiveness of a particular law should at least consider "what factors make for the success or failure of law-making, and what guidance one can give to the practical legislator who wishes to achieve some social reconstruction or transformation through law."[375] In the context of HRDD, the question of effectiveness concerns whether its institutionalization can achieve the objectives established by the UN Guiding Principles, viz., "enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contribute to a socially sustainable globalization."[376]

Broadly speaking, attaining these ambitious objectives is contingent upon the collective endeavors of states, businesses, civil society, and other stakeholders. From a more tangible and state-centric standpoint, the effectiveness of HRDD depends, first, on whether states comply with the procedural and substantive normative parameters of the UN Guiding Principles. BHR scholars have also conducted extensive critical assessments of HRDD institutionalization. Although "there is little research as to how effective human rights due diligence is and whether its aim (…) has been achieved in State and business practices,"[377] existing critical appraisals may supplement the UN Guiding Principles to build a more robust framework to map the empirical complexities of human rights governance in GVCs. The following section is thus dedicated to refining the framework for assessing the effectiveness of HRDD in light of existing research and lessons learned from the Rana Plaza tragedy.

2.3.2 Refining the Effectiveness of Human Rights Due Diligence

When assessing the effectiveness of the institutionalization of HRDD, Robert and Nolan prompt consideration of three overarching questions:[378] (1) to what extent has HRDD been effectively adopted and applied by businesses? (2) to what extent have state actions been effective in ensuring that businesses undertake effective HRDD? and (3) to what extent HRDD has been effective in facilitating the participation of rights holders in the process. Their responses to these inquiries provide two valuable insights for ameliorating the institutionalization of HRDD.

On the one hand, they assert that "[a] key feature of imposing a stronger enforcement framework is that it acts not simply as a deterrent but also works to incentivize compliance of HRDD by business."[379] This is a lesson from regulatory fields of similar complexity, such as the regulation of bribery in international business transactions,[380] and offers a pragmatic way to achieve buy-in from businesses. Recognizing that "[b]uy-in is critical for all forms of regulation,"[381] providing sufficient incentives for businesses to conduct HRDD may prevent superficial

375 Antony Allott, "The Effectiveness of Law," *Valparaiso University Law Review* 15 (1980): 229.

376 General Principles, UN Guiding Principles.

377 Robert McCorquodale and Justine Nolan, "The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses," *Netherlands International Law Review* 68, no. 3 (2021): 455.

378 Ibid, 464.

379 Ibid, 470.

380 See Aras, "The Business Case for Taking Human Rights Obligations Seriously," 91-108 (n.286).

381 Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 175 (n.21).

compliance or, at the very least, encourage business actors to allocate substantial resources to implement HRDD.[382] As these arguments and findings suggest, incentives are indispensable in the smart-mix approach.

On the other hand, McCorquodale and Nolan also advocate for the incorporation of rights holders as an integral part of any HRDD process, contending that "in assessing the effectiveness of HRDD, an important aspect is whether it institutionalizes new mechanisms by which rights holders may *meaningfully challenge* corporate practices."[383] Furthermore, they argue that the deficiency in effective participation of rights holders in the current normative framework and practices necessitates states "not only to mandate such consultation (with rights holders) as an explicit requirement of HRDD, but also to provide greater clarity around the scope of such consultation and participation."[384]

Similar ideas are seen in other empirical studies, suggesting that companies should proactively engage with suppliers and other stakeholders in addition to rights holders.[385] The tragic neglect of workers' voices that resulted in the collapse at Rana Plaza suggests that mere consultation is insufficient, particularly when power imbalances between employers and employees prevail. In a parallel vein, Deva, citing the Jindal Steel Works project as an example, cautions that public consultations in a cosmetic way essentially "ensure that the project goes ahead, rather [than] to address genuine concerns of farmers (and other stakeholders)."[386] Therefore, it is reasonable for lawmakers to consider going a step further to confer some level of decision-making power on stakeholders in the consultation process. Thus, the substantive parameters for stakeholder engagement should include indicators that reflect whether a law clarifies the scope of such consultation and whether it grants stakeholders certain rights to reject or postpone the project in question.

Likewise, guaranteeing the engagement of a broader set of stakeholders in formulating and implementing HRDD regulatory measures is important to ensure their legitimacy and effectiveness. Indeed, "legitimacy and effectiveness deficits emerge in supply chain governance when actors' preferences from producing regions are not represented in policy-making processes and absent from the design of standards and sanctions that affect their rights and livelihoods."[387] Other research also concluded that, "[u]ltimately, the concrete experiences of vulnerable actors in the hundreds of thousands of locations worldwide that are involved in or affected by global commodity chains will be decisive for answering the question of how meaningful and effective due

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382 See Aras, "The Business Case for Taking Human Rights Obligations Seriously," 91-108 (n.286).

383 McCorquodale and Nolan, "The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses," 471 (n.377). Emphasis added.

384 Ibid, 474.

385 See Lise Smit et al., "Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform A Legal Standard," *The International Journal of Human Rights* 25, no. 6 (2020): 945-73.

386 Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 399 (n.118).

387 Michael Mason, Lena Partzsch, and Teresa Kramarz. "The Devil Is in the Detail—the Need for a Decolonizing Turn and Better Environmental Accountability in Global Supply Chain Regulations: A Comment." *Regulation & Governance* (2023): 2.

diligence policies in the ambit of business and human rights actually are."[388]

This is especially true for domestic mHRDD laws, which are predominantly enacted by home states and characterized by extraterritoriality.[389] Laws enacted unilaterally are "inherently in conflict with international law understood as a consent-based positivist inspired project."[390] Furthermore, "the legitimacy of home state regulation will thus depend upon the extent to which it gives a voice to host state local communities."[391] As a result, ensuring the inclusion of those affected by corporate human rights abuses in GVCs in the development and implementation of domestic mHRDD laws "may serve to ensure the effectiveness of these laws in facilitating corporate accountability for impacted peoples, and diminish concerns of interference in domestic affairs, and thus infringement of the sovereignty of host states."[392] The involvement of third parties in the formulation of mHRDD law with extraterritorial implications could be incorporated as a procedural parameter concerning extraterritorial regulation.

One lesson from the Rana Plaza tragedy is that addressing corporate human rights abuse in GVCs requires transnational efforts that involve international and national endeavors as well as public and private co-governance. However, if the power asymmetry in GVCs is not taken into account, the functionality of any transnational effort will be compromised.[393] In this connection, the UN Guiding Principles advocate for states to cooperate at the international level, for example, through capacity-building and awareness-raising in multilateral institutions that deal with business-related issues.[394] Likewise, the UN Guiding Principles confirms that corporate "responsibility to respect human rights applies *fully* and *equally* to all business enterprises" regardless of their size, sector, operational context, ownership and structure.[395] Thus, while the UN Guiding Principles acknowledges the importance of cooperative governance, it does not directly address the power asymmetry at the state-[396]and corporate levels that may impede HRDD. This shortcoming could lead to resistance to mHRDD laws and hollow out HRDD as a mechanism.

To elaborate, some scholars, based on case studies, argue that current supply chain regulation cannot ensure a just sharing of human rights responsibilities among business

388 Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?," 123-24 (n.130).

389 See the discussions concerning the parameter of "extraterritorial regulation" of domestic mHRDD laws in Chapter 4 below.

390 Okowa, Phoebe. "The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation." *International & Comparative Law Quarterly* 69, no. 3 (2020): 689.

391 Seck, Sara L. "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?". *Osgoode Hall Law Journal* 46, no. 3 (2008): 568.

392 Dehbi, Fatimazahra, and Olga Martin-Ortega. "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 9 (n.118).

393 See in general, Sarah Joseph and Joanna Kyriakakis, "From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power," *Leiden Journal of International Law* 36, no. 2 (2023).

394 Commentary to Principle 10, UN Guiding Principles.

395 Ibid, Principle 14 and its Commentary. Emphasis added.

396 Chapter 7 is devoted to addressing the power asymmetry between states, particularly within the broader transnational sphere, using the perspective of the Third World Approach to International Law.

enterprises located at various tiers in a given value chain.[397] This is because “regulation of outsourcing is being outsourced to the regulated parties,”[398] making multinational companies regulate themselves and indirectly regulate the firms in their value chains, exacerbating the unjust redistribution of human rights responsibilities and risks among lead firms and suppliers.[399] A way to tackle this concern is to enhance the role of the state in monitoring the fulfilment of HRDD by corporations.[400] Another study demonstrates the unjust redistribution practices present in GVCs and calls upon lead firms to strengthen their support to suppliers, especially small and medium-sized suppliers, in their shared human rights responsibilities.[401] It is thus essential to incorporate an indicator into the procedural parameter of a smart-mix approach, viz., whether an mHRDD law contains regulatory oversight mechanisms. Two further indicators should be included under the substantive parameter of broad coverage, specifically, whether an mHRDD law (1) prohibits lead firms from exploiting their advantageous status to unevenly transfer human rights responsibilities to suppliers and other business partners and (2) mandates lead firms to support their suppliers in undertaking HRDD. These indicators are crucial for the fair distribution of responsibilities between enterprises and guide states to promote, direct, or require enterprises to assume human rights responsibilities equitably or, at the very least, to prevent irresponsible transfers of responsibility.

A relevant discussion directly related to the previous point is remedial mechanisms. The UNWG requires states to establish a “bouquet of remedies” with preventive, redressive, and deterrent elements, encompassing civil, administrative, and criminal remedies.[402] The distinct importance of civil remedies merits special attention and is a standalone indicator. This is rooted in the pivotal role that civil liability regimes play in ensuring corporate human rights accountability and offering victims a substantive pathway to meaningful redress.[403] One of the notable features of civil liability in the realm of BHR is its potential to directly enforce “a duty to fully repair harm caused to individuals and communities.”[404] This attribute is particularly significant when juxtaposing civil liabilities against administrative and criminal sanctions; the latter are important legal accountability measures but lack the potential to provide direct

397 See Rawling, "Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment," 660-77 (n.32); Sarfaty, "Shining Light on Global Supply Chains," 419-26 (n.291). See also Chapter 7 below.

398 Sarfaty, "Shining Light on Global Supply Chains," 434 (n.291).

399 See the discussion of sustainable fashion and cost transfer in Section 2.3.2 of Chapter 1 above. Section 3.3 of Chapter 7 below also addresses this issue by revealing how suppliers in Global South may be disproportionately burdened by mHRDD laws made in Europe.

400 See Sarfaty, "Shining Light on Global Supply Chains," (n.291); Landau, "Human Rights Due Diligence and the Risk of Cosmetic Compliance," (n.144); Rachel Chambers, and Anil Yilmaz Vastardis. "Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability." *Chicago Journal of International Law* 21, no. 2 (2021).

401 See Smit et al., "Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform A Legal Standard," 945-73 (n.385).

402 UN General Assembly, *Human Rights and Transnational Corporations and other Business Enterprises, Note by the Secretary-General*, A/72/162, 18 July 2022.

403 See in general Nicolas Bueno and Claire Bright, "Implementing Human Rights Due Diligence through Corporate Civil Liability," *International and Comparative Law Quarterly* 69, no. 4 (2020).

404 Quijano and Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?," 244 (n.118).

reparation to victims. As Izabela and her colleagues put it, "[c]ivil liability is the cornerstone of the broader concept of corporate accountability, which in turn is one of the primary objectives of introducing HREDD."[405] Consequently, it is imperative to assess whether an mHRDD law incorporates a civil liability regime when evaluating the effectiveness of its remedial mechanisms.

Finally, given the pivotal role of top management in the effective operationalization of HRDD and the cultivation of a corporate human rights culture, some researchers advocate elevating HRDD to the status of a fiduciary duty owed by corporate directors.[406] The UN Guiding Principles acknowledges this possibility, stipulating that "(…) business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel (…)."[407] The idea of holding individuals accountable for human rights duties is not entirely novel as an international and domestic legal practice.[408] However, the specific mechanisms for integrating HRDD into the fiduciary duty of corporate directors are unresolved.[409] In this context, whether and how legislators of mHRDD laws address the duty of directors concerning HRDD is significant. Therefore, this is incorporated as an indicator under the substantive parameter concerning top-management endorsement.

3. Methods for Assessing Mandatory Human Rights Due Diligence Laws

As stated in the section on methodology, Surya Deva's qualitative assessment method to examine mHRDD laws is the basis of the analysis here.[410] The method is employed to conduct a thorough analysis of five domestic mHRDD laws, offering a viable alternative for the evaluation of mHRDD laws and complementing conventional doctrinal and normative methods by presenting the strengths and weaknesses more concisely. The method involves four key steps: (1) identifying normative foundations, (2) formulating criteria for further analysis, (3) quantifying the criteria, and (4) conducting the evaluation. Section 1 of this chapter establishes the normative foundation, and Section 2 outlines procedural and substantive parameters for further

405 Izabela Jędrzejowska-Schiffauer et al., "Towards EU-Wide Mandatory Human Rights and Environmental Due Diligence for Business: A Breakthrough in Europe and Beyond?," *Polish Yearbook of International Law* 42 (2022): 273.

406 See Jena Martin, "Business and Human Rights: What's the Board Got to Do with It?," *University of Illinois Law Review*, no. 3 (2013). An insightful background introduction to this topic, see Ruggie, Rees, and Davis, "Ten Years After: From UN Guiding Principles To Multi-Fiduciary Obligations," (n.201).

407 Commentary to Principle 16, UN Guiding Principles.

408 See discussions concerning the precursors of BHR discourse in Section 1.1 of Chapter 2 above. A concise but precise discussion in this regard, see Joseph and Kyriakakis, "From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power," 345-46 (n.393).

409 One of the most comprehensive studies on directors' human rights duties was commissioned by the European Commission, see Ernst & Young, "Directorate-General for Justice, and Consumers, Study on Directors' Duties and Sustainable Corporate Governance–Final Report," European Commission DG Justice and Consumers (July 2020), accessed 20 December 2022, https://data.europa.eu/doi/10.2838/472901.

410 See Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 404-13 (n.118).

analysis. The objective here is to quantify the ten proposed parameters and provide further details on the methods adopted to evaluate mHRDD laws in Chapters 4 to 6.

Each parameter includes specific indicators that are crucial for the analysis of mHRDD laws. Unless otherwise specified, each indicator is assigned a score of one point; in other words, if the law assessed exhibits the characteristics described by the indicator, it receives a score of one point. To simplify this framework, each indicator is transformed into a question that can be answered with a clear affirmative (1 point) or negative (0 point) response. These questions are derived from the analysis in Section 2 above.

The first parameter, "A Smart-mix Approach," comprises five indicators that assess whether an mHRDD law: (1) contains mandatory and voluntary measures; (2) integrates international rules; (3) refers to other domestic laws and policies (of note, under the third indicator, the reference to every domestic law or policy is assigned a score of one point); (4) includes incentive mechanisms (one point assigned for each incentive mechanism)); and/or (5) encompasses regulatory oversight mechanisms.

The second parameter, "Policy Coherence," is defined by two indicators: (1) whether an mHRDD law contains provisions requiring the state to factor in HRDD in bilateral and/or multilateral instruments and (2) whether a state enacting mHRDD legislation has established a BHR NAP. While referring to a BHR NAP may not be strictly necessary, as discussed in Section 2, having such a NAP is significant for ensuring policy coherence within the state. It is not difficult to obtain information about a BHR NAP, and including it in this procedural parameter complements the evaluation of the degree of policy coherence.

The third parameter, "Extraterritorial Regulation," comprises two indicators: (1) whether an mHRDD law has extraterritorial implications; and (2) whether third parties outside the jurisdiction of the state were included in the law's formulation.

The fourth parameter, "Remedial Mechanisms," is structured around three indicators that concern whether an mHRDD law: (1) includes state-based judicial mechanisms and non-judicial mechanisms and satisfies the requirement for government support to facilitate operational-level grievance mechanisms (due to the significance of each of the three remedial mechanisms, a point is assigned for each one contained in a particular law); (2) contains a dedicated civil liability regime; and (3) provides support to reduce barriers to access to remedies.

The fifth parameter, "Ongoing Process," is gauged by whether an mHRDD law mandates companies to consistently engage in HRDD. Given that these laws tend to rephrase the concept of HRDD outlined in the UN Guiding Principles, unless a law explicitly demands companies conduct HRDD only once, all laws are automatically assumed to score one point for this indicator.

The sixth parameter, "Broad Coverage," includes three indicators: (1) the applicability of the laws to all business entities; (2) the inclusion of a comprehensive definition of human rights; and (3) the imposition of distinct obligations for different types of corporate human rights abuses.

The seventh parameter, “Contextual Particularity,” is assessed by four indicators, including whether an mHRDD law (1) permits companies to tailor HRDD measures based on their specific business context; (2) requires companies to give special consideration to vulnerable groups; (3) requires businesses to support SMEs in conducting HRDD; and (4) prohibits companies from exploiting their advantageous status to unevenly transfer human rights responsibilities.

The eighth parameter, “Top-management Endorsement,” comprises two indicators, viz., whether an mHRDD law (1) requires top-management endorsement of corporate human rights policies and (2) assigns HRDD responsibilities to corporate directors.

The ninth parameter, “Stakeholder Engagement,” includes three indicators, i.e., whether an mHRDD law (1) requires companies to consult with stakeholders in implementing HRDD; (2) clarifies the scope of stakeholder engagement and defines the term of stakeholder (with one point for each sub-indicator); and (3) confers decision-making powers to stakeholders during the consultation process.

The last parameter, “Operational-level Grievance Mechanisms,” is evaluated through a single indicator, viz., whether an mHRDD law requires companies to put in place an operational-level grievance procedure. Utilizing a single indicator to appraise operational-level grievance mechanisms does not imply a lack of significance. Instead, the reason for employing this straightforward metric is the acknowledgment of its profound importance, requiring a more exhaustive analysis that goes beyond the scope of this study.[411] This simple indicator is adopted to assess the performance of mHRDD laws with respect to operational-level grievance mechanisms to ensure a comprehensive analysis of mHRDD laws.

Based on the preceding discussions, Table 3 below presents the analytical framework for assessing mHRDD laws across domestic, regional, and international contexts. Without considering the scenarios in which a single indicator receives multiple or zero scores, the minimum full score for an mHRDD law is 26 points, representing an ideal type of legislation within the framework. However, earning 26 points or more does not make an mHRDD law perfect. Importantly, this framework is limited, addressing only the most prominent and vital issues in the mHRDD laws evaluation; it would not be feasible to incorporate all direct and indirect criteria into a singular analytical framework. In addition, the selection of these standards may, despite the intent to maintain neutrality, reflect particular interpretative perspectives. Consequently, the theoretical framework proposed is open to critique. Nevertheless, it is anticipated that this research will contribute to existing comparative and critical studies on mHRDD laws, both in terms of research methods and substantive insights.

411 For one of the most systematic studies on the effectiveness of operational-level grievance mechanisms, see International Commission of Jurists, "Effective Operational-level Grievance Mechanisms," (November 2019), accessed 15 December 2022, https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf.

Table 3 Analytical Framework for Evaluating mHRDD Laws[412]

Parameters		Indicators	Scores
1. A Smart-mix Approach	1	Law contains mandatory and voluntary measures	1
	2	Law integrates international rules	1
	3	Law refers to other domestic laws and policies	≥0
	4	Law includes incentive mechanisms	1
	5	Law encompasses regulatory oversight mechanisms	1
2. Policy Coherence	6	Law contains provisions requiring the state to factor in human rights due diligence in bilateral and/or multilateral instruments	1
	7	Whether a state enacting mHRDD has established a BHR NAP	1
3. Extraterritorial Regulation	8	Law has extraterritorial implications	1
	9	Whether the formulation of an mHRDD law with extraterritorial implications involves consultation with third parties outside the jurisdiction of the state	1
4. Remedial Mechanisms	10	Law includes state-based judicial mechanisms, state-based non-judicial mechanisms, and the requirement for government support to facilitate operational-level grievance mechanisms	0-3
	11	Law contains a dedicated civil liability regime	1
	12	Law provides support to reduce barriers to access to remedies	1
5. Ongoing Process	13	Law mandates companies to consistently engage in human rights due diligence	1
6. Broad Coverage	14	Law applies to all business entities	1
	15	Law adopts a comprehensive definition of human rights	1
	16	Law imposes distinct obligations for different types of corporate human rights abuses	1
7. Contextual Particularity	17	Law permits companies to tailor human rights due diligence measures based on their specific business context	1
	18	Law mandates companies to give special consideration to vulnerable groups	1
	19	Law requires businesses to support SMEs in conducting human rights due diligence	1
	20	Law prohibits companies from exploiting their advantageous status to unevenly transfer human rights responsibilities	1
8. Top-Management Endorsement	21	Law mandates top-management endorsement of corporate human rights policies	1
	22	Law assigns human rights due diligence responsibilities to corporate directors	1
9. Stakeholder Participation	23	Law compels companies to engage with stakeholders in implementing human rights due diligence	1
	24	Law clarifies the scope of stakeholder engagement and defines the term "stakeholder"	0-2

412 This table is originally formulated by this research based on the discussions in Sections 2&3 above.

	25	Law confers decision-making powers to stakeholders during the consultation process	1
10. Operational-level Grievance Mechanisms	26	Law mandates companies to establish an operational-level grievance procedure	1

PART III EVALUATING MANDATORY HUMAN RIGHTS DUE DILIGENCE LAWS

CHAPTER 4 MANDATORY HUMAN RIGHTS DUE DILIGENCE LAWS AT DOMESTIC LEVEL

The emergence of mHRDD laws signifies the latest progress in the fields of BHR as well as global supply chain law. Although legislative activities of a comparable nature take place globally, substantive mHRDD laws are predominantly enacted in Europe. This chapter kicks off Part III of the research, centered on evaluating domestic mHRDD laws. It comprises five sections. Section 1 maps a general landscape of mHRDD laws at the domestic level, delimitating the research scope. Sections 2 to 4 are devoted to assessing the French Duty of Vigilance Law, the German Supply Chain Act, and the Norwegian Transparency Act. The analytical framework developed in Chapter 3 is employed to assess these laws. Section 5 concludes this chapter by undertaking a comparison of the three domestic mHRDD laws.

1. Scoping the Terrain: An Overview of Domestic Mandatory Human Rights Due Diligence Laws

In a border context, regulatory due diligence pertaining to human rights has been observed in domestic legal systems globally. For example, the neglect of due diligence in occupational health and safety in Canada and the Netherlands may result in administrative penalties.[413] Likewise, the failure to conduct due diligence for environmental protection in a construction project in Germany and for industrial waste proposal practices in the U.S. may lead to administrative violations or criminal offenses.[414] While these applications of due diligence as a regulatory technique are somewhat relevant to human rights protection, they do neither directly address human rights issues in GVCs nor contain a comprehensive process akin to HRDD. Consequently, these general due diligence legislative practices are not within the scope of this research.

Another general due diligence legal mechanism with particular significance is the Italian *Legislative Decree 231/2001 pertaining to regulation on administrative responsibility of legal entities, companies and associations, including those not having a personality* (L.D. 231/2001).[415] Due to the similarity of the "231 Procedure" within

413 See Schutter et al., *Human Rights Due Diligence: The Role of States*, 19-20 (n.120).

414 Ibid, 20-21. See also Section 1.1 in Chapter 3 of this research.

415 DECRETO LEGISLATIVO 8 giugno 2001, n. 231, Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300,

this law and HRDD, L.D. 231/2001 is considered “a pioneer example of mandatory due diligence legislation.”[416] In essence, L.D. 231/2001 established administrative corporate liability (a *tertium genus*)[417] for crimes committed in the interests or to the advantages of a legal entity (Art. 5), including criminalized offenses (*reati presupposto)* “that may be directly relevant to the protection of human rights.”[418] It applies broadly to various business entities, including corporate entities, companies, and associations, regardless of whether they have a legal personality (Art. 1.2). Also, L.D. 231/2001 has jurisdiction over Italian companies’ wrongdoings abroad (Art. 4) and foreign companies’ violations when part of the action or omission occurs within Italian territory.[419]

Companies are required to adequately establish and effectively implement a due diligence process known as “231 Procedure” (Art. 6.1), which provides a due diligence defense for companies and other relevant entities by providing specific exemption from liability if they can demonstrate compliance.[420] In this regard, companies are required to establish a procedure to: (1) identify risky activities; (2) provide protocols and decision-making processes for prevention; (3) establish procedures for managing financial resources to prevent crimes; (4) disclose information to the supervisory body; and (5) introduce a suitable disciplinary system to punish non-compliance with the model (Art. 6.2). Effective implementation requires periodic evaluations and adjustments of the procedure, along with the establishment of a disciplinary mechanism (Art. 7.4).

In the case of a violation, a company may be subject to administrative sanctions and disqualification (Art. 9). L.D. 231/2001 predates the UN Guiding Principles and is not per se a mHRDD law, as it was not specifically directed at protecting human rights in GVCs. However, its evolving focus on human rights issues, such as slavery, human trafficking, and forced labor, aligns with the advancement of the CSR and BHR movements.[421] This alignment makes it an important reference point for mHRDD legislation. Nevertheless, it is excluded from the scope of this research, as its provisions, including the “231 Procedure,” do not derive from the UN Guiding Principles—the

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https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2001-06-19&atto.codiceRedazionale=001G0293&atto.articolo.numero=0&atto.articolo.sottoArticolo=1&atto.articolo.sottoArticolo1=0&qId=97b16e4e-655b-49b7-827d-64154422c57c&tabID=0.779320616716181&title=lbl.dettaglioAtto.

416 FIDH et al., "Italian Legislative Decree No. 231/2001: A Model for Mandatory Human Rights Due Diligence Legislation," (November 2019): 4, accessed 20 December 2022, https://media.business-humanrights.org/media/documents/files/documents/report_231_2001_ENG.pdf.

417 Built upon the Roman law tradition, which posits that a legal entity cannot commit a crime, the Italian Constitution establishes that criminal responsibility is personal. Consequently, the Italian legislature has crafted an intermediate framework of “administrative corporate liability” for L.D. 231/2001, representing a *tertium genus*—a third type of liability that amalgamates elements of both criminal and administrative systems. Ibid, 6-7.

418 Marco Fasciglione, "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* 10, no. 1 (2016): 111.

419 See FIDH et al., "Italian Legislative Decree No. 231/2001: A Model for Mandatory Human Rights Due Diligence Legislation," 16 (n.416).

420 See Fasciglione, "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," 111-12 (n.418).

421 See FIDH et al., "Italian Legislative Decree No. 231/2001: A Model for Mandatory Human Rights Due Diligence Legislation," (November 2019): 9-11, 19 (n.416).

normative foundation of this research.

In a narrower sense, national laws incorporating HRDD based on the UN Guiding Principles are evident in various types of national laws. As detailed in Section 1.4.2 of Chapter 2, mandatory disclosure laws could be considered a sort of mHRDD (-esque) law. Given these laws typically do not place substantive obligations on companies to identify, prevent, mitigate, and address human rights abuses, they fall outside the scope of this research.

Additionally, this research does not include the Dutch Child Labor Due Diligence Act (Dutch Act) and the Swiss Federal Ordinance on Conflict Minerals and Child Labor (Swiss Federal Ordinance), despite some scholars categorizing them as mHRDD laws. One typical reason given for this exclusion is that both the Dutch Act and the Swiss Federal Ordinance lack substantive due diligence obligations covering a broad spectrum of human rights within the general context of GVCs, as envisioned by the UN Guiding Principles.[422] Other factors for excluding the Dutch Act include its requirement for only a single round of the HRDD process,[423] which does not fit with the normative requirements of the UN Guiding Principles. Additionally, there is a chance that the Dutch Act may never come into effect, as the Dutch legislature is contemplating a more holistic mHRDD law.[424] Regarding the Swiss Federal Ordinance, its hybrid nature as both a mandatory disclosure law and a mHRDD law renders it unqualified for inclusion in this research.[425]

Taken all together, to ensure comparability across different mHRDD laws and the operationality of the proposed analytical framework, only domestic mHRDD legislation meeting the fundamental requirements of the UN Guiding Principles to impose substantive corporate HRDD is examined by this research. The purpose of this comparative legal study is to theoretically examine the effectiveness of different mHRDD laws that possess varied features. And in most cases, "legal effectiveness research begins by identifying the goals of legal policy and moves to assess its success or failure by comparing the goals with the results produced."[426] Therefore, the analysis of domestic, regional, and international laws in terms of mHRDD commences with an

422 For a similar argument, see Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 930 (n.118).

423 Entities falling under the purview of the law are obligated to submit a statement to the designated superintendent declaring that they have carried out child labor due diligence across their entire supply chains. Presently, there are no stipulated requirements for such a statement. And the submission of the statement is a one-time obligation with long-term validity. See Mvoplatform, "Update: Frequently Asked Questions about the New Dutch Child Labour Due Diligence Law," (3 June 2019), accessed 20 December 2022, https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/.

424 See Enneking, "Putting the Dutch Child Labour Due Diligence Act into Perspective," 23 (n.131).

425 The Swiss due diligence legislation establishes general non-financial reporting obligations for large companies on environmental, social and labor-related issues, human rights, and measures against corruption. In addition, it imposes human rights due diligence obligations on two categories of companies: (1) companies importing or processing minerals or metals in Switzerland, including tin, tantalum, tungsten, or gold originating from conflict-affected and high-risk areas, surpassing a defined threshold; and (2) companies selling goods or services when there are reasonable grounds to suspect that their production involved child labor. See Bueno and Kaufmann, "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics," 545-47 (n.132).

426 Sarat, "Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition," 23 (n.374).

examination of the legislative background. This is followed by an analysis and assessment of the legal text.

2. The French Duty of Vigilance Law

2.1 Background of the French Duty of Vigilance Law

On March 27, 2017, the French Duty of Vigilance of Parent and Instructing Companies Law (the French Duty of Vigilance Law) was enacted. It is the "first comprehensive and legally binding human rights due diligence regulation worldwide,"[427] marking "a historic step towards making globalization work for all."[428] As a response to corporate human rights abuses in GVCs, especially the Rana Plaza tragedy, the French Duty of Vigilance Law is often referred to as the "Rana Plaza law."[429] It establishes a legally binding obligation for targeted parent companies. This obligation involves the identification and prevention of adverse human rights and environmental impacts stemming from their own activities, those of the companies under their control, and those of their subcontractors and suppliers with whom they maintain a commercial relationship. Despite its good intentions, the French Duty of Vigilance Law encountered significant opposition from various business entities and interest groups. Critics contended that the Law would impose disproportionate bureaucratic burdens on both the French state and companies, potentially diminishing France's competitiveness and leading companies to withdraw from the French market.[430] Others even assert that the "(legal) text is totally anti-business."[431]

There was also considerable backing for the French Duty of Vigilance Law, with a group of experts figuring out the dual function of the Law: safeguarding the public interest and averting severe damages. Moreover, as they put it, "[b]y protecting the general interest and preventing serious damage, it (the Law) would also protect its (French) companies, which both at the reputational and financial level are today

427 Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?," 110 (n.130).

428 Cossart, Chaplier, and Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All," (n.130).

429 See Guillaume Delalieux, "Corporate Duty of Vigilance in France: The Path of An Improbable Statute," *Droit et société* 106, no. 3 (2020): 649. See also, Sandra Cossart and Roula Mamlouk, "10 Years on from Rana Plaza: Is France's Duty of Vigilance Law Living up to Its Promise?," Cambridge Core blog (6 June 2023), accessed 20 December 2022, https://cupblog.bluefusesystems.com/2023/06/06/10-years-on-from-rana-plaza-is-frances-duty-of-vigilance-law-living-up-to-its-promise/.

430 Assemblée Nationale, *AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE SUR LA PROPOSITION DE LOI (n° 2578), relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, by Mr. Dominique Potier, 11 March 2015, statement of Mr. Philippe Houillon, https://www.assemblee-nationale.fr/14/rapports/r2628.asp. The quote is translated by the author.

431 Assemblée Nationale, *AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE SUR LA PROPOSITION DE LOI (n° 2578),* statement of Mr. Guillaume Larrivé. The quote is translated by the author.

exposed to great risks due to the lack of a stabilized legal framework."[432] In other words, "[m]ore than a weakening of competition, the leading position on the values of protection of human rights and the environment, inscribed in the French tradition, would undoubtedly give our country (France) a comparative advantage supported by the overwhelming majority of citizens," "France could thus be proud of showing the way at the European level."[433]

Likewise, French MP Dominique Potier asserted that "[w]e are made responsible by the fragile. Now, what does it mean to be made responsible?" "While most French and European law, inspired by the Enlightenment, aims to protect the individual, through their fundamental freedoms, from a despotic then totalitarian State, the contemporary world, under the effect of globalization, is characterized by the emergence of a new generation of rights, more collective: it is now a question of protecting the weak in new forms." And the French Duty of Vigilance Law is such a new form "of defending to the ends of the Earth what we value." This Law "creates a new dynamic and system," allowing not to "resolve all the misfortunes of the world" but to contribute to "a new generation of rights, for a more humane globalization, an economic civilization that embodies our values and makes us proud." In short, France "would be the first time that a country in the world" establishes "concrete measures and a global system that applies throughout the production chain: parent companies, subsidiaries, and subcontractors." [434]

In the same regard, Anne-Yvonne Le Dain argued, "it is normal for France to develop a law that will apply to everyone." "In this way, we (France) fit well, as a power, into the international economic dynamic in a world that has changed a lot and continues to evolve (…)." And "[i]n developing and emerging countries, human societies aspire to democracy, more wealth, more comfort, and more security." "The French legislature cannot therefore remain indifferent, pretend not to see it, and continue to 'pass the buck' to international bodies."[435]

It is thus evident that beyond the public outcry triggered by the Rana Plaza tragedy, the final adoption of the French Duty of Vigilance Law can be attributed to various factors. These include the prevailing French national political culture, a center-left government during that period, and the appointment in 2016 of a Minister of Economy and Industry who endorsed such legislation.[436] Furthermore, continuous efforts by CSOs played a crucial role.[437] While CSOs advocating for robust human rights regulations significantly contributed to the Law's adoption, the final text underwent substantial dilution due to intense lobbying by employers' organizations and business

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432 Assemblée Nationale, *AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE SUR LA PROPOSITION DE LOI (n° 2578),* Contribution of the Ecologist Group. The quote is translated by the author.

433 Ibid.

434 Ibid, Statement of Dominique Potier. The quote is translated by the author.

435 Ibid, Statement of Ms. Anne-Yvonne Le Dain. The quote is translated by the author.

436 See Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?," 115 (n.130).

437 See Delalieux, "Corporate Duty of Vigilance in France: The Path of an Improbable Statute," 649 (n.429).

associations.[438] This resulted in a narrow scope of application, limited to larger companies surpassing specific thresholds, and a failure to reverse the onus of proof of victims.[439] To be more specific, in contrast to the initial legislative proposal that sought to cover all companies based in France, the adopted Law now applies solely to larger companies exceeding a particular threshold of employees and turnovers—approximately 260 companies fall under its jurisdiction.[440]

Even after its enactment, the French Duty of Vigilance Law faced challenges, with 120 right-wing legislators from both chambers referring it to the French Constitutional Council on grounds of unconstitutionality.[441] Fortunately, the Frech Constitutional Council ruled that the majority of the Law's text aligns with constitutional principles, excluding the civil fine for non-compliance with the duty of vigilance.[442] Despite these challenges, the French Duty of Vigilance Law remains pivotal for humanizing GVCs through legislating mHRDD laws. Its significance lies in, at least, sparking a legislative bandwagon in Europe and serving as a tangible example for other jurisdictions. As envisioned by its legislators, "[w]ith this text, France adopts a pioneering position that is intended to be followed by the member countries of the European Union. History shows that social and human progress, once initiated, continues its march."[443]

2.2 Content of the French Duty of Vigilance Law

The French Duty of Vigilance Law is comprised of three articles, with key provisions enacted as Art. L. 225-102-4 (Article 1) and Art. L. 225-102-5 (Article 2) of the French Commercial Code (*Code de Commerce*). Article 1 primarily delineates the personal and material scopes, the content of the vigilance duty, and the enforcement provisions of the Law. As per this Article, the French Duty of Vigilance Law is applicable to two categories of companies, i.e., those incorporated or registered in France for two consecutive fiscal years that either (1) employ at least 5,000 people themselves and through their direct and indirect subsidiaries whose registered office is located within the French territory; or (2) employ at least 10,000 people themselves and through their direct and indirect subsidiaries whose registered office is located within

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438 See Cossart, Chaplier, and Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All," 317 (n.130).

439 See Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?," 116 (n.130).

440 Since the adoption of the French Duty of Vigilance Law, there is not an official list of companies subject to its jurisdiction. A CSO, Duty of Vigilance Radar (le radar du devoir de vigilance) operates a non-exhaustive database that lists the name, and the published vigilance plans of targeted companies. At the time of this writing, there are 263 companies are listed in the database. See "The List of Companies," Duty of Vigilance Radar, accessed 3 December 2023, https://vigilance-plan.org/search/.

441 See Cossart, Chaplier, and Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All," 317-18 (n.130).

442 Ibid, 318.

443 Assemblée Nationale, *AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE SUR LA PROPOSITION DE LOI (n° 2578), relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, by Mr. Dominique Potier, 11 March 2015, II.B.4 "The vigilance plan, the keystone of the proposed law." The quote is translated by the author.

the French territory or abroad.

These targeted companies are required to undertake a threefold due diligence obligation (devoir de vigilance) to establish, disclose, and effectively implement a vigilance plan (plan de vigilance). This plan should include reasonable vigilance measures to adequately identify risks and to prevent severe impacts on human rights, fundamental freedoms, individual health and safety, and the environment,[444] arising from the activities of the company itself, the companies it controls, and the activities of subcontractors or suppliers with whom they maintain an established commercial relationship. According to Art. L. 442-6-I-5 of the French Commercial Code, "an established commercial relationship" (une relation commerciale établie) is defined as "a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last."[445]

For a vigilance plan to be deemed reasonable and adequate, it should contain five core elements: (1) a risk mapping designated to identify, analyze, and prioritize risks; (2) regular evaluation procedures concerning the risk status of subsidiaries, subcontractors, or suppliers with whom there is an established commercial relationship, aligned with the risk mapping; (3) appropriate measures to mitigate risks or prevent severe impacts; (4) an alert and complaint mechanism pertaining to the existence or realization of risks, developed in consultation with representative trade union organizations within the company; and (5) a scheme monitoring the implementation and assessing their effectiveness.

The Law emphasizes collaboration with stakeholders in the formulation of a vigilance plan, encouraging engagement in multi-stakeholder initiatives within sectors or at the territorial level where appropriate. The vigilance plan, along with a report on its implementation, should be published and included in a company's annual social and environmental report, as articulated in Art. L. 225-102 of the French Commercial Code. Additionally, Article 1 specifies that details and expansions on the contents of the vigilance plan may be subject to a decree issued by the Conseil d'État.[446] This potential elaboration and expansion may consider multi-stakeholder initiatives within sectors or at the territorial level.

Subparagraph II of Article 1 and Article 2 deals with enforcement and remedy, respectively. In terms of enforcement and monitoring, the French Duty of Vigilance Law adopts a "co-regulatory approach," recognizing the role of a company in its own

444 While most mHRDD laws discussed in this research at domestic, EU, and international levels address environmental concerns to varying degrees, this research primarily focuses on human rights issues.

445 See Cossart, Chaplier, and Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All," 320 (n.130).

446 As of now, the French public authority has not issued any guidance on the enforcement of corporate due diligence obligations, particularly regarding the five core elements of the vigilance plan. There is currently no indication of an imminent decree addressing this matter. See Savourey and Brabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption," 146-47 (n.130).

regulation and its expertise in its own market and strategy.[447] Hence, there is no administrative supervision or sanction in the Law. Instead, it stipulates that any person with locus standi can issue a formal notice to a company, demanding compliance with the threefold due diligence obligation. If a company fails to satisfy its due diligence obligations after three months of receiving the formal notice, any person with locus standi can submit a complaint to a competent court.[448] Then, the qualified court may order the company to fulfil its due diligence obligations and impose periodic penalty payments.

As for remedy, the French Duty of Vigilance Law stands out as the only domestic mHRDD law that establishes a civil liability regime for corporate violations. Article 2 of the Law specifies that victims of businesses failing to comply with their vigilance plan or with an inadequate vigilance plan can seek damages for negligence. Notably, the due diligence duty in the French Duty of Vigilance Law is inherently a standard of conduct rather than a result. In other words, civil liability under this Law is fault-based, holding companies accountable only if they have been negligent or intentionally failed to fulfill their due diligence obligations.[449] Consequently, if a company implements a vigilance plan while adhering to the binding content and quality of the plan, it should not be held liable, even if damages occur.[450] Moreover, given that it is an obligation of process and not results, according to French law, the burden of proof rests on the injured party, who has to prove that the corporate failure to comply with due diligence obligations led to the harms suffered.[451]

2.3 Evaluation of the French Duty of Vigilance Law

(1) **A Smart-mix Approach**: The French Law encourages companies and the Conseil d'État to consider multi-stakeholder initiatives within sectors or at the territorial level when formulating a vigilance plan or detailing the requirements for such a plan. Since most multi-stakeholder initiatives are voluntary, the French Duty of Vigilance Law secures 1 point under Indicator 1.[452]

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447 See Juliette Camy, "The French Law on the Duty of Vigilance: the Challenges of the Preventive Approach," Cambridge Core blog (29 June 2023), accessed 15 December 2023, https://www.cambridge.org/core/blog/2023/06/29/the-french-law-on-the-duty-of-vigilance-the-challenges-of-the-preventive-approach/.

448 There has been burning discussions regarding the jurisdiction under the French Duty of Vigilance Law, specifically whether a commercial court or a civil court should be in charge. In a recent case, the Paris civil court was deemed to have appropriate jurisdiction to address litigation arising from this Law. See Sherpa, "Climate Litigation against Total: the Versailles Court of Appeal confirms the Jurisdiction of the Judicial Court," (Paris, 18 November 2021), accessed 15 December 2023, https://www.asso-sherpa.org/climate-litigation-against-total-the-versailles-court-of-appeal-confirms-the-jurisdiction-of-the-judicial-court.

449 See Bueno and Bright, "Implementing Human Rights Due Diligence through Corporate Civil Liability," 802-04 (n.403).

450 See European Coalition for Corporate Justice, "French Duty of Vigilance Law-Frequently Asked Questions,", (Brussels, 24 March 2017): Section 7, accessed 20 December 2022, https://corporatejustice.org/wp-content/uploads/2021/04/french-corporate-duty-of-vigilance-law-faq-1.pdf.

451 See Cossart, Chaplier, and Beau De Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All," 321 (n.130).

452 Additionally, a French ambassador contends that the introduction of the "company with a mission" provision

Although the Law does not directly mention the UN Guiding Principles, the recitals thereof specify that the establishment and implementation of the vigilance plan correspond to the concept of HRDD outlined in the UN Guiding Principles.[453] Thereby, this landmark Law "is explicitly intended to enshrine these (BHR) soft law norms in positive law,"[454] earning 1 point under Indicator 2.

Referring to the social and environmental disclosure regime in Art. L. 225-102 of the French Commercial Code as well as the civil liability regime, the Law integrates with other domestic laws, garnering 2 points under Indicator 3.

In terms of incentive mechanisms, the French Duty of Vigilance Law itself lacks such provisions. However, the French Climate Change and Resilience Law is a complement to it.[455] As stated in Article 35 of the latter, public buyers have the authority to disapprove enterprises from procurement operations if they fail to fulfill due diligence obligations under the French Duty of Vigilance Law.[456] This provides a beneficial incentive mechanism for businesses to comply with due diligence obligations, earning the French Duty of Vigilance Law 1 point under Indicator 4.

Then, it is evident from the above content analysis that the French Duty of Vigilance Law does not incorporate a regulatory monitoring regime. Instead, its enforcement predominantly relies on the judiciary rather than administrative oversight, resulting in a score of 0 point under Indicator 5.

(2) **Policy Coherence**: The French Duty of Vigilance Law does not explicitly mention bilateral and multilateral instruments. And the *French National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights* was adopted in 2017.[457] In this connection, the Law receives 0 and 1 point under Indicator 6 and Indicator 7, respectively.

(3) **Extraterritorial Regulation**: As per Article 1 of the French Duty of Vigilance Law, the primary targets thereof are larger companies incorporated or registered in France that meet certain thresholds of employees and turnovers. More importantly, the

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to the French Action Plan for Business Growth and Transformation Law complements the French Duty of Vigilance Law by providing a voluntary measure. This provision requires company management to consider social and environmental challenges. See Odile Roussel, "Paving the Way: The Pioneering Role of the French Duty of Vigilance Law and Its Relevance for EU-Level Mandatory Due Diligence," Business and Human Rights Recourses Centre (18 December 2020), accessed 15 December 2023, https://www.business-humanrights.org/en/blog/paving-the-way-the-pioneering-role-of-the-french-duty-of-vigilance-law-and-its-relevance-for-eu-level-mandatory-due-diligence/.

453 See "French Duty of Vigilance Law-Frequently Asked Questions," Section 4.

454 See Sherpa, "Vigilance Plans Reference Guidance," (Paris, June 2019): 11, accessed 15 December 2023, https://vigilance-plan.org/wp-content/uploads//2019/06/2019-VPRG-English.pdf.

455 LOI n° 2021-1104 du 22 août 2021 portant lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets (1) (Law on the Fight Against Climate Change and Strengthening Resilience to Its Effects), https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043956924.

456 5° of Article 35.II reads as "Art. L. 2141-7-1.-The buyer may exclude from the procurement procedure persons subject to article L. 225-102-4 of the commercial code who do not meet the obligation to establish a vigilance plan, including the measures provided for in the same article L. 225-102-4, for the year preceding the year of publication of the call for competition or initiation of the consultation. Such consideration cannot be such as to restrict competition or make the performance of the service technically or economically difficult." Translated by the author.

457 *The National Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights*, France Diplomacy, April 2017, https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/business-and-human-rights/article/the-national-plan-for-the-implementation-of-the-united-nations-guiding.

same article explicitly requires companies under its purview to undertake three-fold due diligence obligations. These obligations require larger companies concerned to ensure compliance not only within their own operations but also extend to the companies they control, as well as the activities of subcontractors or suppliers with whom they maintain an established commercial relationship. In practice, the actors beyond the directly targeted company form the value chain of a company, with the targeted company acting as the lead firm in this chain. This two-tier regulatory model (Figure 5), mandating lead firms to oversee their value chain, can be viewed as a form of "regulating outsourcing by outsourcing regulation" to these lead firms.[458] Given the cascading nature of the globalized production network, the Law can impact, at least indirectly, the entire supply chain through direct regulation of lead firms under its jurisdiction. As Odile Roussel plainly put it, "[d]ue to the globalization and complexity of supply chains, the (French Duty of Vigilance) law has an extra-territorial dimension and indirectly affects companies below the threshold, via the supply chain due diligence of those companies above the threshold."[459]

In this connection, the definition of "value chain" (or "supply chain") not only substantively determines the regulatory scope of the Law but also frames the purpose of regulation, indicating the general design philosophy of governance.[460] Moreover, the legalization of "value chain" through domestic mHRDD laws serves as "an avenue by which home states can potentially set environmental and human rights-related norms for third-party suppliers and their host governments via multinational companies."[461] Hence, the extraterritorial implications of the French Duty of Vigilance Law (as well as other domestic mHRDD laws discussed below) are evident, scoring it 1 point under Indicator 8.

Considering the highly globalized and intertwined world, it is challenging to assert whether the formulation of a mHRDD law with extraterritorial implications involves consultation with third parties outside the jurisdiction of the legislator. Nonetheless, according to some authoritative scholars, foreign third parties, especially those located in the Global South, are largely excluded from the legislative and implementing process of mHRDD laws made in the Global North.[462] Consequently, Indicator 9 merits 0 point.

(4) **Remedial Mechanisms**: The French Duty of Vigilance Law distinguishes itself

458 See Sarfaty, "Shining Light on Global Supply Chains," esp. 434-37 (n.291).

459 Odile Roussel, "Paving the Way: The Pioneering Role of the French Duty of Vigilance Law and Its Relevance for EU-Level Mandatory Due Diligence," (n.452).

460 See Salminen and Rajavuori, "Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and A Framework for Analysis," 617-20 (n.142).

461 Sarfaty, "Shining Light on Global Supply Chains," 420 (n.291). See also Section 3.2.1 of Chapter 7 in this research.

462 Lichuma, "(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains," (n.140); Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," (n.118); Michael Mason, Lena Partzsch, and Teresa Kramarz, "The Devil Is in the Detail—the Need for a Decolonizing Turn and Better Environmental Accountability in Global Supply Chain Regulations: A Comment," (n.387).

from other domestic mHRDD laws (as discussed below) by formulating a dedicated civil liability regime, while it lacks additional support for victims in accessing civil remedies. This state-based judicial mechanism is complemented by a NCP, serving as a state-based non-judicial mechanism, given France's membership in the OECD.[463] As of the latest information, the French NCP has received 36 special instances,[464] covering issues within the material scope of the OECD Guidelines, such as human rights, industrial relations, and environment protection. However, the French Duty of Vigilance Law does not require any public support for the establishment and implementation of operational-level grievance mechanisms. Consequently, it accrues 2 points under Indicator 10, 1 for Indicator 11, but 0 for Indicator 12.

(5) **Ongoing Process**: Examining the mandatory elements of a vigilance plan, the second element thereof requires companies to conduct periodical assessment procedures, evaluating the risk status of entities within their value chains. The fifth element further requires companies to put in place a regime for monitoring and evaluating the implementation of the vigilance plan. Therefore, the French Duty of Vigilance Law secures 1 point under Indicator 13.

(6) **Broad Coverage**: The French Duty of Vigilance Law should have applied to all kinds of businesses. However, due to the fierce opposition of business associations and national interest groups, the ambitious legislative proposal was diluted. The Law now covers only large companies that satisfy both thresholds of employees and turnovers. Consequently, it scores 0 point under Indicator 14. Nonetheless, the material scope of the French Law is broader than the UN Guiding Principles, encompassing not only all human rights and fundamental freedoms, individual safety, and health but also environmental aspects. This wide coverage of material scope is a notable merit, earning it 1 point under Indicator 15. Lastly, from the elaboration on the legal text, the French Duty of Vigilance Law does not articulate different obligations for various types of corporate human rights abuses. Thus, it scores 0 point under Indicator 16.

(7) **Contextual Particularity**: Article 1 of the French Duty of Vigilance Law requires companies to establish and maintain a vigilance plan comprising five elements. Among them, the first element involves prioritizing identified risks; the second requires conducting periodic value chain risk assessments based on the risk mapping; and the third calls for implementing appropriate responsive measures. These provisions afford companies certain policy space to customize their measures for fulfilling HRDD, earning the Law 1 point under Indicator 17. However, the French Duty of Vigilance Law does not mandate companies to give special consideration to vulnerable groups nor does it require them to support and not exploit their supply chain partners in terms of conducting HRDD. Therefore, it

463 For a comprehensive introduction to the French National Contact Point, see "NCP France," OECD Watch (6 December 2023), accessed 15 December 2023, https://www.oecdwatch.org/ncp/ncp-france/.

464 For more details of these special instances, see OECD Database of Specific Instances, accessed 15 December 2023, https://mneguidelines.oecd.org/database/?hf=50&b=0&q=NCP%3A(France).

scores 0 point under Indicators 18, 19, and 20.

(8) **Top-Management Endorsement**: Neither the French Duty of Vigilance Law explicitly mandates top-management endorsement in the formulation of a vigilance plan nor assigns HRDD obligations to corporate directors. Consequently, this Law receives 0 point under Indicators 21 and 22.

(9) **Stakeholder Participation**: The French Duty of Vigilance Law only suggests companies develop a vigilance plan in collaboration with stakeholders of the company.[465] While it explicitly outlines the boundaries of stakeholder engagement in the formulation of such a plan, it falls short in defining the term "stakeholders" and granting certain decision-making power to stakeholders in this collaborative process. Thus, the French Duty of Vigilance Law receives 0 point under Indicator 23, 1 point under Indicator 24, and 0 point under Indicator 25.

(10) **Operational-level Grievance Mechanism**: The French Duty of Vigilance Law does not require government institutions to actively support the creation and functioning of operational-level grievance mechanisms. However, it mandates companies under its scope to develop an alert and complaint mechanism regarding the existence or realization of risks in the vigilance plan. In this regard, the Law accrues 1 point under Indicator 26.

Taken all together, the French Duty of Vigilance Law achieves 15 points out of a (minimum) possible 26 based on the analytical framework. From the scoresheet of the French Duty of Vigilance Law in Table 4 as well as the analysis provided above, the merits and demerits of the Law are evident. It demonstrates strengths in various aspects, such as the implementation of a smart-mix approach, integration of domestic laws, creation of a dedicated civil liability regime, and broad material scope, among others. However, it also underlines shortcomings in areas such as regulatory oversight, the removal of barriers to legal recourse, limited personal scope of application, the lack of explicit requirements for senior management approval, and the absence of stakeholder involvement in the development of a vigilance plan. Likewise, the provisions regarding corporate due diligence requirements in the Law are excessively ambiguous to be effectively applied.

Table 4 Scores of the French Duty of Vigilance Law Across Key Indicators

Parameters	Indicators		Scores
1. A Smart-mix Approach	1	Law contains mandatory and voluntary measures	1
	2	Law integrates international rules	1
	3	Law refers to other domestic laws and policies	2
	4	Law includes incentive mechanisms	1
	5	Law encompasses regulatory oversight mechanisms	0
2. Policy	6	Law contains provisions requiring the state to factor in human	0

465 As an official evaluation of the implementation of the French Duty of Vigilance Law indicates, in practice, companies rarely develop a vigilance plan in collaboration with stakeholders. See Juliette Camy, "The French Law on the Duty of Vigilance: The Challenges of the Preventive Approach," (n.447).

Coherence		rights due diligence in bilateral and/or multilateral instruments	
	7	Whether a state enacting mHRDD has established a BHR NAP	1
3. Extraterritorial Regulation	8	Law has extraterritorial implications	1
	9	Whether the formulation of an mHRDD law with extraterritorial implications involves consultation with third parties outside the jurisdiction of the state	0
4. Remedial Mechanisms	10	Law includes state-based judicial mechanisms, state-based non-judicial mechanisms, and the requirement for government support to facilitate operational-level grievance mechanisms	2
	11	Law contains a dedicated civil liability regime	1
	12	Law provides support to reduce barriers to access to remedies	0
5. Ongoing Process	13	Law mandates companies to consistently engage in human rights due diligence	1
6. Broad Coverage	14	Law applies to all business entities	0
	15	Law adopts a comprehensive definition of human rights	1
	16	Law imposes distinct obligations for different types of corporate human rights abuses	0
7. Contextual Particularity	17	Law permits companies to tailor human rights due diligence measures based on their specific business context	1
	18	Law mandates companies to give special consideration to vulnerable groups	0
	19	Law requires businesses to support SMEs in conducting human rights due diligence	0
	20	Law prohibits companies from exploiting their advantageous status to unevenly transfer human rights responsibilities	0
8. Top-Management Endorsement	21	Law mandates top-management endorsement of corporate human rights policies	0
	22	Law assigns human rights due diligence responsibilities to corporate directors	0
9. Stakeholder Participation	23	Law compels companies to engage with stakeholders in implementing human rights due diligence	0
	24	Law clarifies the scope of stakeholder engagement and defines the term "stakeholder"	1
	25	Law confers decision-making powers to stakeholders during the consultation process	0
10. Operational-level Grievance Mechanisms	26	Law mandates companies to establish an operational-level grievance procedure	1
		Total	15

3. The German Supply Chain Act

3.1 Background of the German Supply Chain Act

The German Act on Corporate Due Diligence Obligations in Supply Chains (German Supply Chain Act) is one of the most recent mHRDD laws. Parallel to the French Duty of Vigilance Law, the German Supply Chain Act encountered substantial resistance from certain commercial entities and political factions. The debates on enacting supply chain law in Germany may be traced back to the mid-2010s. Notably, there was a profound transition from voluntary initiatives to obligatory requirements around 2020.[466] Germany's (historical) resistance to such legislation is shown in its vigorous opposition to the EU Non-Financial Reporting Directive in 2014. The German government and business organizations took a staunch stance, forming the most hardline opponents of this Directive.[467] However, Germany has begun to explore options for enhancing supply chain regulation because of the rapid institutionalization of the UN Guiding Principles,[468] particularly the progress made by the French Duty of Vigilance Law, and the increasing support from civil society and academics.[469]

The establishment of the 2016 *German National Action Plan on Business and Human Rights* (German BHR NAP) marked a watershed in the country's history of legislating mHRDD.[470] The Germen Federal Government expressed its expectation for companies to voluntarily conduct appropriate measures to respect human rights, promising that "[i]n the absence of adequate compliance, the Federal Government will consider further action, which may culminate in legislative measures (…)."[471] The German BHR NAP "opened a window of opportunity" for placing the German Supply Chain Act on the legislative agenda.[472] Drawing insights from the industry-level analysis of the Rana Plaza tragedy,[473] it became apparent that expectations for companies to earnestly undertake human rights measures were largely unmet, especially without external forces or incentives. Indeed, reviews of corporate due diligence based on voluntary initiatives in 2019 and 2020 revealed that "17 to 19

466 See Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," 552-53 (n.135).

467 See David Weihrauch, Sophia Carodenuto, and Sina Leipold, "From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act," *Regulation & Governance* 17 no.4 (2022): 2.

468 See supra, Section 1.4 in Chapter 2.

469 Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," (n.135).

470 German Federal Government, *National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights (2016-2020)*, (16 December 2016), https://www.auswaertiges-amt.de/blueprint/servlet/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf.

471 Ibid, 10.

472 For how the German BHR NAP provides "a window of opportunity" for legislating supply chain law and how CSOs and supportive politicians make full use of this opportunity to accelerate the German Supply Chain Act, see Weihrauch, Carodenuto, and Leipold, "From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act," (n.467).

473 See Section 2.3 of Chapter 1 in this research.

percent of enterprises are 'compliers' and 78 to 81 percent are 'non-compliers'."[474] Thus, "[i]t's obvious and clear that voluntary action has failed,"[475] and Germany was urged to fulfil its legislative commitments.

Despite encountering strong opposition from some business entities[476] and political groups,[477] civil society[478] and supportive politicians capitalized on the "window of opportunity" created by the German BHR NAP to broaden political coalitions for promoting mHRDD legislation. In September 2020, when the tripartite process of drafting a supply chain law was blocked by the economics minister Peter Altmaier, more than 200,000 people signed a petition urging Altmaier to cease his blockade and adopt a stringent law.[479] Subsequently, on February 12, 2021, the three ministers involved reached a political compromise on the legal text. Soon after that, the German Supply Chain Act was adopted on June 10, 2021, and took effect on January 1, 2023. The Act has received criticism from both opponents who argue that it is too rigorous and from supporters who criticize the Act for being watered down due to pressure from industry groupings.[480]

The German Supply Chain Act aims to regulate the responsibility of German companies to respect human rights in GVCs and protect people therein from corporate human rights abuses. As Federal Development Minister Svenja Schulze states, "Global supply chains link us, in Europe, with the people of the Global South. (…) We in Germany share the responsibility to ensure that human rights and environmental standards are respected at all stages of the supply chain. The important thing when introducing these new regulations is to ensure that *they help those they were designed for: the people at the start of the supply chain, many of them women and children*. (…)."[481] Hubertus Heil, the Federal Labour Minister, recounts further: "Germany

474 *Final Report: Monitoring of the Status of Implementation of the Human Rights Due Diligence Obligations of Enterprises set out in the National Action Plan for Business and Human Rights 2016-2020*, (29 September 2020): 5, https://globalnaps.org/wp-content/uploads/2021/05/Germany-nap-monitoring-process.pdf.

475 Andrew Green, "In Germany, Voluntary Monitoring of Supply Chain Abuses 'Has Failed'," devex (27 July 2020), accessed 15 December 2023, https://www.devex.com/news/in-germany-voluntary-monitoring-of-supply-chain-abuses-has-failed-97790.

476 For example, the Confederation of German Employers' Associations undertook a press release to bash both the survey and the potential adoption of any supply chain legislation. See Andrew Green, "In Germany, Voluntary Monitoring of Supply Chain Abuses 'Has Failed'," (n.475). See also, European Coalition for Corporate Justice, "German Parliament Adopts Supply Chain Law, But Compromise Leaves Gaps," (11 June 2021), accessed 15 December 2023, https://corporatejustice.org/news/german-parliament-adopts-supply-chain-law/.

477 For instance, under the strong pressures from business groups, the Christian Democratic Union with Economics Minister Altmaier sought to block an effective supply chain law by watering down the scope and obligations of the law. See Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," 552 (n.135).

478 Among others, the civil society network "Initiative Lieferkettengesetz" (supply chain due diligence initiative), an alliance supporting legislation with more than 120 organizations, played a pivotal role in accelerating the legislative process. See Weihrauch, Carodenuto, and Leipold, "From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act," (n.467).

479 See Gustafsson, Schilling-Vacaflor, and Lenschow, "Foreign Corporate Accountability: The Contested Institutionalization of Mandatory Due Diligence in France and Germany," 904-05 (n.135).

480 See *German Parliament passes Supply Chain Act: "Not There Yet, but Finally at the Start"*, (11 June 2021), accessed 15 December 2023, https://lieferkettengesetz.de/pressemitteilung/german-parliament-passes-supply-chain-law/.

481 See *Development Minister Schulze and Labor Minister Heil Are Travelling to Ghana and Côte d'Ivoire Together:*

benefits more than almost any other country in the world from a globali[z]ed economy that is based on the division of labor. (…) However, this also means that we have a special responsibility: for human rights, for decent working conditions around the world, and for globali[z]ation, which we want to ensure is fair and in line with human rights standards. (…) Through these efforts, we are making improvements for many people in supply chains from start to finish."[482] Heil also asserts that the German Supply Chain Act "is the strongest law in Europe so far against worker exploitation," signifying "the end of companies weighing human rights against their economic interests."[483]

Nevertheless, criticisms exist due to the Act's limited scope and the absence of a dedicated civil liability regime, leading some to argue that it "does not do justice to those affected by human rights violations."[484] A further investigation of the content of the German Supply Chain Act with a multi-dimensional evaluation may offer a nuanced understanding of the upsides and downsides of the Act.

3.2 Content of the German Supply Chian Act

In contrast to the conciseness of the French Duty of Vigilance Law, the German Supply Chain Act is lengthier and more comprehensive, consisting of 24 sections and an Annex.[485] According to Section 1(1) of the Act, it is applicable to enterprises, irrespective of their legal form,[486] with their central administration, principal place of business, administrative headquarters, or statutory seat in Germany, having a minimum of 3,000 employees. From January 1, 2024, this employee threshold is reduced to 1,000, expanding the personal scope of the Act. Foreign companies with a domestic branch office in Germany meeting the specified thresholds are also subject to the Act. However, the Act does not apply to foreign companies without a main seat or domestic branch office in Germany, even if they supply goods and provide services on the German market.[487]

The Act further provides clarification on calculating employees in cases of

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Joint Press Release by the Federal Ministry for Economic Cooperation and Development (BMZ) and the Federal Ministry of Labor and Social Affairs (BMAS), Federal Ministry of Labor and Social Affairs (20 February 2023), accessed 15 December 2023, https://www.bmas.de/EN/Services/Press/recent-publications/2023/ministers-schulze-and-heil-travel-to-ghana-and-cote-d-ivoire.html. Emphasis added.

482 Ibid.

483 See "Germany to Fine Companies Whose Suppliers Abuse Rights," *Reuters* (20 February 2021), accessed 15 December 2023, https://news.trust.org/item/20210212103931-t3lbr/.

484 See European Center for Constitutional and Human Rights, "German Parliament Passes Human Rights Due Diligence Law: An Important Step-But Not Enough for Those Affected," (11 June 2021), accessed 15 December 2023, https://www.ecchr.eu/en/press-release/bundestag-verabschiedet-lieferkettengesetz/.

485 The following elaboration and analysis are based on an official translation of the German Supply Chain Act. See *Act on Corporate Due Diligence Obligations in Supply Chains*, https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html.

486 The German Supply Chain Act primarily applies to private entities that meet the specified threshold. Charitable enterprises under private law are included within the scope of the Act. Legal persons under public law are subject to the Act only to the extent that they engage in commercial activities in the market and meet the Act's defined threshold. See "Supply Chain Act Frequently Asked Questions," Federal Ministry of Labor and Social Affairs (24 July 2023): III.4 & 5, accessed 15 December 2023, https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html.

487 See Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," 553 (n.135).

temporary employment and group companies. Temporary agency workers must be counted if their deployment exceeds six months (Section 1(2)). Regarding group companies, the employees of all enterprises in the group, both in Germany and posted abroad, should be calculated (Section 1(3)). Freelance employees, the self-employed, apprentices, and interns are not included in the calculation of a company's number of employees.[488]

HRDD obligations outlined in the German Supply Chain Act have notable impacts on a company's supply chain, especially within the company's own business area and its direct suppliers. The Act defines the supply chain using "necessary criteria," i.e., "all steps in Germany and abroad that are necessary to produce the products and provide the services, starting from the extraction of the raw materials to the delivery to the end consumers" are parts of a specific supply chain (Section 2(5)).

The Act further defines three different "tiers" of a supply chain in Sections 2(6)–(8): (1) the own business area that covers all activities conducted by an enterprise to achieve the business objectives; (2) a direct supplier of the enterprise, referring to a partner in a contract supplying goods or services essential for the enterprise's products or services; (3) an indirect supplier, who is not a direct supplier but provides goods and services necessary for the production or provision of the enterprise's products or services. Importantly, the Act considers a subsidiary company as part of the parent company's "own business areas" if the parent exercises decisive influence over the subsidiary (Section 2(6)).[489] To prevent an enterprise from evading responsibility for direct suppliers, Section 5(1) states that if an enterprise structures a direct supplier relationship improperly or engages in a transaction to circumvent the due diligence obligations for the direct supplier, an indirect supplier is deemed to be a direct supplier.

Enterprises subject to the Germany Supply Chain Act must fulfill human rights and environment-related due diligence obligations, comprising nine elements from establishing a risk management system to reporting (Section 3(1)). Compliance with these due diligence obligations is governed by the principle of appropriateness, aligning with the relevant principles in the UN Guiding Principles.[490] This principle allows enterprises sufficient policy space to determine how to prioritize and manage risks. According to Section 3(2) of the Act, the decisive criteria for appropriateness include: (1) the nature and extent of the enterprise's business activities; (2) its ability to influence the party directly responsible for human rights and environmental risks; (3) the severity and reversibility of the violation; and (4) the extent of a company's contribution to the risk, and so on.

As defined in Section 2(2), a human rights risk is "a condition in which, on the basis

488 See "Supply Chain Act Frequently Asked Questions," III.2 (n.486).

489 The assessment of decisive influence involves considering the overall picture of business, staff, organizational, and legal connections between the subsidiary and the parent company. Indications of decisive influence may include holding a large majority share in the subsidiary, implementing a group-wide compliance system, steering key processes in the subsidiary, having a similar business area, or employing overlapping personnel. These factors collectively contribute to determining whether the parent company has decisive influence over the subsidiary. See "Supply Chain Act Frequently Asked Questions," IV.6 (n.486).

490 Principles 17 and 19, UN Guiding Principles.

of factual circumstances, there is a sufficient probability that a violation of one of the [stated] prohibitions is imminent." This provision further provides an "open-ended indicative list of human rights violations,"[491] covering the prohibition of certain human rights infringements, potential environmental damages leading to human rights harms, and other actions or inactions "directly capable of impairing a protected legal position in a particular serious manner, and the unlawfulness of which is obvious upon reasonable assessment of all the circumstances in question" (Section 2(2), no.12).

To be more specific, the enumerated human rights violations include, for example, the employment of child labor and forced labor, all forms of slavery, and violations related to occupational health and safety, unequal treatment in employment, an adequate living wage, as well as the freedom of association (Section 2(2), nos.1-8). These violations are defined with reference to international human rights conventions listed in paragraphs 1-11 of the Annex. The provision also encompasses any harm to the environment, including pollution of soil, water, or air, and unlawful eviction or acquisition of land and water that may significantly impact human rights (Section 2(2), no.10). Additionally, this provision prohibits the utilization of public or private security forces for the protection of the enterprise's project if such utilization may have negative impacts on or damages to human rights (Section 2(2), no.11).

Environment-related risks are defined in Section 2(3) as "a condition in which, on the basis of factual circumstances, there is a sufficient probability that one of the [stated] prohibitions will be violated." These prohibitions include the illegal use and manufacture of mercury, the irresponsible handling and disposal of waste, and the forbidden export and import of hazardous waste (Section 2(3), nos.1-8). It is noteworthy that, unlike the inclusive approach to defining human rights risks, the German Supply Chain Act limits environmental risks exclusively to actions that contravene specific international environmental treaties to which Germany is a party.[492] Consequently, certain pressing environmental issues, like climate change and biodiversity-related impacts, fall outside the material scope of the Act.

To prevent or minimize any risks to human rights or environment-related risks or to cease the violation of human rights-related or environmental obligations, the covered enterprises should fulfill HRDD obligations outlined in Section 3(1) and detailed in Sections 4-10. Firstly, Section 4 requires a targeted enterprise to establish a risk management system. This obligation entails the implementation of an appropriate and effective risk management system, integrated into all relevant business processes through appropriate measures. The "appropriateness" of a risk management system is evaluated based on the principle of appropriateness mentioned earlier. The effectiveness of the risk management system is measured by its ability to achieve its purposes, including identifying and minimizing human rights and environment-related risks, as

491 Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," 553 (n.135).

492 The specific international environmental conventions referred to in the German Supply Chain Act are listed in nos.12-14 of the Annex. These conventions include the Minamata Convention on Mercury of 10 October 2013, the Stockholm Convention of 23 May 2001 on Persistent Organic Pollutants, and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal of 22 March 1989.

well as preventing, terminating, or minimizing the extent of human rights and environment-related obligations within the supply chain. Of particular significance is the requirement for enterprises to give due consideration to the interests of their employees, employees within their supply chains, and those who may be directly affected by the economic activities of the enterprise or its supply chains.[493] This consideration is mandated during the establishment and implementation of the risk management system, emphasizing a holistic approach that encompasses various stakeholders. The Act also obliges the enterprise to designate a responsible unit for monitoring the risk management system, and the Act suggests the appointment of a human rights officer for this purpose.[494]

The second step involves conducting a comprehensive risk analysis. As per Section 5 of the German Supply Chain Act, enterprises must perform a thorough risk analysis for human rights and environmental risks within their own business areas and among their direct suppliers. The identified risks must be appropriately weighted and prioritized. Then the outcomes of risk mapping should be communicated internally to relevant decision-makers, such as the board of directors or the purchasing department. This risk analysis is not a one-time requirement but should be conducted periodically, either annually or on an ad hoc basis, particularly when introducing new products, projects, or venturing into new business fields. The same periodic requirement is applicable to other due diligence obligations set forth by the Act, such as preventive measures, remedial action, complaint procedures, documentation and reporting, as explained below.

The third step is to conduct preventive measures. As per Section 6 of the Act, enterprises must immediately take appropriate preventive measures upon identifying a risk. In general, the enterprise must issue a policy statement adopted by senior management, outlining its strategies to fulfill due diligence obligations.[495] Regarding its own business area, the preventive measures the enterprise should undertake include, but are not limited to, implementing appropriate procurement strategies and purchasing practices to prevent or minimize identified risks. Concerning direct suppliers, the

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493 Those directly affected by the consequences of the enterprise's commercial activities within its supply chains must be actively involved. This involvement is particularly relevant in situations where residents or communities near production sites are directly impacted by the production processes. See "Supply Chain Act Frequently Asked Questions," VII.3 (n.486). While this requirement appears to further develop the German codetermination (Mitbestimmung) corporate governance model, which is believed to enhance corporate social responsibility performance. However, the German Supply Chain Act only requires due consideration to be given to the interests of relevant stakeholders when establishing and implementing a risk management system. This requirement is notably more lenient and vague compared to codetermination, which mandates that employees have a say in a company's decisions. For insightful research on the relationship between codetermination and corporate social responsibility under German corporate governance regime, see Robert Scholz, and Sigurt Vitols. "Board-level codetermination: A Driving Force for Corporate Social Responsibility in German Companies?." *European Journal of Industrial Relations* 25, no. 3 (2019): 233-246.

494 While the German Supply Chain Act does not stipulate specific requirements for the responsible person, the official explanation elucidates that these individuals must be appointed from within the enterprise, precluding external appointments. See "Supply Chain Act Frequently Asked Questions," VII.1 (n.486).

495 A policy statement is deemed to have been officially adopted when it has been publicly disclosed by senior management, such as being made available on the enterprise's homepage. The policy statement, as per the requirements of the German Supply Chain Act, must encompass all necessary elements within a single document. This document should be complete in its coverage and comprehensible on its own. See "Supply Chain Act Frequently Asked Questions," IX.1 & 2 (n.486).

enterprise should, among others: (1) seek contractual assurances from a direct supplier that it will comply with the enterprise's human rights policies and address them appropriately along the supply chain; and (2) obtain the agreement of a direct supplier on appropriate contractual control mechanisms and relevant verification schemes.

In instances where a violation of human rights and environment-related obligations has occurred or is imminent in its own business area or at a direct supplier, the targeted enterprise must carry out remedial action in accordance with Section 7 of the German Supply Chain Act. In its own business area, the expected outcome is to cease the violation. If the violation is identified at a direct supplier, the enterprise must immediately devise and implement a plan to end or minimize the violation. Remedial actions should include, at a minimum: (1) jointly developing and implementing a plan to end or minimize the violation with the enterprise causing it; (2) forming collaborative efforts with other enterprises to enhance the ability to influence the entity causing or likely to cause harm; and (3) suspending the business relationship while efforts are made to minimize the risk. If these measures prove ineffective, the provision also allows the termination of a business relationship as an ultima ratio to address risks or violations from direct suppliers. Preconditions for such termination include: (1) deeming the violation of a protected legal position or an environment-related obligation as very serious; (2) the measures developed not remedying the situation after the specified time in the scheme has elapsed; (3) the enterprise having no other less severe means at its disposal; and (4) increasing the ability to exert influence having no prospect of success.

It is worth noting that while the German Supply Chain Act primarily addresses an enterprise's own business and its direct suppliers, it also imposes certain obligations on the enterprise for its indirect suppliers. Section 9(3) requires the enterprise to take a series of due diligence actions if it has "substantiated knowledge" of risks and violations from an indirect supplier.[496] These actions are similar but more lenient than those for a direct supplier and include: (1) conducting a risk analysis; (2) taking appropriate preventive measures vis-à-vis the party responsible, such as the implementation of control measures, support in the prevention and avoidance of a risk, or the implementation of sector-specific or cross-sector initiatives to which the enterprise is a party; (3) devising and implementing a prevention, cessation, or minimization scheme; and (4) updating its policy statement if necessary.

A fifth step of the due diligence obligations under the German Supply Chain Act involves the formulation and operation of an internal complaint mechanism, as articulated in Section 8. This complaint mechanism aims to enable individuals to report human rights and environment-related risks, as well as violations of human rights or environment-related obligations resulting from the economic activities of an enterprise in its own business area, a direct supplier, or an indirect supplier (Section 9(1)). To ensure the functionality of the internal complaint mechanism, the enterprise is required to acknowledge the receipt of reported information from the complainant and appoint

496 The term "substantiated knowledge" implies that the enterprise possesses concrete indications suggesting a violation of human rights or an environment-related obligation by indirect suppliers. For the criteria defining "actual indications" and "substantiated knowledge," Ibid, VI.14 and 13.

a designated and competent person to discuss the facts with the complainant. Additionally, the Act encourages enterprises to offer a procedure for amicable settlement. Section 8 details some mandatory elements for an internal complaint mechanism, including: (1) establishing rules of procedure in text form that are publicly available; (2) ensuring the persons entrusted by the enterprise with conducting the proceedings guarantee impartiality, particularly by being independent and not bound by instructions; and (3) making clear and comprehensible information on accessibility, responsibility, and the implementation of the complaint procedure publicly available in an appropriate manner, among other requirements.

The cycle of due diligence obligations concludes with the duty to document and report, as stipulated in Section 10 of the German Supply Chain Act. In this regard, the enterprise is mandated to prepare an annual report on the fulfillment of its due diligence obligations in the preceding financial year and make it publicly available free of charge on the enterprise's website within four months after the end of the financial year. This information should be accessible for a period of seven years. The report should, at a minimum, cover the following aspects: (1) whether the enterprise has identified any human rights and environment-related risks or violations of a human rights-related or environment-related obligation; (2) the measures taken by the enterprise to fulfil its due diligence obligations under the Act; (3) how the enterprise assesses the impact and effectiveness of the measures taken; and (4) conclusions drawn from the assessment for future measures. In cases where no risks or violations have been identified, the enterprise is required to provide a plausible explanation for this in its report. Moreover, the German Supply Chain Act allows for due consideration of business and trade secrets when conducting reporting.

One of the very features of the German Supply Chain Act is the establishment of a public oversight and enforcement mechanism. This holds significance in the regulation of GVCs, signaling, albeit in a limited manner,[497] a departure from "regulating outsourcing by outsourcing regulation (to private actors),"[498] emphasizing the need to proactively involve a public authority in addressing regulatory issues. Section 19 designates the Federal Office for Economic Affairs and Export Control (BAFA) as the competent authority responsible for monitoring and enforcing this Act. As outlined in Section 12, BAFA is mandated to provide electronic or digital access to receive corporate due diligence reports. Section 13 further empowers BAFA to evaluate whether the reports have been provided and whether their content meets the minimum requirements of the Act, and if not, to demand corrective action from the concerned

497 As the below Chapter 7 argues, the German Supply Chain Act does not fully abandon the "dual regulatory design" since lead firms under its purview still play a significant regulatory role vis-à-vis suppliers in GVCs. Likewise, of interest, the German Supply Chain Act authorizes BAFA, an economic department, to monitor and enforce corporate due diligence obligations. Moreover, the BAFA's actions under the Act are subject to the legal and technical supervision of the Federal Ministry for Economic Affairs and Energy, which had blocked the legislative process and watered down the legal text of the Act. Therefore, as Andreas astutely put it, "[t]he effectiveness of the law will very much depend on the way how the BAFA will use its enforcement powers. It is not certain whether it is well enough resourced to fulfil its role." Andreas Rühmkorf, "The German Supply Chain Law: A First Step Towards More Corporate Sustainability," *European Company Law* 20 (2023): 13.

498 See Sarfaty, "Shining Light on Global Supply Chains," 434-37 (n.291).

enterprise.

BAFA also has the authority to take necessary measures to detect, end and prevent violations of the Act, including the competence to summon individuals, request information, require corrections, and enter the premises of the enterprise (Sections 14-16). BAFA may exercise these authorities ex officio or upon request of persons with a substantiated claim that their rights have been violated or are at imminent risk of violation due to an enterprise's non-fulfillment of its obligations under the Act (Section 14(1)). It is interesting to note that, besides authorizing the mentioned powers to BAFA, Sections 17 and 18 impose obligations on enterprises to provide information, surrender documents, and tolerate and cooperate with BAFA's tasks. Furthermore, BAFA is authorized to offer cross-sectoral or sector-specific information, assistance, and recommendations regarding compliance with the Act (Section 19). BAFA itself is obliged to annually prepare and publish an accountability report on its monitoring and enforcement activities (Section 21(1)). The report must include information on any identified violations, the remedial measures ordered, and an evaluation of the reports submitted by enterprises. However, the Act does not require the disclosure of the names of the specific enterprises involved in these violations (Section 21(2)).

Moreover, the German Supply Chain Act grants BAFA a variety of tools to penalize noncompliant enterprises. According to Sections 24(1) and (2), enterprises may be subject to financial penalties ranging from 100,000 to 800,000 euros, with the specific amount determined based on the circumstances of their violations. For enterprises with an annual turnover exceeding 400 million Euros, the administrative fine can be increased to up to 2% of the average annual turnover (Section 24(3)). Furthermore, enterprises that receive fines should be excluded from the award of public contracts for a period of up to three years (Section 22(1)).

Last but not least, the German Supply Chain Act does not establish a dedicated civil liability regime for the breach of due diligence obligations thereof. In fact, it explicitly excludes such a regime, as articulated in Section 3(3), stating that "a violation of the obligations under this Act does not give rise to any liability under civil law." This provision further specifies, "[a]ny liability under civil law arising independently of this Act remains unaffected." The latter indicates that this Act does not preclude liability claims based on general tort law, which would likely be adjudicated according to the law in the jurisdiction where the damages occurred.[499] Furthermore, Section 11 introduces a special capacity to sue, enabling individuals claiming to have suffered a violation in their legal positions to authorize a competent German trade union or NGO to file proceedings in its own capacity. The initiation of this special capacity to sue applies to the violation of a legal position that is deemed of "paramount importance."[500] While the Act itself lacks a precise definition of what qualifies as "paramount importance," an official explanation clarifies that the special capacity to sue is

499 See Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," 558 (n.135).

500 According to Section 2(1) of the German Supply Chain Act, "protected legal positions" are those arising from the conventions on the protection of human rights listed in nos. 1 to 11 of the Annex.

applicable “when there are possible violations of very important legal positions (…), such as life or limb.”[501] Initiating the special capacity to sue appears to be somewhat demanding in this context.

3.3 Evaluation of the German Supply Chain Act

(1) **A Smart-mix Approach**: As seen above, BAFA is mandated to provide cross-sectoral or sector-specific information, assistance, and recommendations regarding compliance with the Act. These recommendations serve as important voluntary standards complementing the compulsory requirements outlined by the German Supply Chain Act, earning 1 point under Indicator 1. The Act’s material scope is defined by certain internationally recognized human rights and environmental conventions, garnering 1 point under Indicator 2.

Moreover, the Act refers to the special capacity to sue, the general tort liability regime, public procurement as an important incentive mechanism, and administrative fines as a deterrent mechanism, thereby integrating with other domestic laws and policies. In this regard, it earns 4 points under Indicator 3 and 1 point under Indicator 4. Additionally, it is evident that legislators have equipped the German Supply Chain Act with a robust public oversight and enforcement regime, authorizing BAFA to undertake multi-dimensional tasks. Therefore, it secures 1 point under Indicator 5.

(2) **Policy Coherence**: The German Supply Chain Act lacks a provision requiring the government to factor in human rights and environmental considerations in negotiating bilateral or multilateral instruments, accruing 0 point under Indicator 6. Like many countries in Europe, Germany has published a BHR NAP. As seen above, it was this NAP that facilitated a transition from voluntary HRDD to mHRDD laws. Hence, this Act receives 1 point under Indicator 7.

(3) **Extraterritorial Regulation**: On the one hand, the German Supply Chain Act is applicable to foreign companies that meet the employee’s threshold and have a main seat or domestic branch office in Germany. Also, the direct suppliers of such foreign companies are under the purview of the Act. On the other hand, as observed in the evaluation of the extraterritorial regulation of the French Duty of Vigilance Law, due to the cascading effect of GVCs, mHRDD laws addressing GVCs inherently have extraterritorial implications. Therefore, the German Act gains 1 point under Indicator 8 and 0 point under Indicator 9, given that it does not explicitly include third parties outside its jurisdiction in formulating the legal text.[502]

(4) **Remedial Mechanisms**: The German Supply Chain Act incorporates a significant state-based judicial mechanism through the special capacity to sue. Additionally, like France, Germany is also an OECD member state, bearing the obligation to put

501 See "Supply Chain Act Frequently Asked Questions," XV. 3 (n.486).

502 See Mason, Partzsch, and Kramarz, "The Devil Is in the Detail—the Need for a Decolonizing Turn and Better Environmental Accountability in Global Supply Chain Regulations: A Comment," 7 (n.387).

in place a NCP.[503] At present, the Germany NCP has received 34 special instances, with 15 addressing human rights issues and 9 dealing with environmental complaints.[504] Thus, there are both state-based judicial mechanisms and state-based non-judicial mechanisms under the Act. While the Act does not directly require the government to support corporate complaints procedures, it mandates BAFA to provide cross-sectoral or sector-tailored information, assistance, and recommendations on compliance with the Act. And the establishment and operation of a complaint mechanism is an independent due diligence obligation for enterprises under the Act. Therefore, providing guidance and recommendations for enterprises concerning the complaint procedure is within BAFA's mandate. Considering these aspects, the German Supply Chain Act achieves 3 points under Indicator 10. However, as there is no dedicated civil liability regime, the Act receives 0 point under Indicator 11.

Furthermore, regarding the special capacity to sue, the German Supply Chain Act confers legal standing on qualified national trade unions and NGOs to bring proceedings on behalf of affected rights holders. While there are some limitations to initiating this procedure, it indeed "provides an important tool to bridge the asymmetry of power between large German corporations and the victims of human rights abuses in seeking access to remedy."[505] In this context, the German Supply Chain Act secures 1 point under Indicator 12.

(5) **Ongoing Process:** The German Supply Chain Act requires enterprises to fulfill all due diligence obligations annually or on an ad hoc basis in the event of substantial changes in the business and operational context, as well as the risk profile of the enterprises. This allocates the Act 1 point under Indicator 13.

(6) **Broad Coverage**: The German Supply Chain Act does not extend to cover all business entities or the entire supply chain, garnering 0 point under Indicator 14. However, the Act employs an open-ended indicative list of human rights violations. This comprehensive definition grants it 1 point under Indicator 15. Concerning the differentiated obligations for various types of human rights abuses, the Act, as discussed previously, allows enterprises to undertake distinct HRDD obligations vis-à-vis their own business area, direct suppliers, and indirect suppliers. This approach ensures that companies shoulder human rights responsibilities in proportion to the extent of their "involvement" in such abuses. Thus, the German Supply Chain Act receives 1 point under Indicator 16.

(7) **Contextual Particularity**: The German Supply Chain Act closely aligns with the UN Guiding Principles in designing corporate due diligence obligations. Applying the principle of appropriateness allows enterprises sufficient policy space to adopt

503 "Network of National Contact Points for implementing the OECD Guidelines," Federal Ministry for Economic Affairs and Climate Action, accessed 15 December 2023, https://www.bmwk.de/Redaktion/EN/Artikel/Foreign-Trade/ncp-process.html.

504 For more details of these special instances, see OECD Database of Specific Instances, accessed 15 December 2023, https://mneguidelines.oecd.org/database/?hf=50&b=0&q=NCP%3A(Germany)&s=desc(mne_datereceived).

505 Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 411 (n.118).

tailored actions for fulfilling human rights and environment-related due diligence obligations. Likewise, concerning BAFA's mandate to publish handouts, the Act requires BAFA to consider sector-specific guidance and recommendations. Therefore, the German Supply Chain Act satisfies Indicator 17, achieving 1 point.

Furthermore, Section 4(4) explicitly obligates the enterprise to give due consideration to the interests of employees, both within its own operations and its supply chain, as well as others impacted by the enterprise's operations or within its supply chain, when formulating and implementing the required risk management system.[506] As illustrated by the Rana Plaza tragedy case study, employees in GVCs are typically a crucial part of vulnerable groups. In this regard, the German Supply Chain Act earns 1 point under Indicator 18.

In terms of providing support to SMEs in conducting HRDD, the Act does not directly refer to SMEs. However, it requires the enterprise to support its direct and indirect suppliers on many occasions. For example, in the case of violations with direct suppliers, the enterprise should jointly develop and implement a plan to cease or mitigate the violation with its direct suppliers (Section 7(2)). Similarly, for indirect suppliers, the enterprise should establish preventive measures, including support for the prevention and avoidance of risks (Section 9(3)). Given that most direct and indirect suppliers in GVCs are SMEs, therefore, the Act accrues 1 point under Indicator 19.

Last but not least, the Act requires enterprises to adopt appropriate procurement strategies and purchasing practices that prevent or minimize identified risks (Section 6(3)). This requirement is of great significance. As evidenced by the previous discussions on "Fast Fashion and Labor Exploitation" and "Sustainable Fashion and Cost Transfer,"[507] corporate business models and procurement practices can significantly impact human rights within a supply chain. The privileged position of lead firms allows them to unevenly shift the responsibility of improving human rights conditions onto suppliers. This frequently leads to a reduction in the profit margin for suppliers, subsequently exacerbating the situation for workers. This requirement in the Act shows promise in reshaping purchasing practices and discouraging the arbitrary transfer of the cost of HRDD. Consequently, the German Supply Chain Act is awarded 1 point under Indicator 20.

(8) **Top-Management Endorsement**: While the German Supply Chain Act requires senior management to adopt human rights policy statements and seek information from a human rights unit responsible for monitoring risk management, it falls short of assigning HRDD responsibility to corporate directors or other senior management. Hence, the Act garners 1 and 0 point under Indicators 21 and 22,

506 The term "employee" is to be constructed broadly to ensure comprehensive protection of human rights. This expansive interpretation goes beyond the conventional understanding of employees and includes self-employed suppliers, individuals not adequately covered by statistics, labor, and social laws. Additionally, it includes those individuals who may not be allowed to work under certain circumstances. See "Supply Chain Act Frequently Asked Questions,"VII.2 (n.486).

507 See Sections 2.3.1 and 2.3.2 in Chapter I of this research.

respectively.

(9) **Stakeholders Participation**: Despite Section 4(4) requiring enterprises to properly consider the interests of employees and those who may be affected by the economic activities of the enterprise itself and its supply chain, it does not explicitly require the enterprise to engage in consultations with stakeholders. Phrase it differently: under this provision, "consultations with persons that are actually or potentially affected are not mandatory, [and] the German Law neglects the importance of stakeholder participation." [508] Consequently, the German Supply Chain Act achieves 0 point under Indicators 23-25.

(10) **Operational-level Grievance Mechanism**: Establishing and operating an internal complaint procedure is a pivotal step for enterprises under the jurisdiction of the German Supply Chain Act to fulfill their human rights and environment-related due diligence obligations. Therefore, the Act scores 1 point under Indicator 26.

Based on the comprehensive evaluation, the German Supply Chain Act achieves a score of 23 out of 26 points (Table 5). The legislation excels in aligning with the UN Guiding Principles, showcasing strengths in parameters such as a smart-mix approach, robust remedial mechanisms, and contextual particularity. Noteworthy features include a well-structured public oversight and enforcement regime, incorporation of the appropriateness principle in due diligence, mandates for transformative purchasing practices, the requirement for a designated human rights officer, and the provision of a special capacity to sue. However, certain limitations, including a restricted personal scope, insufficient response to certain environmental issues, the absence of a dedicated civil liability regime, and a lack of emphasis on stakeholder participation, are areas for potential improvement. Despite these shortcomings, the German Supply Chain Act represents a significant stride towards addressing human rights and environmental concerns in supply chains, contributing to the global framework for responsible corporate conduct.

Table 5 Scores of the German Supply Chain Act Across Key Indicators

Parameters	Indicators		Scores
1. A Smart-mix Approach	1	Law contains mandatory and voluntary measures	1
	2	Law integrates international rules	1
	3	Law refers to other domestic laws and policies	4
	4	Law includes incentive mechanisms	1
	5	Law encompasses regulatory oversight mechanisms	1
2. Policy Coherence	6	Law contains provisions requiring the state to factor in human rights due diligence in bilateral and/or multilateral instruments	0
	7	Whether a state enacting mHRDD has established a BHR NAP	1
3.	8	Law has extraterritorial implications	1

508 Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," 555 (n.135). For a similar interpretation, see Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 11 (n.118).

Extraterritorial Regulation	9	Whether the formulation of an mHRDD law with extraterritorial implications involves consultation with third parties outside the jurisdiction of the state	0
4. Remedial Mechanisms	10	Law includes state-based judicial mechanisms, state-based non-judicial mechanisms, and the requirement for government support to facilitate operational-level grievance mechanisms	3
	11	Law contains a dedicated civil liability regime	0
	12	Law provides support to reduce barriers to access to remedies	1
5. Ongoing Process	13	Law mandates companies to consistently engage in human rights due diligence	1
6. Broad Coverage	14	Law applies to all business entities	0
	15	Law adopts a comprehensive definition of human rights	1
	16	Law imposes distinct obligations for different types of corporate human rights abuses	1
7. Contextual Particularity	17	Law permits companies to tailor human rights due diligence measures based on their specific business context	1
	18	Law mandates companies to give special consideration to vulnerable groups	1
	19	Law requires businesses to support SMEs in conducting human rights due diligence	1
	20	Law prohibits companies from exploiting their advantageous status to unevenly transfer human rights responsibilities	1
8. Top-Management Endorsement	21	Law mandates top-management endorsement of corporate human rights policies	1
	22	Law assigns human rights due diligence responsibilities to corporate directors	0
9. Stakeholder Participation	23	Law compels companies to engage with stakeholders in implementing human rights due diligence	0
	24	Law clarifies the scope of stakeholder engagement and defines the term “stakeholder”	0
	25	Law confers decision-making powers to stakeholders during the consultation process	0
10. Operational-level Grievance Mechanisms	26	Law mandates companies to establish an operational-level grievance procedure	1
		Total	23

4. The Norwegian Transparency Act

4.1 Background of the Norwegian Transparency Act

On June 18, 2021, the Norwegian Act relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Norwegian Transparency Act) received Royal Assent.[509] It then came into effect on July 1, 2022. Like its French and German counterparts, discussions surrounding the Norwegian Transparency Act emerged in the aftermath of the Rana Plaza tragedy in 2013.[510] Following the collapse of the Rana Plaza, the Norwegian NGO "Future in Our Hands" mobilized more than 30,000 consumers to sign the "I want to know" petition, advocating for improved access to information regarding ethics in manufacturing and a law on ethics information. This grassroots movement, in conjunction with the efforts from other NGOs, underscored a compelling demand from ethical and politically conscious consumers and civil society for "not only more information about the ethical aspects of manufacturing, but changes in practice."[511] This collective advocacy propelled the legislative process forward and shaped the Norwegian Transparency Act, emphasizing both information disclosure and substantive due diligence. It also makes the Norwegian Transparency Act stand out from other disclosure-based transparency laws in the realm of BHR.

In February 2016, politicians from the Christian Democratic Party, the Green Party, and the Centre Party collaborated to submit a bill for a "law on ethics information," underscoring the significance of companies demonstrating compliance with due diligence as per the UN Guiding Principles. Subsequently, the Ethics Information Committee was established on June1, 2018, with a mandate to "assess whether Norway should adopt an ethics information law(…). Whether it is possible and advisable to require businesses to disclose information to consumers and organizations about production sites used in manufacturing, responsible business conduct and supply chain management."[512] Following various consultations and field trips, the Ethics Information Committee presented its final report, including a draft law and legal commentary, in November 2019. Then, the Government presented its stance to the Norwegian Parliament without substantive changes to the Committee's proposal. The proposal in the Parliament underwent a public hearing on April 29, 2021, conducted by the Standing Committee on Family and Culture Affair, without making any amendments. Subsequently, the Norwegian Transparency Act was passed on June14,

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509 The examination of the Norwegian Transparency Act in this study relies on an unofficial translation of the Act offered by the Ministry of Children and Families of Norway, available at: https://lovdata.no/dokument/NLE/lov/2021-06-18-99.

510 See "Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence," Norwegian Ethics Information Committee (28 November 2019): 18, accessed 20 December 2023, https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf.

511 Ibid.

512 *Mandate of the Ethics Information Committee*, Etikkinformasjonsutvalget, https://nettsteder.regjeringen.no/etikkinformasjonsutvalget/purpose/.

2021.

4.2 Content of the Norwegian Transparency Act

The Norwegian Transparency Act comprises fifteen sections, placing its length between the French Duty of Vigilance Law, consisting of only three articles, and the German Supply Chain Act, which includes twenty-four sections plus an Annex. The Act serves dual objectives: (1) promoting enterprises to respect human rights and decent working conditions; and (2) ensuring public access to information regarding how enterprises manage adverse impacts on human rights and decent working conditions (Section 1). Obviously, the Act is envisioned to "improve working conditions for people who are involved in global supply chains, within *and* outside Norway."[513]

The Act has jurisdiction over both domestic and foreign enterprises, including: (1) larger enterprises resident in Norway offering goods or services within or outside Norway; and (2) larger foreign enterprises providing goods or services in Norway, subject to the Norwegian taxation regime (Section 2). Larger enterprises are those defined in Sections 1–5 of the Accounting Act, as well as enterprises surpassing the threshold of two of the following conditions: (1) sales revenue of NOK 70 million; (2) balance sheet total of NOK 35 million; and/or (3) 50 full-time employees in the financial year. The Act is projected to have a direct impact on approximately 9,000 enterprises and an indirect impact on smaller enterprises within supply chains.[514]

To ensure respect for fundamental human rights and decent working conditions,[515] covered enterprises are obligated to undertake the duty to carry out due diligence (Section 4), the duty to account for due diligence (Section 5), and the duty to provide information (Section 10). As per Section 3(b), "fundamental human rights" are defined in line with UN Guiding Principles, referring to internationally recognized human rights. The Act explicitly mentions the ICESCR, the ICCPR, and the ILO's core conventions on fundamental principles and rights at work. Regarding "decent working conditions," Section 3(c) alludes to work that upholds fundamental human rights, health, safety, and environment in the workplace, and ensures a living wage. The legal commentary further clarifies that a "living wage" is understood as "wages that enable workers to provide for themselves and their families.[516]

The duty to carry out due diligence is the first mandatory obligation for covered enterprises. As stipulated in Section 4, enterprises are required to undertake due

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513 "Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence," 4 (n.510). Emphasis added.

514 *The Transparency Act*, Forbrukertilsynet (Norwegian Consumer Authority), 29 August 2023, https://www.forbrukertilsynet.no/vi-jobber-med/apenhetsloven/the-transparency-act.

515 Unlike many other mHRDD laws that incorporate environmental concerns within their material scope, the Norwegian Transparency Act does not cover environmental issues. This exclusion is not due to a lack of recognition regarding the importance of the environmental crisis and its interconnectedness with human rights. Instead, it stems from the specific mandate given to the Ethics Information Committee, the body responsible for drafting the Act, which did not explicitly include consideration of environmental issues. See "Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence," 5 (n.510).

516 Ibid, 64.

diligence in accordance with the OECD Guidelines. The due diligence duty involves six steps, viz.: (1) integrating responsible business conduct into the enterprise's policies; (2) identifying and evaluating actual and potential adverse impacts on human rights or decent working conditions in their own operations, their supply chain and other business relationships; (3) implementing appropriate measures to end, prevent or mitigate adverse impacts based on risk prioritization; (4) monitoring the implementation and outcomes of measures taken; (5) engaging in communication with affected stakeholders and rights-holders regarding how adverse impacts are addressed; and (6) providing for or co-operate in remediation and compensation when appropriate. Additionally, this Section underscores that due diligence should be taken periodically and commensurate with the size and nature of the enterprise, the operational context, and the severity and likelihood of adverse impacts on fundamental human rights and decent working conditions. The Norwegian Consumer Authority encourages enterprises to refer to the *OECD Due Diligence Guidance for Responsible Business Conduct* for additional practical guidance on implementation.[517]

It is noteworthy that "supply chain" under the Norwegian Transparency Act encompasses "any party in the chain of suppliers and sub-contractors that supplies or produces goods, services, or other input factors included in an enterprise's delivery of services or production of goods from the raw material stage to a finished product" (Section 3(d)). In this connection, the Act "does not limit the (due diligence) duties to specific tiers in the supply chain and may in principle be interpreted as covering both upstream and downstream suppliers." [518] To phrase it differently, the covered enterprises should conduct due diligence duties throughout the whole supply chain, subject to the principle of proportionality as set forth in Section 4.

Second, enterprises should publish an account of their due diligence efforts, as outlined in Section 5. This account should include, at a minimum, three key elements: (1) a comprehensive description of the enterprise's structure, operational scope, guidelines, and procedures addressing human rights and decent working conditions; (2) information concerning the actual adverse impacts and identified risks; and (3) information regarding measures adopted by the enterprise to deal with adverse impacts and identified risks. In addition, this account must be signed by a competent auditor and made readily accessible on the enterprise's website. Enterprises are required to report annually and in cases of significant changes to risk assessments.

Last but not least, anyone, including enterprises, has a duty to provide the Consumer Authority (Forbrukertilsynet) and the Market Council with the information required as per Section 10. This obligation is similar to Section 17 of the German Supply Chain Act, which requires the provision of information and documents. However, the Norwegian Transparency Act steps further by empowering individuals with the right to seek information from enterprises. Pursuant to Section 6, any person has the right to

517 *OECD Due Diligence Guidance for Responsible Business Conduct*, OECD (31 May 2018), accessed 20 December 2023, https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.

518 Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," 556 (n.135).

request information from an enterprise, upon written request, regarding how the enterprise addresses actual and potential adverse impacts on human rights and decent working conditions.[519] The due diligence information that can be requested includes both general information and details relating to a specific product or service offered by the enterprise. To avoid undue burden on enterprises, paragraph 2 of Section 6 defines instances when the enterprise may deny a request for information.[520] Section 7 further elucidates the enterprise's duty concerning the processing of requests for information. Notably, the enterprise shall provide adequate and comprehensible information in written format no later than three weeks after receiving the request for information.

Like the German Supply Chain Act, the Norwegian Transparency Act establishes a comprehensive public oversight and enforcement framework. Section 9 thereof authorizes the Consumer Authority to monitor and enforce the Act. The first dimension of the Consumer Authority's mandate is to provide guidance in relation to the Act (Section 8). Moreover, the Consumer Authority is authorized to, on its own initiative or based on a request from others, seek to influence enterprises to comply with the Act. In the event of a breach, it has the power to request a written confirmation from the enterprise, affirming that the illegal conduct will cease. Alternatively, the Consumer Authority can issue a formal decision addressing the breach (Section 9).

Furthermore, the Consumer Authority and the Market Council may issue a prohibition and order to ensure compliance with due diligence obligations articulated in Sections 4–7 (Sections 11 and 12). In instances where an enterprise fails to adhere to enforcement measures, the Consumer Authority and the Market Council may impose an enforcement penalty as a running charge or as a lump sum (Section 13). If there are repeated infringements of the duties articulated in Sections 5-7, Section 14 allows for an infringement penalty on the party to whom the decision is directed. Importantly, Paragraph 2 of Section 14 further clarifies that an enterprise may face an infringement penalty when the infringement is committed by someone acting on behalf of the enterprise. Simultaneously, an infringement penalty may be imposed on natural persons in cases of willful or negligent infringements.

The Norwegian Transparency Act also assigns the Ministry of Children and Families the responsibility to issue regulations that: (1) provide further clarification on the material and personal scopes of the Act on the party concerned (Section 3); (2) detail the duty to carry out and account for due diligence (Sections 4 and 5); (3) explain the right to information and the right of enterprises to deny a request for information (Section 6); (4) flesh out the enterprises' processing of requests for information (Section

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519 "Any person" means anyone, for example, other businesses, public bodies and CSOs. See *The Transparency Act*, Forbrukertilsynet, 29 August 2023, https://www.forbrukertilsynet.no/vi-jobber-med/apenhetsloven/the-transparency-act.

520 An enterprise has the discretion to deny a request for information in the following situations: (1) if the request lacks a sufficient basis for identifying its subject matter; (2) if the request is evidently unreasonable; (3) if the requested information pertains to data concerning an individual's personal affairs; and (4) if the requested information involves data about technical devices, procedures, or other operational and business matters crucial to keep confidential for competitive reasons in the interest of the affected party. When an enterprise denies a request for information, it is obligated to provide information about the legal basis for the denial. See Sections 6 and 7, Norwegian Transparency Act.

7); (5) interpret the imposition of enforcement penalties and infringement penalties (Sections 13–14). It is pertinent to mention that although the Act establishes a holistic public monitoring and enforcing regime, there are no explicit provisions within the Norwegian Transparency Act for the civil or criminal liability of enterprises for violations.[521]

4.3 Evaluation of the Norwegian Transparency Act

(1) **A Smart-mix Approach**: On the one hand, the Norwegian Transparency Act recommends enterprises under its jurisdictions consult the *OECD Due Diligence Guidance for Responsible Business Conduct* for additional practical guidance on implementation. On the other hand, it mandates the Consumer Authority to provide guidance for enterprises. This dual approach, drawing from both international instruments and domestic authority, complements the mandatory due diligence requirements by providing voluntary references to the enterprise. Thus, the Act achieves a score of 1 point under Indicator 1.

In terms of integrating international rules, the Norwegian Transparency Act steps further than its French and German counterparts. By incorporating the UN Guiding Principles and globally recognized human rights principles and modeling its obligation to conduct thorough due diligence on the OECD Guidelines, the Act provides a comprehensive due diligence framework. Therefore, it receives a score of 1 point under Indicator 2.

Regarding Indicator 3, the Norwegian Transparency Act allows enterprises to integrate due diligence reports into their social responsibility reports by referencing Section 3-3(c) of the Accountability Act.[522] This provision is anticipated to enhance the coherence of Norwegian disclosure regime. Similarly, to ensure the functioning of the designated authorities, the Norwegian Transparency Act involves rules concerning the organization and operation of the authorities from the Norwegian Marketing Control Act.[523] Accordingly, it receives 2 points under Indicator 3. Despite the well-structured regulatory oversight mechanism in the Norwegian Transparency Act, it falls short in providing incentive mechanisms to foster corporate compliance. Therefore, it accumulates 0 point under Indicator 4 and 1 point under Indicator 5.

(2) **Policy Coherence**: Like other domestic mHRDD laws discussed, the Norwegian Transparency Act does not contain any provision requiring the government to factor in HRDD in bilateral and multilateral instruments. Thus, it is awarded 0 point under Indicator 6. However, Norway established a *Business and Human Rights: National*

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521 Civil liability was not a prominent concern even during the legislative debates. See Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," 558 (n.135).

522 Section 5, paragraph 3, Norwegian Transparency Act.

523 Section 9, paragraph 4, Norwegian Transparency Act.

Action Plan for the Implementation of the UN Guiding Principles in 2015,[524] affording it 1 point under Indicator 7. Regrettably, there is no indication of an impending update to the BHR NAP in Norway.[525]

(3) **Extraterritorial Regulation**: The Norwegian Transparency Act is directly applicable to foreign enterprises in certain circumstances. Moreover, as it adopts a broad definition of "supply chain," the Act has impacts on suppliers abroad. Consequently, it secures 1 point under Indicator 8 concerning extraterritorial implications. Additionally, the Ethics Information Committee conducted field trips in China to study the factual issues of GVCs, such as the operation of the global production chain and corporate purchasing practices, as well as factors with potential to improve.[526] As a result, the Act achieves 1 point under Indicator 9 regarding consultation with a third country in formulating a mHRDD law.[527]

(4) **Remedial Mechanisms**: As seen above, the Norwegian Transparency Act contains neither a state-based judicial mechanism nor a dedicated civil liability regime. Likewise, the Act does not require public support for operational-level grievance mechanisms. Yet, it features a state-based non-judicial mechanism, i.e., the Norwegian NCP under the OECD Guidelines.[528] Since 2011, this mechanism has handled 20 special instances, with over half of them pertaining to complaints against corporate human rights abuses.[529] This serves as a significant state-based non-judicial mechanism for addressing corporate human rights abuses.

Moreover, the Norwegian Transparency Act provides support to reduce obstacles to accessing justice. The innovative designs in corporate duty to provide information and individuals' right to information function as "a potential tool for affected individuals and communities to seek relevant information in a time-bound manner and in turn address partially the information asymmetry that exists between businesses and rightsholders."[530] Taken together, the Norwegian Transparency Act obtains 1 point, 0 point, and 1 point under Indicator 10, 11, and 12, respectively.

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524 Norwegian Ministry of Foreign Affairs, *Business and Human Rights: National Action Plan for the Implementation of the UN Guiding Principles*, (2015), accessed 20 December 2023, https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/mr/business_hr_b.pdf.

525 For an overview of the Norwegian BHR NAP, see "Norway," National Action Plans on Business and Human Rights (11 April 2023), accessed 20 December 2023, https://globalnaps.org/country/norway/.

526 See "Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence," 12 (n.510).

527 The extent to which the Norwegian legislator engaged in consultation with Chinese people beyond factual issues is unclear. Likewise, some authoritative European BHR scholars suggest that Western legislatures usually lack proper consideration for the concerns of people from the Global South in designing mHRDD laws. However, this research assigns the Norwegian Transparency Act a score of 1, as it is a positive step with profound implications for shedding light on the incorporation of more voices from the Global South in designing and implementing a mHRDD law with extraterritorial reach. The significance of such engagement from the Global South will be discussed further in Chapter 7 below.

528 For a general introduction to the Norwegian National Contact Point, see "National Contact Point Norway," OECD, accessed 20 December 2023, https://www.responsiblebusiness.no/en/.

529 For more information on the special instances submitted to the Norwegian National Contact Point, see OECD Database of Specific Instances, 20 December 2023, https://mneguidelines.oecd.org/database/?hf=50&b=0&q=NCP%3A(Norway).

530 Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 410 (n.118).

(5) **Ongoing Process**: The Norwegian Transparency Act explicitly requires covered enterprises to undertake due diligence duties regularly, as stated in paragraph 2 of Section 4. Thus, the Act accrues 1 point under Indicator 13.

(6) **Broad Coverage**: The Norwegian Transparency Act has a limited personal scope, applying only to certain larger enterprises rather than covering all business entities. However, the Act adopts a broad definition of human rights and decent working conditions in its material scope, though it does not distinguish corporate duties based on the extent of corporate involvement in violations. Therefore, the Act garners 0, 1, and 0 point under Indicator 14, 15, and 16, respectively.

(7) **Contextual Particularity**: Paragraph 2 of Section 4 of the Norwegian Transparency Act articulates the principle of proportionality. This principle allows enterprises to conduct due diligence commensurate with their size, nature, operational context, and the severity and possibility of human rights risks, awarding the Act 1 point under Indicator 17. Unfortunately, the Act fails to clearly obligate enterprises to give special consideration to vulnerable groups, assist SMEs in implementing HRDD in their supply chains, and prohibit larger companies from unfairly passing on their shares of HRDD. As a result, the Norwegian Transparency Act receives 0 point under Indicators 18, 19, and 20.

(8) **Top-management Endorsement**: While the Norwegian Transparency Act requires a qualified auditor to endorse the corporate due diligence report and mandates the enterprise to follow the OECD Guidelines for conducting due diligence, the Act itself does not explicitly oblige top management to endorse the due diligence processes.[531] In this connection, the Act earns 0 point under Indicator 21.

Similarly, although the provisions on infringement penalties in the Act shed some light on the director's HRDD duty, the interpretation and implementation of this rule remain unclear. What is clear now is that the Norwegian Transparency Act falls short in expressly assigning HRDD responsibilities to corporate directors. As a consequence, the Act is credited with 0 point under Indicator 22.

(9) **Stakeholder Participation**: As per Section 4, paragraph e) of the Norwegian Transparency Act, the enterprise is clearly required to "communicate with affected stakeholders and rights-holders regarding how adverse impacts are addressed." Nonetheless, the Act lacks clarification regarding the extent of stakeholder engagement, the definition of the term "stakeholder," and the granting of specific decision-making power to stakeholders. The mere necessity for "communication" is insufficient. As Dehbi and Martin-Ortega correctly note, "by not defining a minimum level of engagement, beyond the receipt of information, companies

531 A recent evaluation of corporate compliance with the Norwegian Transparency Act exposes a disheartening reality, notably in cases where numerous examined enterprises lacked signatures from managers on their due diligence reports. This underscores the importance of the Act explicitly mandating top-management endorsement in the formulation and implementation of human rights due diligence duties. See *Åpenhetsloven: Én av fem mangler redegjørelse på nettsidene* (Transparency Act: One in five lacks an explanation on the websites), 15 November 2023, Forbrukertilsynet, https://www.forbrukertilsynet.no/apenhetsloven-en-av-fem-mangler-redegjorelse-pa-nettsidene.

remain free to determine if and how to involve rights-holders and stakeholders in the specific actions and outcomes." Consequently, the Norwegian Transparency Act obtains 0 point under Indicators 23, 24, and 25.

(10) **Operational-level Grievance Mechanisms**: As seen in the introduction to the content of the Norwegian Transparency Act, establishing and maintaining an operational-level grievance mechanism is not explicitly enacted as a mandatory step of corporate due diligence obligations. While the Act requires the enterprise to conduct due diligence in accordance with the OECD Guidelines, the absence of specific obligations regarding operational-level grievance mechanisms offers too much leeway for the enterprise. The unsatisfactory outcomes of a recent evaluation of corporate compliance with the Norwegian Transparency Act provide a telling example of this challenge.[532] As a result, the Act earns 0 point under the final Indicator 26.

The Norwegian Transparency Act achieves a score of 13 out of 26 (Table 6). The Act is notable for its holistic integration with the OECD Guidelines in defining due diligence obligations; a well-structured public monitoring and enforcement mechanism; proper considerations of the concerns of a third country in formulating the legal text; and the innovative creation of the right to information and the duty to provide information. Nonetheless, there is room for improvement, particularly in areas related to contextual particularity, stakeholder participation, and operational-level grievance mechanisms, where it receives a less favorable evaluation within the proposed framework.

Table 6 Scores of the Norwegian Transparency Act Across Key Indicators

Parameters	Indicators		Scores
1. A Smart-mix Approach	1	Law contains mandatory and voluntary measures	1
	2	Law integrates international rules	1
	3	Law refers to other domestic laws and policies	2
	4	Law includes incentive mechanisms	0
	5	Law encompasses regulatory oversight mechanisms	1
2. Policy Coherence	6	Law contains provisions requiring the state to factor in human rights due diligence in bilateral and/or multilateral instruments	0
	7	Whether a state enacting mHRDD has established a BHR NAP	1
3. Extraterritorial Regulation	8	Law has extraterritorial implications	1
	9	Whether the formulation of an mHRDD law with extraterritorial implications involves consultation with third parties outside the jurisdiction of the state	1
4. Remedial Mechanisms	10	Law includes state-based judicial mechanisms, state-based non-judicial mechanisms, and the requirement for government support to facilitate operational-level grievance mechanisms	1
	11	Law contains a dedicated civil liability regime	0

532 See *Åpenhetsloven: Én av fem mangler redegjørelse på nettsidene* (Transparency Act: One in five lacks an explanation on the websites) (n.531).

	12	Law provides support to reduce barriers to access to remedies	1
5. Ongoing Process	13	Law mandates companies to consistently engage in human rights due diligence	1
6. Broad Coverage	14	Law applies to all business entities	0
	15	Law adopts a comprehensive definition of human rights	1
	16	Law imposes distinct obligations for different types of corporate human rights abuses	0
7. Contextual Particularity	17	Law permits companies to tailor human rights due diligence measures based on their specific business context	1
	18	Law mandates companies to give special consideration to vulnerable groups	0
	19	Law requires businesses to support SMEs in conducting human rights due diligence	0
	20	Law prohibits companies from exploiting their advantageous status to unevenly transfer human rights responsibilities	0
8. Top-Management Endorsement	21	Law mandates top-management endorsement of corporate human rights policies	0
	22	Law assigns human rights due diligence responsibilities to corporate directors	0
9. Stakeholder Participation	23	Law compels companies to engage with stakeholders in implementing human rights due diligence	0
	24	Law clarifies the scope of stakeholder engagement and defines the term “stakeholder”	0
	25	Law confers decision-making powers to stakeholders during the consultation process	0
10. Operational-level Grievance Mechanisms	26	Law mandates companies to establish an operational-level grievance procedure	0
		Total	13

5. Comparing the Three Domestic Mandatory Human Rights Due Diligence Laws

The above assessment of the French Duty of Vigilance Law, the German Supply Chain Act, and the Norwegian Transparency Act reveals both strengths and inherent limitations within these domestic mHRDD laws, offering insightful findings for future legislative endeavors. In line with the qualitative assessment by Surya Deva,[533] the German Supply Chain Act achieves the highest score (23/26) under this assessment. However, the French Duty of Vigilance Law secures the second position (15/26),

533 See Deva, "Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?," 412 (n.118).

followed by the Norwegian Transparency Act (13/26) (Figure 2). It is crucial to reiterate that while such evaluations provide a nuanced understanding and evidence-based comparative overview of these domestic mHRDD laws, the scores do not necessarily indicate the actual effectiveness of these laws in practice. Various dynamics beyond the scope of this research may impact the effectiveness of these laws. Nonetheless, the following paragraphs delve into a horizontal comparison of these laws in both a holistic and specific context. A more detailed comparative evaluation of the laws is presented in Chapter 7 below.

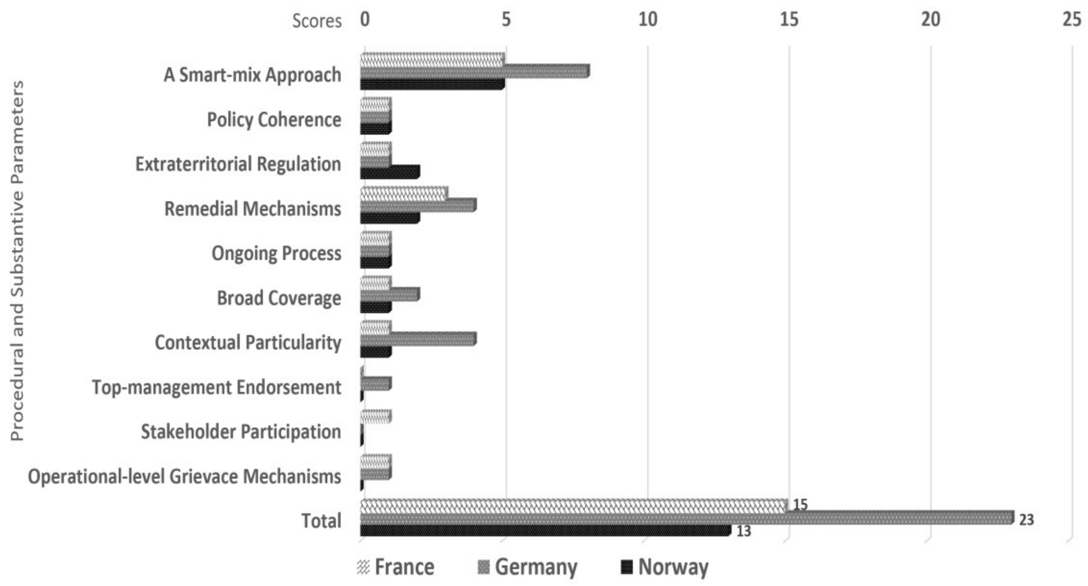

Figure 2 Comparison of the Three Domestic mHRDD Laws Across Key Parameters

5.1 Merits of the Examined mHRDD Laws at Domestic Level

From a general perspective, there is a noticeable trend in domestic mHRDD legislative practices, with a clear inclination towards aligning positive laws with soft international BHR standards, such as the UN Guiding Principles and the OECD Guidelines. When assessing various parameters collectively, it becomes apparent that all three mHRDD laws embrace a smart-mix approach proactively. Specifically, both the French Duty of Vigilance Law and the German Supply Chain Act establish a connection between corporate due diligence obligations and the eligibility for public procurement, introducing a crucial incentive mechanism to encourage corporate compliance. Additionally, both the German Supply Chain Act and the Norwegian Transparency Act incorporate a well-structured public oversight and enforcement regime. This represents a concrete response to the urgent need for "'brining the state back' into global governance and for hardening corporate accountability".[534]

534 Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?," 112 (n.130).

Then, all these domestic mHRDD laws exhibit extraterritorial implications, responding to the cross-border and trans-jurisdictional features of the networked GVCs. This mirrors "a trend of the so-called *home* states of transnational corporations to pass legislation that is intended to combat human rights violations in *global* supply chains."[535] Moreover, these domestic mHRDD laws closely adhere to the fundamental requirements for HRDD as outlined by the UN Guiding Principles. For example, they obligate targeted enterprises to conduct their due diligence obligations periodically and proportionately. Furthermore, these laws embrace an inclusive approach to determining "human rights" and "supply chain," going beyond a narrow focus on labor rights and a company's own operational areas. Both the French Duty of Vigilance Law and the German Supply Chain Act extend the material scope of application to environmental aspects. This adaptability addresses the empirical complexity of corporate human rights abuses within GVCs.

Lastly, the examined mHRDD laws are equipped with diverse remedial mechanisms, all of which facilitate access to remedies to varying extents. Notably, the French Duty of Vigilance Law distinguishes itself by formulating a dedicated civil liability regime; the German Supply Chain Act provides for special capacity to sue; and the Norwegian Transparency Act introduces the individual's right to information and the corporate duty to provide information. While these laws have faced criticism for potential inadequacies in remedy provisions, they undeniably signify important progress toward enhanced accountability and remedy within the field of BHR.

5.2 Demerits of the Examined mHRDD Laws at Domestic Level

In terms of shortcomings, these examined domestic mHRDD laws share some specific limitations. Firstly, they lack provisions that mandate governments to address corporate human rights responsibility, or HRDD, when developing and executing bilateral and multilateral agreements.

Second, apart from the Norwegian Transparency Act, which sought input from a third country that could be impacted by the extraterritorial reach of mHRDD laws during the development of the legislation, the other two laws failed to properly take into account the concerns of such third countries. Failure to include the voice of a third country affected by mHRDD laws during the legislative process undermines both the legitimacy and efficacy of the laws, as explained in Chapter 7 below.

Third, and what frequently gets discussed, is the absence of a dedicated civil liability regime for corporate human rights violations under the Germany Supply Chain Act and the Norwegian Transparency Act. While the French Duty of Vigilance Law is characterized by such a civil liability regime, it fails to properly address legal and non-legal obstacles that prevent victims from obtaining civil remedies.

Fourth, all three of the examined mHRDD laws at the domestic level apply to a

535 Rühmkorf, "The German Supply Chain Law: A First Step Towards More Corporate Sustainability," 6 (n.497). Emphasis added.

limited scope of large enterprises instead of encompassing all business entities as envisioned by the UN Guiding Principles. This limitation could make the mHRDD laws half-hearted, given that the majority of business entities within GVCs, including those situated in Europe, are SMEs.

Fifth, although the significance of top-management endorsement in the corporate HRDD process, including establishing a human rights statement, is widely acknowledged in international BHR instruments and scholarly debates, it is only the German Supply Chain Act that makes it a compulsory component of corporate HRDD obligations. In the same vein, besides the Norwegian Transparency Act, neither of the other two mHRDD laws provides the possibility of holding corporate directors responsible for HRDD duty.

Finally, all three mHRDD laws receive very negative evaluations in terms of the parameter concerning stakeholder participation. None of them makes the stakeholder engagement in the HRDD implementation a mandatory duty, nor do they provide explicit definitions of the term "stakeholder" or specify the level of "participation" required, let alone granting decision-making powers to stakeholders in terms of participation in HRDD process.

5.3 Concluding Remarks

In summary, although HRDD-related legislation can be observed worldwide, the substantive mHRDD laws modeled on the UN Guiding Principles are examined in this research. The horizontal comparison of mHRDD laws at the domestic level demonstrates distinct approaches taken by France, Germany, and Norway in humanizing GVCs. Through this qualitative assessment, it is evident that the German Supply Chain Act stands out, at least in theory, among the examined mHRDD laws. Despite the lack of a dedicated civil liability regime, the German Supply Chain Act allows for the specific capacity to sue companies and underscores the possibility of filing a civil proceeding under the general tort regime. Furthermore, the German Supply Chain Act not only closely aligns with the UN Guiding Principles to delineate key components of corporate due diligence duties but also explicitly requires the establishment of a human rights unit. This internal unit is in charge of monitoring risk management. Corporate senior management should consistently seek information from the unit. Moreover, the German Supply Chain Act clearly requires targeted enterprises to provide support for SMEs, pay special attention to vulnerable groups in the supply chain, and alter deleterious purchasing practices. These three provisions are significant in terms of addressing human rights challenges in GVCs, particularly power asymmetry, as illustrated by the case study of the Rana Plaza tragedy in Chapter 1.

Despite the merits of the Germen Supply Chain Act, it is far from optimal. Any potential efforts to formulate mHRDD laws, whether at the domestic, regional, or international level, should adopt a holistic approach. This entails thoroughly considering the advantages and disadvantages derived from the above comparisons,[536] as well as the merits of other comparable laws, such as the Italian Legislative Decree 231/200, instead of prevailing a single domestic mHRDD law. Such a holistic approach fosters a reflexive paradigm in legislating mHRDD laws and, more broadly, in the institutionalization of BHR norms. This also contributes to the development of a more functional transnational regulatory ecosystem for humanizing GVCs.

However, it might be contended that assessing the intricate mHRDD laws using a straightforward qualitative method, as in this research, is impractical. Nevertheless, conducting such a qualitative assessment, based on the proposed theoretical framework, indeed provides in-depth understanding and incremental knowledge of the differences and advantages of various domestic mHRDD laws. Both the contribution of Surya Deva and this research serve as examples in this regard. This is particularly significant in the current context, as there is a dearth of a well-defined and widely recognized set of criteria for comparing the rapidly advancing mHRDD laws. Therefore, this qualitative method will continuously be employed to assess mHRDD legislation at both the EU and international levels.

536 Chapter 7 offers more in-depth discussions of the advantages, disadvantages, and best practices of mHRDD laws.

CHAPTER 5 MANDATORY HUMAN RIGHTS DUE DILIGENCE LAW AT EUROPEAN UNION LEVEL

As a central hub in GVCs, the EU is intricately woven into various BHR issues. Since the adoption of the UN Guiding Principles in 2011, the EU has taken a more proactive role in the global BHR agenda. This involves not only strengthening the implementation of the UN Guiding Principles through internal policies but also continuously amending or enacting legislation to institutionalize BHR laws. Driven by the rapid advancement of mHRDD laws in Member States and the increasing demands from civil society, the EU's legislative process on mHRDD law has speeded up. If adopted, the EU-level mHRDD law will substantially reconstruct the GVC regulatory ecosystem. It will not only reshape mHRDD laws in EU Member States like France and Germany but also affect laws in non-EU countries and even the negotiated international BHR treaty. Its significance makes it indispensable for this comparative research on mHRDD laws. This chapter offers a holistic examination of the proposed Union-level mHRDD law. It aims to present the law by both providing a broad overview and delving into specific details. The chapter consists of three sections. Section 1 introduces the legislative background of the EU CSDDD. Then, Section 2 provides an in-depth analysis of the legal text. Finally, Section 3 employs the analytical framework developed by this research for a multidimensional evaluation of the EU CSDDD.

1. Background of EU Legislation on Mandatory Human Rights Due Diligence

The EU's economic influence and political leverage in the realm of globalized economic activities firmly embed it inside the BHR movement. It de facto offers "the most dynamic, evolving and intriguing legal framework for B&HRs."[537] Since the beginning of the millennium, the EU has been actively engaged in and aspired to spearhead the international BHR agenda,[538] particularly following the adoption of the *Renewed EU Strategy for Corporate Social Responsibility* in 2011 (Renewed CSR Strategy).[539] This pivotal Strategy signifies a notable shift in the EU's approach, transitioning from mere endorsement of the international BHR movement to active integration and pursuit of leadership in the institutionalization of BHR.

Elaborated in the aftermath of the financial and economic crisis, the Renewed CSR Strategy's overarching objectives were "to create conditions favourable to sustainable growth, responsible business behaviour and durable employment generation in the

537 Francesco Luigi Gatta, "From Soft International Law on Business and Human Rights to Hard EU Legislation?," in *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, ed. Martina Buscemi et al. (Leiden: Brill | Nijhoff, 2020), 248.

538 For an insightful retrospection of this evolution, see Mary E Footer, "The EU's Engagement with Business on Human Rights," in *The European Union and Human Rights: Law and Policy*, ed. Jan Wouters et al. (Oxford University Press, 2020), 312-42.

539 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM/2011/0681 final, 25 October 2011.

medium and long term."[540] Furthermore, it aimed to "reaffirm the EU's global influence in this field, enabling the EU to better promote its interests and values in relations with other regions and countries."[541] Importantly, this Renewed CSR Strategy framed BHR as an integral part of the Union's general CSR strategy. It achieved this by assimilating major international BHR standards, such as the UN Guiding Principles and the OECD Guidelines, into the essential core underpinning the EU CSR framework. It also explicitly stated that "European policy to promote CSR should be made fully consistent with this framework."[542] In particular, acknowledging that a "[b]etter implementation of the UN Guiding Principles will contribute to EU objectives regarding specific human rights issues and core labor standards (…)," the Commission decided to release an additional report on EU priorities in implementing the UN Guiding Principles.[543] This Council of EU likewise supported this position, affirming in 2012 that the implementation of the UN Guiding Principles is a crucial element within EU priorities on human rights.[544]

Despite the absence of a dedicated Union-level Action Plan on Business and Human Rights,[545] the *EU Action Plan on Human Rights and Democracy (2015-2019)* played a pivotal role in solidifying actions at both the Union and Member States levels to advance the BHR cause.[546] Subsequently, the EU has deployed a smart-mix approach to fostering responsible business conduct within and outside the EU, predominantly through the provision of incentives, guidance, and coordination.[547] A noteworthy accomplishment during this period was the proliferation of BHR NAPs within EU Member States, signifying that the implementation of the UN Guiding Principles in the EU has transitioned "from regional action to national implementation."[548] Moreover, the EU has gradually attempted to adopt mandatory disclosure laws or sector-specific mHRDD laws, albeit with less stringency. Nonetheless, the EU was still quite reluctant to legislate extensively in this area, as "it considers that business enterprises are in the lead in this regard and its role must necessarily be a marginal one, confined to soft

540 Ibid 4.

541 Ibid 6.

542 Ibid 6-7.

543 Ibid 14.

544 EU Strategic Framework and Action Plan on Human Rights and Democracy, 25 June 2012, Council of the European Union, 11855/12, 3.

545 As of December 2023, there is not a specialized BHR NAP at the EU level. For a brief introduction to the importance of such a BHR NAP, see *Recommendations to the New EU Commission: Developing and Adopting an EU-level Action Plan on Business and Human Rights*, European Network of National Human Rights Institutions (November 2019), https://ennhri.org/wp-content/uploads/2019/11/ENNHRI-BHR-Statement_EU-Commision.pdf.

546 *EU Action Plan on Human Rights and Democracy (2015-2019)*, 20 July 2015, Council of the European Union, 10897/15, 17.

547 See Stephanie Bijlmakers, Mary Footer, Nicolas Hachez, *The EU's Engagement with the Main Business and Human Rights Instruments*, 1 November 2015, 139, https://www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-7.4.pdf.

548 See Humberto Cantú Rivera, "The United Nations Guiding Principles on Business and Human Rights in the European Union: From Regional Action to National Implementation," in *The Business and Human Rights Landscape: Moving Forward, Looking Back*, ed. Karen E. Bravo and Jena Martin (Cambridge: Cambridge University Press, 2015), 498-529.

promotion and coordination."[549]

However, the ineffectiveness of voluntary measures and mandatory disclosure laws,[550] coupled with the persistent occurrence of severe corporate human rights abuses, underscored the imperative for more robust actions. Indeed, as early as 2015, the European Parliament asserted in a Resolution adopted on the anniversary of the Rana Plaza tragedy that "new EU legislation is necessary to *create a legal obligation of due diligence for EU companies* outsourcing production to third countries, including measures to secure traceability and transparency, in line with the UN Guiding Principles (…) and the OECD MNE Guidelines."[551] Subsequently, in 2016, the Council urged the Commission to consider introducing BHR-related Union legislation, especially in terms of access to remedies.[552] Building on this momentum, in 2018, the European Parliament went a step further, urging the Commission to present a "legislative proposal" for "an overarching, mandatory due diligence framework including a duty of care to be fully phased-in within a transitional period and taking into account the proportionality principle."[553]

Notably, in a 2020 Conclusion, the Council highlighted the possibility for the Commission to introduce GVC rules under the European Green Deal and called on the Commission to "[table] a proposal for *an EU legal framework on sustainable corporate governance*, including (…) process companies need to follow to identify, prevent, mitigate and account for its adverse human and labour rights and environmental impacts."[554] Concurrently, there has been a growing chorus of support for EU mHRDD legislation from various quarters, including business, the public sector, academia, and civil society.[555] Against this backdrop, the EU found itself at "a unique historical moment characterized by a strong momentum" to table Union-level mHRDD legislation.[556]

On March 10, 2021, the European Parliament conclusively published a *Resolution*

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549 Stephanie Bijlmakers, Mary Footer, Nicolas Hachez, *The EU's Engagement with the Main Business and Human Rights Instruments*, 1 November 2015, 156 (n.547).

550 A European Commission-mandated study indicates that only a minority of EU businesses undertake comprehensive due diligence measures, considering all human and labor rights as well as environmental impacts in GVCs. See Lise Smit et al., "Study on Due Diligence Requirements through the Supply Chain: Final Report, British Institute of International and Comparative Law," Civic Consulting, and the London School of Economics and Political Science (Luxembourg, January 2020): 44-92, accessed 20 December 2023, https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

551 JOINT MOTION FOR A RESOLUTION on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact, 28 April 2015, the European Parliament, 2015/2589(RSP), para.23. Emphasis added.

552 *Council Conclusions on Business and Human Rights*, 20 June 2016, Council of the European Union, 10254/16, 4.

553 *Report on Sustainable Finance*, 4 May 2018, European Parliament, (2018/2007(INI)), para.6.

554 Council Conclusions on Human Rights and Decent Work in Global Supply Chains, 1 December 2020, Council of the European Union, 13512/20, paras. 9 and 46. Emphasis added.

555 See "Towards EU Mandatory Due Diligence Legislation: Perspectives from Business, Public Sector, Academia and Civil Society," Business and Human Rights Resource Centre (November 2020), accessed 15 December 2023, https://www.business-humanrights.org/en/from-us/briefings/towards-eu-mandatory-due-diligence-legislation/.

556 See Chiara Macchi, "The EU as a Leading Global Actor in Business and Human Rights: Towards a Coherent Policy Framework, Summary of the Context and Overall Objectives of the Project," (3 June 2022), https://cordis.europa.eu/project/id/843115/reporting.

with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (EP Recommendation),[557] strongly urging the Commission to present a proposal for Union legislation in this domain. This EP Recommendation aspired to shape global standards for responsible business conduct by imposing due diligence duties related to human rights, the environment, and good governance on large EU and non-EU companies, including listed SMEs and SMEs in high-risk sectors (Articles 1.1 and 2). The EP Recommendation outlined a series of ambitious provisions designated to address corporate human rights abuses and environmental harm. Among others, it requires businesses to engage in effective, meaningful, and informed discussions with relevant stakeholders when formulating and implementing corporate due diligence strategies (Article 5). Furthermore, it not only established a dedicated civil liability regime but also shifted the burden of proof to businesses (Article 19). While certain pivotal provisions from the EP Recommendation remain unassimilated in the Commission's proposal,[558] it inarguably offers a prototype and catalyst for potential legislative developments of mHRDD at the EU level.

Finally, in late 2021, the European Parliament, the Council, and the European Commission jointly committed to delivering on a socially just, inclusive, and sustainable growth strategy for people and planet, including to "improve the regulatory framework on sustainable corporate governance."[559] Soon after that, on February 23, 2022, the European Commission took a significant step by issuing a proposal on Corporate Sustainability Due Diligence Directive, i.e., EU CSDDD.[560] While the "added value[s]" of EU mHRDD legislation would be profoundly multidimensional,[561] a prominent and discernible objective animating the EU CSDDD is "the hope that the directive will improve the human rights and environmental conditions of people in the Global South."[562] Then, in December 2022, the EU CSDDD was listed as an indispensable item on the agenda of EU legislative priorities for the years 2023 and

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557 European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability, 10 March 21, (2020/2129(INL)).

558 For a thorough comparative study on the EP Recommendation and the EU CSDDD text, see Methven O'Brien Claire and Martin-Ortega Olga, "Commission proposal on Corporate Sustainability Due Diligence: Analysis from a Human Rights perspective," European Parliament Directorate-General for External Policies (2022), accessed 20 December 2023, https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702560/EXPO_IDA(2022)702560_EN.pdf.

559 Joint Declaration of the European Parliament, the Council of the European Union and the European Commission on EU Legislative Priorities for 2022, 21 December 2021, OJ C 514I, p.3.

560 Proposal for A Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, European Commission, (COM(2022) 71 final).

561 For example, the adoption of a Union-level mHRDD law would increase the EU's compliance with international BHR standards, strengthen access to remedies for victims, harmonize mHRDD rules within the single market, enable EU companies greater leverage over GVCs. For a European Parliament-mandated thorough study in this regard, see Cecilia Navarra, "Corporate Due Diligence and Corporate Accountability: European Added Value Assessment," European Parliament Research Service, PE 654.191 (October 2020), accessed 20 December 2023, https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU(2020)654191_EN.pdf.

562 Caroline Omari Lichuma, "Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South," Völkerrechtsblog (16 January 2023), accessed 20 December 2023, https://voelkerrechtsblog.org/centering-europe-and-othering-the-rest/.

2024.[563]

As of the time of this writing, the EU CSDDD is currently in the legislative process and is expected to be adopted in the year 2024.[564] While this proposal has received a considerable number of criticisms since publication,[565] it indeed represents "an opportunity with few parallels in terms of its potential to drive sustainability into the heart of how business gets done,"[566] as discussed below. More recently, following extensive and lengthy negotiations, the Council and the European Parliament reached a provisional agreement on the text of the EU CSDDD on December 14, 2023.[567] However, despite the political compromise reached by EU co-legislators, the final text of the CSDDD is still pending. Therefore, the analysis of EU CSDDD in the research is based on the Commission's original proposal.

2. Content of the EU Corporate Sustainability Due Diligence Directive Proposal

Built upon the foundation laid by the French Duty of Vigilance Law and the German Supply Chain Act, the EU CSDDD shares a closer resemblance in both format and substantial content with the German Act. To clearly introduce this comprehensive legislation, this section is organized in alignment with the key structure of the EU CSDDD.

2.1 Scope of Application

2.1.1 Personal Scope

In terms of personal scope, the EU CSDDD Proposal applies to four groups of companies, covering both EU and foreign companies, as demonstrated in Table 7 (Articles 2.1 and 2.2). The EU CSDDD embraces an inclusive approach to defining "employee." Specifically, the calculation of part-time employees is to be assessed on a full-time equivalent basis. Temporary agency workers are to be included in the calculation of the number of employees in the same way as if they were directly

563 Joint Declaration on EU Legislative Priorities for 2023 and 2024—Working Document, 15 December 2022, p.5, https://commission.europa.eu/strategy-and-policy/strategic-planning/joint-priorities-eu-institutions-2021-2024_en.

564 For more updates on the EU CSDDD legislative process, see *Corporate Due Diligence Accountability*, European Parliament Legislative Train Schedule (15 December 2023), https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-corporate-due-diligence.

565 See Jędrzejowska-Schiffauer et al., "Towards EU-Wide Mandatory Human Rights and Environmental Due Diligence for Business: A Breakthrough in Europe and Beyond?," 246-78 (n.405).

566 *The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive: Shift's Analysis*, Shift (March 2022), accessed 20 December 2023, http://shiftproject.org/eu-csdd-proposal-analysis.

567 For the details of what the new EU CSDDD Proposal text includes, see "Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights," the Council of EU (14 December 2023), accessed 20 December 2023, https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/

employed by the company for an equivalent duration (Article 2.3).

Table 7 Personal Scope of the EU CSDDD

Group	Nationality	Conditions
A	EU	with over 500 employees and a net worldwide turnover of more than EUR 150 million
B		under the thresholds for Group A but with more than 250 employees and a net worldwide turnover of more than EUR 40 million, at least half of which was generated in one or more of the high-risk sectors
C	Non-EU	with a net turnover of more than EUR 150 million generated in EU
D		with a net turnover between EUR 40-150 million generated in EU, at least half of which was generated in one or more of the high-risk sectors

As seen above, when determining targeted foreign companies (Groups C and D), the sole criterion considered is turnover. This approach stems from the EU legislator's perspective that the turnover generated within the EU adequately establishes a territorial nexus between third-country companies and the EU. This justification is based on the potential impact of these companies on the EU internal market. Additionally, the varying definitions of "employees" in foreign countries may disqualify certain companies from the jurisdiction of the EU CSDDD.[568]

Moreover, beyond the conventional focus on large companies in the French Duty of Vigilance Law, the German Supply Chain Act, and the Norwegian Transparency Act, the EU CSDDD also covers medium-size EU and non-EU companies operating in high-risk sectors (Groups B and D). Article 2.1(b) delimitates "high-risk sectors" as: (1) textiles, leather, and related products (including footwear), and the wholesale trade of textiles, clothing, and footwear; (2) agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages; and (3) the extraction, processing, and manufacture of mineral and metal and derivative products.

This risk taxonomy mirrors the approach taken by the OECD in defining sectors with high impact. Notably, the financial sector is excluded by the EU CSDDD, and the Commission believes that this exclusion may "creat[e] a balance between the interest in achieving the goals of the Directive and the interest in minimi[z]ing the financial and administrative burden on companies."[569] However, this exclusion has encountered substantial criticism.[570] The recently reached agreement among EU co-legislators has

568 EU CSDDD, pp.15-16

569 EU CSDDD, p.15.

570 The opposition is particularly striking given a recent, extensive compilation of nearly 50 statements spanning 2022-2023. This compilation clearly and definitively demonstrates widespread support for the inclusion of financial institutions and activities in the EU CSDDD. The backing comes from a diverse array of stakeholders, including hundreds of financial firms, real economy companies, civil society organizations, faith leaders, academics, and an umbrella trade union organization representing over a million financial sector workers in Europe. See "Statements Show Widespread Support for Inclusion of Financial Activities in the Corporate Sustainability Due Diligence Directive," Business and Human Rights Resource Centre (4 December 2023), accessed 20 December 2023, https://www.business-humanrights.org/en/latest-news/position-papers-and-statements-supporting-financial-sector-inclusion-in-the-corporate-sustainability-due-diligence-directive/.

left this issue unsolved, introducing a review clause that allows for the potential inclusion of the financial downstream sector contingent upon a sufficient impact assessment.[571] Despite this exclusion, if this proposal is adopted, the EU CSDDD will have jurisdiction over approximately 13,000 EU companies and 4,000 non-EU companies.[572]

2.1.2 Material Scope

Concerning the material scope, the EU CSDDD covers both adverse human rights and environmental impacts. An adverse human rights impact is defined in Article 3(c) as "an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2." To elaborate, adverse human rights impacts can be classified into three categories, or "three main provisions"[573] as discussed below.

The first category is delineated in the enumeration of specific rights outlined in international human rights agreements, encompassed in paragraphs 1 to 20 of Part I, Section 1 of the Annex. Illustratively, this includes the violation of the right to life and security as per Article 3 of the UDHR and the deprivation of an adequate living wage, as articulated in Article 7 of the ICESCR.

The second category is of a semi-open-ended nature, including the violation of a prohibition or right not covered by the first category but "which directly impairs a legal interest protected in those agreements, provided that the company concerned could have reasonably established the risk of such impairment and any appropriate measures to be taken in order to comply with the obligations referred to in Article 4 of this Directive, taking into account all relevant circumstances of their operations, such as the sector and operational context" (Section 1, Part I, para. 21 of the Annex).

The third category entails an exhaustive list of "human rights and fundamental freedoms conventions" in Section 2, Part I of the Annex. It includes the International Bill of Rights,[574] seven of the nine UN Core Human Rights Conventions,[575] nine of the eleven of ILO's fundamental conventions[576] and other well-acknowledged

571 See "Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights," (n.567).

572 EU CSDDD, p.16.

573 See Claire and Olga, "Commission proposal on Corporate Sustainability Due Diligence: Analysis from a Human Rights perspective," 5-6 (n.558).

574 International Bill of Rights consists of the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.

575 The covered UN Core Human Rights Conventions include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, and the two covenants listed in the International Bill of Rights above. Regrettably, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention for the Protection of All Persons from Enforced Disappearance are excluded in the Annex.

576 ILO fundamental conventions are those conventions that cover subjects that are considered to be fundamental

international human rights and labor instruments. It is thus obvious that the EU CSDDD contains a very comprehensive definition of "human rights," notwithstanding the exclusion of the European Convention on Human Rights and the EU Charter of Fundamental Rights from the Annex.[577]

Regarding adverse environmental impacts, Article 3(c) stipulates that "an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II." The listed specific violations of internationally recognized environmental conventions include twelve paragraphs, such as the protection of biodiversity, the prohibition to import and/or export specimens, mercury-related products, and hazardous wastes. This specific delineation contrasts with the broader coverage of human rights treaties.

Notably, the Annex adopts a narrower approach to delineating "environmental violation" by "refer[ing] to specific provisions within environmental treaties, rather than the treaties themselves, making the reference to environmental impacts narrower."[578] However, this exhaustive list of environmental violations does not explicitly cover adverse climate impacts.[579] It means that climate change-related adverse impacts fall outside the scope of general due diligence obligations,[580] despite the dedicated "combating climate change" clause as introduced below.

2.2 Corporate Sustainability Due Diligence Duties

2.2.1 General Duty of Due Diligence

The EU CSDDD adopts a framework akin to the German Supply Chain Act, delineating corporate due diligence duties through a comprehensive structure. The overarching due diligence provision, articulated in Article 4, serves as the anchor for

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principles and rights at work. Besides the Occupational Safety and Health Convention of 1981 and the Promotional Framework for Occupational Safety and Health Convention of 2006, which were regarded as ILO fundamental conventions postdating the adoption of the EU CSDDD Proposal, all the rest ILO fundamental conventions are listed in the Annex, including, Freedom of Association and Protection of the Right to Organise Convention of 1948, Right to Organise and Collective Bargaining Convention of 1949, Forced Labour Convention of 1930 and its 2014 Protocol, Abolition of Forced Labour Convention of 1957, Minimum Age Convention of 1973, Worst Forms of Child Labour Convention of 1999, Equal Remuneration Convention of 1951, and Discrimination (Employment and Occupation) Convention of 1958. A full list of the ILO fundamental conventions, see *Conventions and Recommendations*, ILO, https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm.

577 For a reflection on the failure to cover European regional human rights instruments, see Claire Methven O'Brien, Jacques Hartmann, "The European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence: Two Paradoxes," EJIL: Talk! (19 May 2022), accessed 20 December 2023, https://www.ejiltalk.org/the-european-commissions-proposal-for-a-directive-on-corporate-sustainability-due-diligence-two-paradoxes/.

578 Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 6 (n.118).

579 The EU CSDDD specifies in paragraph 70 of the Recital that "[t]he Commission should assess and report whether (…) the provisions on due diligence under this Directive should be extended to adverse climate impacts."

580 Given the shortcoming of the EU CSDDD to explicitly include climate change in its material scope, many CSOs issue statements advocating for a stronger alignment with climate change. For example, "Unpacking the CSDDD: 7 Years of Climate Hope from the Paris Agreement to Climate Transition Plans," European Coalition for Corporate Justice(15 November 2023), accessed 20 December 2023, https://corporatejustice.org/news/unpacking-the-csddd-7-years-of-climate-hope-from-the-paris-agreement-to-climate-transition-plans/.

six distinct dimensions of corporate due diligence duties outlined in Articles 5–11. Beginning with Article 5, companies are required to embed due diligence into their policies and institute an annually updated due diligence policy. Compulsory elements of this policy include: (1) an elucidation of the company's due diligence approach; (2) a code of conduct stipulating rules and principles for the company's employees and subsidiaries; and (3) an account of the company's implementation of due diligence, the verification of compliance with its code of conduct, and the extension of the code of conduct throughout its established business relationships.

Similar to the French Duty of Vigilance Law, the EU CSDDD defines an "established business relationship" as "a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain" (Article 3(f)). To assess whether an indirect business relationship is "established," paragraph 20 of the Recital therein clarifies that "[i]f the direct business relationship of a company is established, then all linked indirect business relationships should also be considered as established regarding that company." Therefore, these provisions indicate that the code of conduct should explicitly communicate a company's rules and principles of human rights and environmental due diligence across the entire value chain. This entails "activities related to the production of goods or provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company" (Article 3(g).)

The second facet of corporate due diligence duty is to take appropriate measures to identify actual and potential adverse impacts arising from their own operations, those of their subsidiaries, and their value chains, albeit only with regard to their established business relationships (Article 6(1)). The definition of "appropriate measure" in the EU CSDDD is akin to, but more comprehensive than, that of the German Supply Chain Act and the Norwegian Transparency Act. Article 3(q) defines it as "a measure that is capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including characteristics of the economic sector and of the specific business relationship and the company's influence thereof, and the need to ensure prioritization of action."

Under the EU CSDDD, Group B and Group D companies operating in high-risk sectors are permitted to identify *only* severe adverse impacts that are *relevant to the sector* (Article 6(2), emphasis added). A "severe adverse impact" is defined as an adverse human rights or environmental impact that "is especially significant by its nature, or affects a large number of persons or a large area of the environment, or which is irreversible, or is particularly difficult to remedy as a result of the measures necessary to restore the situation prevailing prior to the impact" (Article 3(l)). In the same vein, financial undertakings are allowed to conduct risk identification *only before* providing financial services (Article 6(3), emphasis added). For the purposes of risk mapping, covered companies should, *where relevant*, engage in consultations with potentially affected groups and other relevant stakeholders to gather information on actual or potential adverse impacts (Article 6(4), emphasis added). Stakeholders include "the company's employees, the employees of its subsidiaries, and other individuals, groups, communities, or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships" (Article 3(n)).

Following risk mapping, the third facet of corporate due diligence duty pertains to preventative and mitigating measures. Companies are required to conduct appropriate measures to prevent or, where prevention is not possible or not immediately possible, adequately mitigate potential negative impacts. Mandatory measures generally include: (1) formulating and undertaking a prevention action plan with clearly defined reasonable timelines and both qualitative and quantitative indicators for assessment, developed in consultation with affected stakeholders (Article 7.2(a)); (2) seeking contractual assurances from direct suppliers to ensure the compliance with the company's code of conduct and, where necessary, from relevant business partners to achieve contractual cascading of the company's prevention action plan (Article 7.2(b)); (3) providing necessary investments to ensure the establishment and operation of the company's preventive actions (Article 7.2(c)); (4) offering targeted and proportionate support for an SME where the compliance with code of conduct or prevention action plan would overburden the SME (Article 7.2(d)); and (5) collaborating with other entities to increase a company's leverage to terminate the adverse impacts (Article 7.2(e)).

Moreover, if the aforementioned measures prove insufficient to prevent or mitigate adverse human rights and environmental impacts, the company may consider establishing a contract with indirect suppliers to ensure compliance with the company's code of conduct or preventative scheme (Article 7.3). Once contractual controls on relevant business partners and indirect suppliers are established, the company is required to further verify such compliance by participating in sectoral initiatives or engaging in independent third-party verification (Article 7.4). Additionally, when obtaining such contractual controls from an SME, the company should ensure that the terms used are fair, reasonable, and non-discriminatory, and bear the cost of independent verification (Article 7.4).

Despite all efforts made, it is possible that the impacts are not properly prevented and mitigated. In this connection, the company's due diligence duty concerning prevention is extended to refrain from entering new or extending existing relations with the partner concerned (Article 7.5). Where domestic law governing business relations allows companies to terminate the business relations, the company should: (1) temporarily suspend relevant commercial relations if there is a reasonable expectation that due diligence efforts will succeed in the short term; (2) terminate relevant business relationships if the potential adverse impact is severe (Article 7.5).

In the event of actual adverse impacts, companies are required to cease actual adverse impacts, or where such impacts cannot be ended, to minimize the extent of such adverse impacts (Articles 8(1)–(2)). Provisions thereunder mirror those in Article 7 concerning preventive actions. In detail, the EU CSDDD requires the company to implement several measures to fulfil its duties to end actual adverse impacts. These measures entail: (1) neutralizing the adverse impact or minimizing its extent (Article 8.3(a));[581] (2) establishing and implementing a remedial action plan when the adverse impact cannot be immediately terminated (Article 8.3(b)); (3) seeking contractual assurances from a direct supplier and, where necessary, from other business partners (Article 8.3(c)); (4) offering necessary investments to fulfil its duties (Article 8.3(d)); (5) providing targeted and proportionate support for SMEs; and (6) collaborating with other entities to increase a company's leverage (Article 8.3(e)).

Furthermore, the company is required to: (1) establish a contractual control with an indirect supplier concerned (Article 8.4); (2) verify the compliance of its suppliers and business partners (Article 8.5); and (3) follow a prohibition of continued or new business relations with companies where adverse impacts have not been addressed (Article 8.6). All the detailed requirements for the corresponding action stipulated in Article 7 apply to the above actions to terminate adverse impacts.

Article 9 provides the fourth facet of corporate due diligence duty, focusing on the complaint procedure. Accordingly, the company is required to establish and operate a complaints procedure to receive grievances from individuals with legitimate concerns regarding actual or potential human rights and environmental impacts in relation to its own operation, the operations of its subsidiaries, and value chains (Article 9.1). To elaborate, Article 9.2 specifies three groups of qualified complainants: (1) individuals who are directly affected or have reasonable grounds to believe they might be affected by an adverse impact; (2) representatives of individuals working in the relevant value chain; and (3) CSOs active in areas related to the concerned value chain. Article 9.3 requires the company to put in place procedures for assessing the validity of complaints and providing follow-up to the complainants. Additionally, Article 9.4 further specifies the right of complainants to request follow-up on the complaint from the company and to meet with the company's representatives to discuss potential or actual severe adverse impacts. This parallels the design of the individual's right to information and corporate duty to provide information under the Norwegian Transparency Act, but in a more concise form.

The fifth facet involves monitoring. Companies falling under the purview of the EU CSDDD are obliged to conduct periodic assessments to gauge the effectiveness of their due diligence actions, as well as those of their subsidiaries and within their value chain, with respect to their established business relations (Article 10). Similar to the German Supply Chain Act and the Norwegian Transparency Act, the EU CSDDD requires concerned companies to perform periodical assessments annually or on an ad hoc basis whenever there are reasonable grounds to believe that substantial new risks of adverse impacts may emerge. Correspondingly, a company's due diligence policy should be

581 Actions to this end include the payment of damages to the affected persons and of financial compensation to the affected communities.

updated along with the findings of the periodical assessment (Article 10).

The final step in a general due diligence cycle under the EU CSDDD is communication. According to Article 11, companies must annually prepare and publish a report on the aspects covered by EU CSDDD on their website using a language customary in the sphere of international business.

Significantly, Article 14.4 allows companies to employ industry schemes and multi-stakeholder initiatives to perform their general due diligence duties. Moreover, foreign companies falling under Group C and Group D are required to appoint a natural or legal person as their authorized representatives (Article 16.1), with a mandate to act on their behalf concerning compliance with corporate due diligence duties (Article 3(k)). As outlined in Article 16.4, the company must provide its authorized representatives with the requisite powers and resources to cooperate with supervisory authorities under the EU CSDDD.

2.2.2 Corporate Climate Due Diligence Duty

Besides the general due diligence duties, the EU CSDDD imposes a free-standing "climate due diligence" obligation for certain companies.[582] Article 15(1) explicitly requires companies within the purview of Group A and Group C to develop a transition plan ensuring compatibility of the business model and strategy with the transition to a sustainable economy and the objective of limiting global warming to 1.5 degrees, as outlined in the Paris Agreement. The purpose of the transition plan is to assess the extent to which climate change poses a risk to, or is an impact of, the company's operations. If climate change is identified or should have been identified as a principal risk or a principal impact, the company must include emission reduction objectives in its plan (Article 15.2). However, these provisions seemingly only require the adoption of a transition plan and the establishment of emission objectives without imposing a mandatory obligation for implementation.[583]

Furthermore, companies are required to consider the performance of corporate climate due diligence when determining variable remuneration, especially when such remuneration is linked to a director's contribution to the company's business strategy, long-run interests, and sustainability (Article 15.3). This correlation between corporate climate performance and a director's remuneration underscores a strong inclination to make the fulfilment of corporate climate due diligence a director's fiduciary duty. In

582 Although the EU legislator does not explicitly label Article 15 as "climate due diligence", the normative content of this article closely aligns with what BHR scholars commonly refer to as "climate due diligence." See, for example, Macchi, "The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'," (n.280).

583 Despite these provisions, the EU CSDDD appears to have shortcomings in addressing climate concerns, given that climate due diligence is not explicitly integrated into the general duty of due diligence. Hence, it is recommended that the EU CSDDD elaborate on climate due diligence within the broader duty of due diligence and specify essential elements and mandatory requirements for implementing transition plans. For a brief but insightful discussion in this regard, see "Effective Environmental and Climate Protection in the CSDDD: Challenges and Priorities," European Coalition for Corporate Justice (29 August 2023), accessed 20 December 2023, https://corporatejustice.org/publications/new-briefing-effective-environmental-and-climate-protection-in-the-csddd-challenges-and-priorities/.

this connection, Article 15 marks a significant “shift in combating climate change, moving from the reliance on market forces, (…) to reliance not only on conduct regulation,” but also “on punctual and possibly disproportionate governmental intervention.”[584] Thus, it has invoked substantial controversies.[585]

2.2.3 Directors' Duty of Care

The EU CSDDD Proposal introduces an innovative advancement—the inclusion of a director’s duty of care, addressing a gap left by the UN Guiding Principles that do not explicitly touch upon the director’s duty to human rights.[586] Article 25 thereof mandates directors of Group A companies to, in fulfilling their duty to act in the best interest of the company, “take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.”[587]

Further, Article 26 clarifies that the directors of Group A companies are obligated to set up and monitor the implementation of corporate human rights and environmental due diligence, particularly corporate due diligence policy. They are also tasked with adapting the corporate strategy to the fulfilment of the company’s general due diligence duties discussed above.[588] Accordingly, senior management is required to endorse the human rights policy and actively engage in the execution and supervision of due diligence processes. Therefore, this article not only meets but considerably exceeds the criteria for securing top-level approval in human rights policy outlined in the UN Guiding Principles.[589]

2.3 Public Oversight and Enforcement

2.3.1 Union Level

To effectively enforce the rules and coordinate supervisory activities at the domestic

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584 "Why Article 15 (combating climate change) Should Be Taken out of the CSDD," European Corporate Governance Institute (2 August 2022), accessed 20 December 2023, https://www.ecgi.global/blog/why-article-15-combating-climate-change-should-be-taken-out-csdd.

585 See, for example, Søren Friis Hansen and Troels Michael Lilja, "Corporate Sustainability Due Diligence: Is There a Legal Basis for the Proposed Article 15?," *Copenhagen Business School Law Research Paper Series*, No. 22-01, (2022), https://research.cbs.dk/en/publications/corporate-sustainability-due-diligence-is-there-a-legal-basis-for.

586 See Claire and Olga, "Commission proposal on Corporate Sustainability Due Diligence: Analysis from a Human Rights perspective," 26-27 (n.558).

587 The incorporation of directors’ duty of care in the EU CSDDD has ignited vigorous debates. For an insightful critique highlighting the potential negative impact and invalidity of Article 25, see Federica Agostini and Michele Corgatelli, "Art. 25 of the proposed Due Diligence Directive: Quo Vadis?," Oxford Business Law Blog (22 September 2022), accessed 20 December 2023, https://blogs.law.ox.ac.uk/oblb/blog-post/2022/09/art-25-proposed-due-diligence-directive-quo-vadis.

588 Similar to the discussions on Article 25 of the EU CSDDD, there is also significant opposition to Article 26. For a potentially “compromised” solution advocating the “relocation” of Article 26 to the general duty of due diligence, rather than their complete deletion, see "The Proposed Due Diligence Directive Should Not Cover the General Duty of Care of Directors," European Corporate Governance Institute (2 August 2022), accessed 20 December 2023, https://www.ecgi.global/blog/proposed-due-diligence-directive-should-not-cover-general-duty-care-directors.

589 Principle 16 and Commentary, UN Guiding Principles.

level of EU member states, the EU CSDDD devises a dual-tier regulatory framework. When compared to the mandates of supervisory authorities at the domestic level, the competency of EU institutions is more coordinating and complementary in nature. This conforms to the principles of subsidiarity and proportionality in EU Law. To elaborate, the EU's competence in this aspect can be grouped into three categories. The first category of competence is to flesh out delegated acts concerning the content and criteria for corporate reports on human rights and environmental due diligence (Articles 11 and 28). This delegated act should further detail information on the description of due diligence, potential and actual adverse impacts, and responsive actions taken (Article 11.)

The second category of EU competence therein involves developing voluntary instruments to promote corporate compliance. For instance, Article 12 of the EU CSDDD mandates the Commission to issue guidance on voluntary model contract clauses, aiding companies in establishing contractual assurance mechanisms more efficiently. Article 13 requests the Commission to consider developing sector-specific or impact-oriented guidelines to facilitate a precise understanding of due diligence obligations under the CSDDD for companies and supervisory authorities. Additionally, Article 14.3 states that the Commission may complement Member States's support measures to assist corporate implementation of due diligence obligations. Moreover, Article 14.4 specifies that the Commission, in collaboration with Member States, may provide guidance for evaluating the suitability of industry schemes and multi-stakeholder initiatives on which companies may rely to fulfil their due diligence obligations.

The third category of EU competence in this aspect revolves around coordinating the activities of supervisory authorities across various Member States. For instance, the Commission is tasked with making publicly available and regularly updating a list of the supervisory authorities in Member States (Article 17.7). More importantly, the Commission is required to establish a European Network of Supervisory Authorities, consisting of representatives from the supervisory authorities of Member States. The primary goals of this Network are to promote collaboration among domestic supervisory authorities and to ensure the coordination and alignment of regulatory, investigative, sanctioning, and supervisory processes. Additionally, the Network aims to ease the exchange of information among these authorities as deemed necessary (Article 21.1). Furthermore, if there are uncertainties regarding the attribution of competence, the information upon which that attribution is based will be shared with the Network, which can then collaborate to find a resolution (Article 21.8).

2.3.2 National Level

As the enforcement of the EU CSDDD will ultimately take place at the national level, the monitoring and enforcement competence of domestic supervisory authorities is more comprehensive than that of the EU. Firstly, under Article 14.1 of the EU CSDDD, Member States are obliged to establish and maintain dedicated websites, platforms, or portals, individually or jointly, to provide information and support to entities concerned to better implement due diligence obligations. Special attention is required for SMEs present in the value chains of targeted companies in providing such support. Additionally, Member States may offer financial support to SMEs to fulfil their due diligence duties, without prejudice to applicable state aid rules (Article 14.2). Furthermore, Member States are responsible for ensuring that companies applying for public support certify that no sanctions have been imposed on them for a failure to comply with human rights and environmental due diligence obligations (Article 24).

In terms of the establishment and operation of supervisory authorities, the EU CSDDD requires Member States to appoint at least one authority to oversee corporate compliance with due diligence obligations (Article 17.1). Member States are also required to provide the Commission with detailed information about the designated supervisory authority, such as specific competence and contact details (Article 17.6). To prevent the occurrence of "regulatory capture," as illustrated in the case of the Rana Plaza tragedy,[590] the EU CSDDD stresses the importance of Member States ensuring the independence, impartiality, and transparency of supervisory authorities. Specifically, it underscores the need for these authorities to be independent from corporate actors and free of conflicting interests (Article 17.8). Moreover, Member States should guarantee that the designated supervisory authorities possess sufficient powers and resources to fulfil their mandates (Article 18.1).

Like the German Supply Chain Act, the mandates of supervisory authorities under the EU CSDDD are multifaceted. Firstly, according to Article 19, the supervisory authorities should duly address substantiated concerns. Article 19.1 articulates that any person, natural or legal, poses the right to submit substantiated concerns to any supervisory authority when, based on objective circumstances, s/he has reasons to believe that a company is potentially breaching corresponding due diligence obligations under the EU CSDDD. Where the substantiated concerns fall under the competence of another supervisory authority, the authority receiving the concern shall transmit it to that authority (Article 19.2). Once receiving the substantiated concerns, the supervisory authority shall assess the admissibility of such concerns and communicate with the person who submitted the concerns about the result of the assessment (Articles 19.3 and 19.4).

Secondly, the supervisory authority has the power to conduct investigations and inspections. It may initiate an investigation on its own motion or in response to substantiated concerns, provided it deems that it has sufficient information indicating a breach by a company of human rights and environmental due diligence obligations (Article 18.2). Following a warning to the company where appropriate, the supervisory authority can undertake an inspection against the company concerned, either independently or in collaboration with supervisory authorities in other Member States (Article 18.3). In the event of identifying corporate non-compliance, the supervisory authorities shall grant the company concerned an appropriate period of time to take remedial action. However, taking remedial action does not preclude the imposition of

590 See Section 2.3.3 in Chapter 1 of this research.

administrative sanctions or the triggering of civil liability in cases of damages (Article 18.4).

Thirdly, the supervisory authorities are empowered to impose compulsory measures on the companies concerned. Article 18.5 equips the supervisory authorities with the powers to issue binding orders, requiring the cessation of infringements, abstention from any repetition, and, where appropriate, the implementation of remedial measures proportionate to the infringement and necessary to end it (Article 18.5(a)). Meanwhile, the supervisory authorities can levy pecuniary sanctions on companies concerned (Article 18.5(b)). The EU CSDDD requires the authorities to factor in the remedial actions taken by the company and the turnover of the company (Articles 20.2 and 20.3), when determining fines. Lastly, the supervisory authorities are authorized to impose interim measures to avoid the risk of severe and irreparable harm (Article 18.5(c)).

Fourthly, domestic supervisory authorities are required to collaborate with each other under the auspices of the European Network of Supervisory Authorities. Article 21 specifies the duties of national supervisory authorities in this aspect. In essence, they are required to exchange relevant information, provide mutual assistance to fulfil their tasks, establish well-defined mechanisms for collaboration, fairly share the cost of collaboration, and so on. This cross-border collaboration and coordination, albeit confined within the EU boundaries, position the EU CSDDD as a potential "model law" for regulating GVCs, addressing the crucial need for a transnational approach to GVC regulation.

2.4 Civil Liability

The EU CSDDD has achieved another significant advancement through the establishment of a civil liability scheme akin to the French Duty of Vigilance Law. In greater detail, Article 22.1 links civil liability to corporate obligations to prevent potential and terminate ongoing adverse impacts. It articulates that "companies are liable for damages if: (a) they failed to comply with the obligations laid down in Articles 7 and 8; and (b) as a result of this failure, an adverse impact that should have been identified, prevented, mitigated, brought to an end, or its extent minimized through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage." Hence, establishing a causal link between a company's non-compliance with due diligence obligations and the resulting damage is essential for holding the company liable. However, in the absence of an explicit provision specifying procedures for allocating the burden of proof, it is the claimant who must shoulder the onus of proving the causal link. Furthermore, as indicated by paragraph (a) of Article 22.1, "exercising due diligence thus has an exculpatory function for the company."[591] In this context, it appears challenging for victims to establish liability for companies under this civil liability regime.

591 Jędrzejowska-Schiffauer et al., "Towards EU-Wide Mandatory Human Rights and Environmental Due Diligence for Business: A Breakthrough in Europe and Beyond?," 273 (n.405).

Likewise, Article 22(2) states that when companies fulfil duties to establish and verify contractual assurances and contractual cascading to prevent potential adverse impacts or to end ongoing adverse impacts, they shall not be held liable for damages caused by indirect business partners in certain circumstances. In other words, seeking contractual assurance and verifying compliance therewith satisfies a company with its due diligence obligations for indirect suppliers, generally exempting the company from potential liabilities.[592] Article 22.3 further clarifies that the civil liability of a company for damages under this provision does not affect the civil liability of its subsidiaries or any direct and indirect business partners in the value chain.

Last but not least, Article 22.5 establishes civil liability as having "overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State." This provision is crucial as it ensures that companies can be held liable under the EU CSDDD, regardless of where the harm occurred.[593] When considered alongside Article 16 of the Rome II Regulation,[594] this "overriding mandatory application" clause would allow victims who lack sufficient legal protection in their home country, where the harm occurred, to initiate legal proceedings against EU-based parent companies. Furthermore, in conjunction with Article 1 (1a) of the EU CSDDD,[595] Article 22.5 has the potential to nullify the legal separation principle, which has long been employed as a viable shield for EU-based parent companies attempting to evade liability for the actions of their subsidiaries.[596] However, despite these advancements, there are no additional requirements for Member States to eliminate the major barriers to justice often faced by claimants in BHR cases,[597] which have been well documented in several EU-mandated studies.[598]

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592 See Gabriela Quijano and Joseph Wilde-Ramsing, "A Piece, Not a Proxy: The European Commission's Dangerous Overreliance on Industry Schemes, Multi-stakeholder Initiatives, and Third-party Auditing in the Corporate Sustainability Due Diligence Directive," SOMO (November 2022): 8, accessed 20 December 2023, https://www.somo.nl/a-piece-not-a-proxy/.

593 See "European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence: A Comprehensive Analysis," European Coalition for Corporate Justice (April 2022): 21, accessed https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf.

594 Article 16 of the Rome II Regulation reads, "Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation." Regulation (EC) No 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 L 199, 31.7.2007.

595 Article 1 (1a) addresses the subject matter of the EU CSDDD, stating that: "This Directive lays down rules (a) on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, *the operations of their subsidiaries*, and the value chain operations carried out by entities with whom the company has an established business relationship (…)." Emphasis added.

596 See Jędrzejowska-Schiffauer et al., "Towards EU-Wide Mandatory Human Rights and Environmental Due Diligence for Business: A Breakthrough in Europe and Beyond?," 275-76 (n.405).

597 While the most recent agreement between the EU co-legislators on the CSDDD text reinforces the access to justice of persons affected, but the final text is still pending. For a general introduction to the latest agreement on the EU CSDDD, see, "Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights," (n.567). For a holistic discussion on these shortcomings, see "European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence: A Comprehensive Analysis," 20-21 (n.593).

598 For example, see "Business and Human Rights-Access to Remedy," European Union Agency for Fundamental Rights (2020), doi:10.2811/54662; Claire Methven O'Brien, "EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims," European Parliament, Directorate-General for External Policies (June 2020), doi:10.2861/61044.

3. Evaluation of the EU Corporate Sustainability Due Diligence Directive Proposal

(1) **A Smart-mix Approach**: From the above analysis, it is evident that the EU CSDDD holistically combines mandatory requirements and voluntary standards. This is exemplified by the incorporation of both compulsory corporate due diligence obligations and the allowance for companies to draw from non-binding industry schemes and multi-stakeholder initiatives to support implementation (Article 14.4). These voluntary standards complementarily enhance the execution of corporate due diligence obligations. Therefore, the EU CSDDD is awarded 1 point under Indicator 1.

Despite the absence of explicit references to international standards such as the UN Guiding Principles and OECD Guidelines in its legal texts, the EU CSDDD closely aligns with these norms. This alignment is not only reflected in its general due diligence duties but also in its recital.[599] Additionally, Article 15, defining corporate climate due diligence duty, directly refers to the 1.5-degree target of the Paris Agreement. Moreover, the EU CSDDD extensively incorporates international human rights and environmental conventions to delineate its material scope for human rights and environmental due diligence. Consequently, it scores 1 point under Indicator 2.

Given its status as Union-wide legislation, the EU CSDDD needs to be transported by Member States to enter into effect. In this regard, many provisions therein necessitate domestic laws of Member States to further delineate and elucidate. The manner in which Member States integrate the EU CSDDD into their legal systems remains unclear. Despite this, the evaluation highlights crucial instances where the EU CSDDD aligns with existing Union laws. These cases include, notably, the following situations: (1) underscoring the importance of EU competition law for companies in considering building their leverage with other entities to cease the adverse impacts (Articles 7.2(e) and 8.3(f)); (2) mandating the Commission to adopt delegated acts to flesh out rules for corporate due diligence reports (Article 11); and (3) referring to the Rome II Regulation to ensure its overriding mandatory application (Article 22.5). Hence, it accumulates 3 points under Indicator 3.

Furthermore, the EU CSDDD requires companies seeking public support, such as public procurement, to certify that they have not been sanctioned due to a failure to comply with human rights and environmental due diligence. This provision earns the legislation 1 point under Indicator 4, as it promotes corporate adherence to the EU CSDDD.

Regarding regulatory oversight mechanisms, the EU CSDDD exhibits a well-designed system involving public monitoring and enforcement. Beyond the double regulatory oversight at Union and domestic levels, it establishes close ties with

599 For instance, paragraph 16 in the Recital explains that "[t]he due diligence process set out in this Directive should cover the six steps defined by the OECD Due Diligence Guidance for Responsible Business Conduct (…)."

private verification and certification, resulting in 1 point under Indicator 5.

(2) **Policy Coherence**: Like the examined domestic mHRDD laws, the EU CSDDD does not require or encourage Member States to integrate human rights considerations into bilateral and multilateral instruments. This omission leaves the requirements of vertical policy coherence in the UN Guiding Principles unsolved,[600] earning the EU CSDDD 0 point under Indicator 6.

Turning to the BHR NAP, the EU, while not establishing a dedicated Union-level BHR NAP,[601] conveys a proactive commitment through the *EU Action Plan on Human Rights and Democracy 2020–2024*.[602] This sets out the Union's engagement in the international BHR agenda and the enhancement of the implementation of international standards related to responsible business conduct. Additionally, over 15 EU Member States, including those with existing BHR laws such as France, Germany, and the Netherlands, as well as others contemplating enacting BHR laws like Italy,[603] have published at least one BHR NAP. In this broader context, the EU CSDDD secures 1 point under Indicator 7.

(3) **Extraterritorial Regulation**: On the one hand, as seen above, mHRDD laws are usually characterized by inherent extraterritorial implications, and the definition of "value chain" oftentimes determines the boundaries of such implications. The EU CSDDD adopts a very inclusive definition of "value chain," encompassing the entire cycle of a product or service, ranging from raw material sourcing, production, use, disposal, and recycling processes.[604] This approach extends beyond the normative scope of the UN Guiding Principles and the OECD Guidelines. Even though it confines the general due diligence obligations to value chain entities with "established business relationships" and the ambiguous definition of such relationships risks divergent interpretations,[605] the extraterritorial reach of the EU CSDDD is somewhat certain. On the other hand, both large and high-risk foreign companies (Group C and Group D) are under the purview of the EU CSDDD. This enhances its capability to regulate the activities of global businesses outside the EU. Accordingly, the EU CSDDD earns 1 point under Indicator 8.

The EU CSDDD also stands out for the inclusion of third parties outside the EU

600 Principles 9-10 and Commentaries, UN Guiding Principles.

601 There was a strong call for an EU-level Action Plan on the Implementation of the UN Guiding Principles from both civil society and political groups. For a proposal for such a EU-level action plan, see *Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU*, RBC Group of the European Parliament (March 2019), https://responsiblebusinessconduct.eu/wp/wp-content/uploads/2019/03/SHADOW-EU-Action-Plan-on-Business-and-Human-Rights.pdf.

602 Joint Communication to the European Parliament and the Council on the EU Action Plan on Human Rights and Democracy 2020-2024, (JOIN/2020/5 final), 24-25.

603 "Strengthening of the process to outline a regulatory framework for human rights due diligence" is set as a national priority in the second Italian BHR NAP. See, *Italy's Second National Action Plan on Business and Human Rights (2021-2026)*, 11.

604 "Collaboration, Innovation, Transformation: Ideas and Inspiration to Accelerate Sustainable Growth-A Value Chain Approach," World Business Council for Sustainable Development (WBCSD) (December 2011): 3, accessed 20 December 2023, https://docs.wbcsd.org/2011/12/CollaborationInnovationTransformation.pdf.

605 See "European Commission's Proposal for a Directive on Corporate Sustainability Due Diligence: A Comprehensive Analysis," 9-11 (n.593).

in the public consultation process. During the public consultation, 174,919 responses were gathered from non-EU citizens, constituting 39.94% of the total feedback.[606] Among these responses from non-EU countries, roughly 29,000 were submitted by Global South nations, accounting for around 16.5% and 6.1% of the feedback from non-EU countries and all countries, respectively.[607] In addition, the Commission held a very small-scale online consultation with BHR advocates from the Global South to seek feedback on the proposed directive.[608]

It holds true that "both these consultation processes were hardly a drop in the ocean in terms of the quantity and quality of consultations that should have been done with Global South rightsholders."[609] Therefore, some scholars from both Europe and non-Europe have criticized the marginalization of the Global South in the legislative consultation of the EU CSDDD (as well as other mHRDD laws crafted by European countries, as discussed).[610] However, it is crucial to note that this research adopts a more optimistic perspective in evaluation, considering the involvement of Global South countries in the consultation process as a positive signal. Despite the limited extent of such involvement, the recognition of input from these nations contributes to the EU CSDDD receiving 1 point under Indicator 9.

(4) **Remedial Mechanisms**: The EU CSDDD obliges Member States to put in place a civil liability regime for violations of corporate due diligence duties. Additionally, most EU Member States that are required to transport the EU CSDDD into domestic mHRDD laws are members of the OECD.[611] Therefore, most EU Member States are subject to the OECD Guidelines to establish and maintain a NCP addressing special instances related to responsible business conduct.[612] Moreover, there are many provisions in the EU CSDDD that mandate both the Commission and Member States to support companies, especially SMEs, in fulfilling their due diligence duties. This includes the establishment and operation of complaint procedures. Taken all together, the EU CSDDD garners 3 points under Indicator 10.

However, it is worth noting that while it is anticipated that a dedicated civil

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606 *About this Consultation*, European Commission, accessed 20 December 2023, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en.

607 This data is calculated by the author based on the above statistics provided by the European Commission.

608 *European Commission Holds Online Consultation with Global South Business & Human Rights Advocates*, Business and Human Rights Resources Centre (22 January 2021), accessed 20 December 2023, https://www.business-humanrights.org/en/latest-news/webinar-european-commission-consultation-with-global-south-business-human-rights-advocates/.

609 Caroline Omari Lichuma, "More than Meets the Eye: Participatory (In)Justice and the EU Corporate Sustainability Due Diligence Directive," Nova Centre on Business, Human Rights and the Environment Blog (15 February 2023), accessed 20 December 2023, https://novabhre.novalaw.unl.pt/more-than-meets-the-eye/.

610 See, for example, Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," (n.118); Lichuma "Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South," (n.562).

611 22 out of the 38 OECD Members are EU Member States. See *Relations with OECD and UNESCO*, EU Delegation to the OECD and UNESCO, (7 September 2021), https://www.eeas.europa.eu/paris-oecd-unesco/relations-oecd-and-unesco_en?s=64.

612 For a full list of OECD NCPs, see *OECD Responsible Business Conduct: OECD Guidelines for Multinational Enterprises*, https://mneguidelines.oecd.org/ncps/.

liability regime as per the EU CSDDD will be established among Member States upon the proposal's adoption, there are no further requirements obligating Member States to actively eliminate barriers to such civil remedies. Consequently, the EU CSDDD obtains 1 point and 0 point under Indicator 11 and Indicator 12, respectively.

(5) **Ongoing Process**: The EU CSDDD also mirrors the fundamental requirements for conducting due diligence obligations periodically, as envisioned by the UN Guiding Principles. A thorough examination of Articles 5 and 10 reveals that companies falling under the purview of the EU CSDDD are required to perform general due diligence obligations annually or in a risk-oriented ad hoc manner. The periodicity of due diligence obligations earns the EU CSDDD 1 point under Indicator 13.

(6) **Broad Coverage**: Similar to the domestic mHRDD laws under examination, the EU CSDDD only applies to companies that meet specific thresholds and operate in listed high-risk sectors. This narrow personal scope disqualifies most SMEs, which constitute around 99% of all companies in EU,[613] from its application. It further exempts financial sectors from the list of high-impact industries. Considering all these limitations, particularly when measured against the UN Guiding Principles and OECD Guidelines, the personal scope of the EU CSDDD is deemed insufficient. Consequently, it receives 0 point under Indicator 14.

The EU CSDDD Proposal presents a potential paradox by not incorporating core regional instruments such as the European Convention on Human Rights and the EU Charter of Fundamental Rights into the Annex. Despite this, it adopts an inclusively enumerative approach to defining "human rights" by extensively referring to international human rights conventions. In light of this approach, the EU CSDDD earns 1 point under Indicator 15.

Furthermore, the EU CSDDD not only sets forth different due diligence obligations for companies vis-à-vis direct and indirect suppliers but also imposes climate due diligence obligations on large companies (Group A and Group C). This distinction ensures that enterprises assume due diligence obligations in proportion to their level of "involvement" in such abuses. As a result, the EU CSDDD receives 1 point under Indicator 16.

(7) **Contextual Particularity**: There are many provisions in the EU CSDDD that allow companies to adopt "appropriate measures" for due diligence obligations in terms of, e.g., risk identification, prevention, and cessation of adverse impacts. Notably, companies are granted discretion to rely on industry schemes and multi-stakeholder initiatives for implementing general due diligence obligations. Accordingly, the EU CSDDD merits 1 point under Indicator 17.

However, despite the emphasis on stakeholder consultations in fulfilling corporate due diligence obligations, the EU CSDDD indeed falls short of explicitly

613 EU CSDDD, p.14.

requiring companies to give special consideration to vulnerable groups. As a result, it accrues 0 point under Indicator 18, reflecting a gap in ensuring specific attention to vulnerable groups.

In terms of supporting SMEs in undertaking HRDD, the EU CSDDD explicitly requires the company, the Commission, and Member States to provide support for SMEs. As for Indicator 19, Articles 7.2(d) and 8.2(e) clearly demand companies offer targeted and proportionate support for SMEs with established business relationships, especially where compliance with codes of conduct or preventive/corrective plans might overburden the SMEs. Additionally, Articles 7.4 and 8.5 require companies to bear the costs of independent third-party verification for auditing SMEs' compliance. In light of these provisions, the EU CSDDD achieves 1 point under Indicator 19.[614]

Lastly, Articles 7.4 and 8.5 plainly require companies to guarantee fairness, reasonableness, and non-discrimination in the contractual terms when cascading due diligence obligations to both direct and indirect business partners through such contracts. These provisions hold promise, at least in theory, to circumvent the lead firms to unevenly pass on the associated costs resulting from the implementation of such duties to suppliers. Therefore, the EU CSDDD merits 1 point under Indicator 20.

(8) **Top-management Endorsement**: As seen in the analysis of Article 26, the compulsory requirements for senior managers' involvement in HRDD in the EU CSDDD extend beyond merely adopting human rights policies. Directors of large EU companies under Group A are obliged to implement and monitor the company's performance of general due diligence. In addition, they are required to adapt the corporate strategy to the risk profile and due diligence practices thereof. This comprehensive involvement of senior managers in the HRDD process earns the EU CSDDD 1 point under Indicator 21.

Furthermore, the EU CSDDD takes an innovative approach to formulating directors' duties for HRDD. Corporate performance pertaining to human rights and environmental aspects outlined in the EU CSDDD becomes part of directors' duty of care under Article 25. Moreover, according to Article 15, directors of both EU and non-EU large companies in Groups A and C are obligated to ensure corporate compliance with climate due diligence obligations, which are linked to their variable remuneration. This robust connection between HRDD and directors' duties enables the EU CSDDD to score 1 point under Indicator 22.

(9) **Stakeholder Participation**: Stakeholder participation in the EU CSDDD is a complex issue marked by ambiguous language, creating uncertainty about the

614 Nonetheless, merely sharing auditing costs falls short of addressing the unjust redistribution of responsibility and surface-level compliance in human rights governance within GVCs, as illustrated by the case of the Rana Plaza tragedy in Section 2.3.2 of Chapter 1. Similarly, relying heavily on social auditing and verification has its drawbacks for upholding human rights in GVCs and holding lead firms accountable. Chapter 7 below discusses these issues in detail.

compulsory nature of such participation. European BHR experts, Methven O'Brien and Martin-Ortega assert in a thorough analysis that, while the EU CSDDD explicitly requires companies to consult with stakeholders in identifying risks, formulating preventative measures, and developing corrective action plans, the use of qualifying terms such as "where relevant" makes "the exact legal effect of this (type of) provision appea[r] uncertain."[615] Dehbi and Martin-Ortega further figure out that "the circumstances in which such consultations would be deemed relevant are not defined, seeming to leave this to be determined by companies themselves."[616] In this connection, Izabela and her colleagues argue that under the EU CSDDD "consultation with potentially or actually affected individuals or groups (workers and other stakeholders) is *not* mandatory."[617] Therefore, this research scores the EU CSDDD 0 point under Indicator 23.

However, the EU CSDDD defines the scope of stakeholder participation, albeit limited, in terms of risk identification and the formulation of preventive and corrective measures. Likewise, it clearly defines the term "stakeholders" in Article 3(n). Thus, the EU CSDDD receives 2 points under Indicator 24.

Nevertheless, due to the failure to confer certain decision-making powers to stakeholders during the consultation process, the EU CSDDD accrues 1 point under Indicator 25.

(10) **Operational-level Grievance Mechanisms**: The EU CSDDD, akin to the French Duty of Vigilance Law and the German Supply Chain Act, makes the establishment and maintenance of an operational-level grievance mechanism a compulsory element of corporate due diligence duty. Article 9 specifically requires companies to put in place a complaint procedure to address complaints pertaining to human rights and environmental impacts. Additionally, the same article outlines certain procedural requirements for this mechanism. Hence, the EU CSDDD secures 1 point under Indicator 26.

Taken together with the above evaluation, the EU CSDDD finally achieves a score of 25 out of 26 points (Table 8), showcasing its strengths in most parameters. This score is higher than those of comparable legislation such as the French Duty of Vigilance Law (15/26), the German Supply Chain Act (23/26), and the Norwegian Transparency Act (14/26).[618] In general, the EU CSDDD demonstrates promise in the parameters concerning a smart-mix approach, extraterritorial regulation, remedial mechanisms,

615 Claire and Olga, "Commission proposal on Corporate Sustainability Due Diligence: Analysis from a Human Rights perspective," 10 (n.558).

616 Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 11 (n.118).

617 Jędrzejowska-Schiffauer et al., "Towards EU-Wide Mandatory Human Rights and Environmental Due Diligence for Business: A Breakthrough in Europe and Beyond?," 269 (n.405). Emphasis added. A similar conclusion can be seen in, Sana Farrukh et al., "Strengthening Stakeholder Engagement in the EU Corporate Sustainability Due Diligence Directive," Global Justice Clinic at Erfurt University, the German Institute for Human Rights, and Luxembourg University (June 2023): 11-12, accessed 20 December 2023, https://www.uni-erfurt.de/fileadmin/fakultaet/staatswissenschaften/6.2023_Policy_Briefing_Paper_Strengthening_Stakeholder_Engagement_in_the_EU_Corporate_Sustainability_Due_Diligence_Directive.pdf.

618 Chapter 7 below provides detailed comparisons of the EU CSDDD and the three domestic mHRDD laws.

contextual particularity, and operational-level grievance mechanisms. Specifically, the EU CSDDD's well-designed dual-tier public regulatory and enforcement regime, the proper incorporation of non-EU individuals in legislative consultations, regional dissemination of a dedicated civil liability regime with overriding mandatory applicability, broader alignment with international human rights standards, multidimensional supports for SMEs, and the innovative establishment of directors' duty of care in terms of human rights and environmental due diligence contribute to its, at least in theory, notable performance.

However, some evident deficiencies in the current text of the EU CSDDD warrant careful consideration and rectification. Firstly, the absence of provisions offering support to mitigate barriers impeding victims' access to civil remedies, despite well-documented challenges highlighted in EU-mandated surveys and research, needs urgent attention. Secondly, the narrow personal scope of the legislation excludes a substantial number of EU companies, along with high-risk financial sectors, hindering the law's comprehensive reach. Additionally, the current material scope exhibits insufficient coherence with EU human rights regimes and climate change law, as both are not explicitly incorporated in the Annex. Furthermore, the legislation lacks a dedicated focus on the broader group of vulnerable individuals, as it narrowly defines "stakeholders." Moreover, the absence of clear compulsory requirements for companies to engage in meaningful stakeholder consultation throughout the full due diligence process is a notable gap. Lastly, the prevalent ambiguity and divergence in the current text add a layer of legal uncertainty,[619] potentially granting excessive interpretational leeway that could undermine the overall effectiveness of the EU CSDDD. Addressing these shortcomings is pivotal to fortifying the legislation's impact and ensuring its robust implementation within and outside the EU.

To sum up, the above analysis suggests that the EU CSDDD contains numerous ambitious provisions, scoring higher than the three domestic mHRDD laws hitherto examined. Nevertheless, its inherent limitations are also apparent, underscoring the fact that the EU CSDDD lacks sufficient alignment with the international BHR framework to which it has committed to being "fully consistent with."[620] As the legislative process for the EU CSDDD gains momentum, it is foreseeable that in the near future, the EU will establish the first regionally international mHRDD law. This development is anticipated to not only foster harmonization among the mHRDD laws of EU Member States, like those in France and Germany, but also exert influence on external legislators and potentially shape the contours of the negotiated international BHR treaty via both

619 For a concise but precise discussion on the uncertainties of the EU CSDDD Proposal, see "Legal Certainty and the Directive on Corporate Sustainability Due Diligence," European Corporate Governance Institute (2 August 2022), accessed 20 December 2023, https://www.ecgi.global/blog/legal-certainty-and-directive-corporate-sustainability-due-diligence.

620 COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM/2011/0681 final, 25 October 2011, 6-7.

de facto and de jure “Brussels Effect.”[621]

Table 8 Scores of the EU CSDDD Across Key Indicators

Parameters	Indicators		Scores
1. A Smart-mix Approach	1	Law contains mandatory and voluntary measures	1
	2	Law integrates international rules	1
	3	Law refers to other domestic laws and policies	3
	4	Law includes incentive mechanisms	1
	5	Law encompasses regulatory oversight mechanisms	1
2. Policy Coherence	6	Law contains provisions requiring the state to factor in human rights due diligence in bilateral and/or multilateral instruments	0
	7	Whether a state enacting mHRDD has established a BHR NAP	1
3. Extraterritorial Regulation	8	Law has extraterritorial implications	1
	9	Whether the formulation of an mHRDD law with extraterritorial implications involves consultation with third parties outside the jurisdiction of the state	1
4. Remedial Mechanisms	10	Law includes state-based judicial mechanisms, state-based non-judicial mechanisms, and the requirement for government support to facilitate operational-level grievance mechanisms	3
	11	Law contains a dedicated civil liability regime	1
	12	Law provides support to reduce barriers to access to remedies	0
5. Ongoing Process	13	Law mandates companies to consistently engage in human rights due diligence	1
6. Broad Coverage	14	Law applies to all business entities	0
	15	Law adopts a comprehensive definition of human rights	1
	16	Law imposes distinct obligations for different types of corporate human rights abuses	1
7. Contextual Particularity	17	Law permits companies to tailor human rights due diligence measures based on their specific business context	1
	18	Law mandates companies to give special consideration to vulnerable groups	0
	19	Law requires businesses to support SMEs in conducting human rights due diligence	1
	20	Law prohibits companies from exploiting their advantageous status to unevenly transfer human rights responsibilities	1
8. Top-Management	21	Law mandates top-management endorsement of corporate human rights policies	1

621 The "Brussels Effect" is a phenomenon that illustrates how the EU unilaterally regulates the global marketplace. The "de facto Brussels Effect" elucidates how global corporations adapt their global conduct to align with EU regulations, while the "de jure Brussels Effect" pertains to foreign governments adopting regulations in the style of the EU, influenced by the de facto Brussels Effect. Section 2.2 in Chapter 7 of this research leverages this theory to posit the potential of the EU CSDDD in illuminating the path towards humanizing GVCs in the foreseeable future. For a precise introduction to "Brussels Effect," see Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020), 1-6.

Endorsement	22	Law assigns human rights due diligence responsibilities to corporate directors	1
9. Stakeholder Participation	23	Law compels companies to engage with stakeholders in implementing human rights due diligence	0
	24	Law clarifies the scope of stakeholder engagement and defines the term “stakeholder”	2
	25	Law confers decision-making powers to stakeholders during the consultation process	0
10. Operational-level Grievance Mechanisms	26	Law mandates companies to establish an operational-level grievance procedure	1
		Total	25

CHAPTER 6 MANDATORY HUMAN RIGHTS DUE DILIGENCE LAW AT INTERNATIONAL LEVEL

The adoption and institutionalization of the UN Guiding Principles have served as a catalyst and springboard for a new wave of international legislation on corporate human rights responsibility. Although the international BHR treaty process began earlier than the emergence of the scrutinized domestic and EU mHRDD laws, the substantive achievements of the BHR treaty process have progressed much more slowly than the latter. It can be anticipated that, for the foreseeable future, domestic, regional, and international processes for mHRDD legislation will coexist, even if not developing synchronously, and will mutually influence each other. This makes it necessary to incorporate the ongoing BHR treaty process into the comparative analysis and evaluation of mHRDD laws. This chapter is dedicated to introducing and examining an international BHR treaty. The first section herein illuminates the background of the current BHR treaty process as well as its latest draft. The second section delves into the content of the latest draft, followed by the evaluation of this draft through the proposed analytical framework.

1. Background of the Draft International Business and Human Rights Treaty

The prolonged governance gap within the field of BHR is a tangible manifestation of Antonio Cassese's observation that "global economic and financial upheavals occur *free* from any international legal restraints" and are in dire "need of radical change."[622] This gap persists, in part, due to the firmly entrenched principles of state-centric international law, emphasizing theories of international legal personality and primary responsibility.[623] Consequently, companies, despite enjoying significant rights and protections under international law, largely operate beyond its purview. The concise historical review of the BHR movement in Chapter 2 also underscores the challenges of holding business actors accountable for human rights violations through international law.[624] Nevertheless, a BHR Treaty Process was initiated on June 25, 2014, by the UN Human Rights Council, driven by a substantial coalition of state and non-state actors. This potential BHR treaty holds the promise of offering "new ways and modalities to bring international legal institutions and rules up to date,"[625] particularly in addressing corporate human rights abuses in GVCs. This argument resonates throughout the evolution of the BHR treaty process, albeit within diverse discourses.

622 Antonio Cassese, "Introduction," in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford University Press, 2012), XX. Emphasis added.
623 For a brief yet insightful discussion on how state-centric international law limits the human rights accountability of business actors, see Marco Fasciglione, "A Binding Instrument on Business and Human Rights as a Source of International Obligations for Private Companies: Utopia or Reality?," in *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, ed. Martina Buscemi et al. (Leiden: Brill | Nijhoff, 2020), 33-42.
624 Especially Sections 1.1-1.3 of Chapter 2.
625 Cassese, "Introduction," XX (n.622).

In a kick-off statement for the BHR treaty process in 2013, Ecuador, representing a coalition of supportive countries, asserted that the escalating instances of human rights violations and abuses by certain TNCs necessitated the formulation of an international legally binding instrument to regulate transnational business activities.[626] It further underscored that while the UN Guiding Principles constituted a landmark "first step," its implementation is inadequate to fully address the governance gap. According to Ecuador, the UN Guiding Principles "fell short of addressing properly the problem of lack of accountability regarding [TNCs] worldwide and the absence of adequate legal remedies for victims."[627] This statement garnered considerable support from CSOs globally. Subsequently, following Ecuador's initiative, a BHR Treaty Alliance was founded, with over 1,000 members dedicated to advocating for an international legally binding BHR instrument.[628]

Building on this momentum, Ecuador and its allies secured the adoption of Resolution 26/9 by the UN HRC in 2014. This resolution aims to "establish an open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights," with the mandate to "elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."(BHR LBI)[629] While this resolution obtained considerable support from developing countries and CSOs,[630] it received fierce opposition from developed countries and business organizations, reflecting a clear "global split" concerning a BHR treaty.[631] All 22 votes in favor came from developing countries,[632] which "have been most affected by the commercial and political power of foreign TNCs,"[633] while 14 votes against were cast by developed countries.[634]

The US is one of the most staunch opponents of a BHR LBI, strongly refuting the practicability of a BHR LBI and contending that such a process "would likely be

626 Republic of Ecuador, *Statement on Behalf of a Group of Countries at the 24th Session of the Human Rights Council General Debate – Item 3 "Transnational Corporations and Human Rights"*, September 2013, https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf.

627 Ibid.

628 For detailed information on the Treaty Alliance, see https://www.treatymovement.com/about-us.

629 UN Human Rights Council, *26/9 Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights*, A/HRC/RES/26/9, 14 July 2014, para.1.

630 Like many EU-based CSOs, Italian CSOs actively contribute to supporting the BHR treaty process. For further information, see Marta Bordignon, "A Winding Road towards a Binding Treaty on Business & Human Rights: A Focus on Italy," Business and Human Rights Resources Centre (23 October 2017), accessed 20 December 2023, https://www.business-humanrights.org/en/blog/a-winding-road-towards-a-binding-treaty-on-business-human-rights-a-focus-on-italy/.

631 See Bilchitz, "The Necessity for a Business and Human Rights Treaty," 204 (n.134).

632 The countries that voted in favor include 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 (the Bolivarian Republic of), and Viet Nam.

633 Chiara Macchi, "A Treaty on Business and Human Rights: Problems and Prospects," in *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty*, ed. Nicolás Carrillo-Santarelli and Jernej Letnar Cernic (Intersentia, 2018), 79.

634 Countries that voted against include Austria, the Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, the Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

lengthy and would distract from efforts to implement the Guiding Principles."[635] It further emphasizes that the BHR treaty process constitutes "a competing initiative that would challenge the global commitment to the Guiding Principles and undermine years of important work," arguing that "a one-size-fits-all instrument is not the right approach to handling the rich fabric that is regulation of business and would only be binding on the States that became parties to it."[636] Similar stances were found in business associations. For instance, the International Chamber of Commerce expressed deep disappointment with the result of the vote, asserting that a BHR LBI would "seriously undermine the implementation of the 2011 Guiding Principles" and "risk shifting the responsibility to protect human rights from states to the private actors."[637]

The kernel of the forementioned counterview against a BHR LBI revolves around the potential undermining of the implementation of the UN Guiding Principles. Additionally, other general caveats against a BHR LBI are articulated, involving arguments related to the scope and nature of the proposed LBI; the political aspect concerning potential drawbacks in the lengthy and bumpy negotiation process for a new international instrument; and the concerns about the operationality of the LBI, given the challenges in monitoring and enforcing such a LBI.[638] However, most of these concerns have been properly addressed, at least in theory, by BHR scholars.[639] In particular, regarding the scope of application, the successive drafts of a BHR treaty demonstrate a preference among its proponents for a comprehensive and overarching treaty.[640]

Furthermore, BHR scholarship extensively examines and underscores the value additions of a BHR LBI in addressing the governance gap of corporate human rights abuses in GVCs and, more broadly, in tackling the troubling lacunae of international law. In brief, the adoption and implementation of a BHR treaty would: (1) first of all, complement and address the deficiencies of the UN Guiding Principles,[641] providing formal international law to develop an internal sense of corporate human rights obligations and solidify current soft norms;[642] (2) recenter the role of states in dealing

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635 U.S. Mission Geneva, *U.S. Statement at the Clustered Interactive Dialogue on Health and Human Rights and Business*, U.S. Mission to International Organizations in Geneva, 11 June 2014, https://geneva.usmission.gov/2014/06/11/u-s-statement-at-the-clustered-interactive-dialogue-on-health-and-human-rights-and-business/?_ga=2.96438620.1506255847.1703997115-980704072.1703997115.

636 Ibid.

637 *ICC Disappointed by Ecuador Initiative Adoption*, International Chamber of Commerce, 30 June 2014, https://iccwbo.org/news-publications/news/icc-disappointed-by-ecuador-initiative-adoption/.

638 See Macchi, "A Treaty on Business and Human Rights: Problems and Prospects," 67 (n.633).

639 For a detailed response to the mentioned three concerns, see Macchi, "A Treaty on Business and Human Rights: Problems and Prospects," 68-82 (n.633). For a more general defense of a BHR treaty, especially in terms of its bindingness, scope of application, relationship with the UN Guiding Principles, political foundation, see Bilchitz, "The Necessity for a Business and Human Rights Treaty," esp. 205-27 (n.134).

640 See Radu Mares, "The United Nations Draft Treaty on Business and Human Rights: An Analysis of Its Emergence, Development and Potential," in *Research Handbook on Global Governance, Business and Human Rights*, ed. Axel Marx et al. (Edward Elgar Publishing, 2022), 23.

641 "Does the World Need a Treaty on Business and Human Rights? Weighting the Pros and Cons (Notes of the Workshop and Public Debate held by Notre Dame Law School)," Business and Human Rights Resource Centre (14 May 2014): especially the affirmative arguments under the title "Will a Treaty Strengthen or Weaken the Guiding Principles?", accessed 20 December 2023, https://media.business-humanrights.org/media/documents/cfebdab67eb10367397b504f1380f820b5533bba.pdf.

642 See Penelope Simons, "The Value-Added of a Treaty to Regulate Transnational Corporations and Other

with corporate impunity concerning human rights violations;[643] (3) foster the clarification and formation of international (customary) law regarding the obligations of states and businesses surrounding human rights protection in GVCs and the exercise of extraterritorial jurisdictions in the realm of BHR;[644] (4) rebalance the weight of human rights in international legal order, correcting the bias favoring economic activities over the protection of human rights;[645] (5) promote norm development and policy coherence both at the international and national levels in terms of corporate human rights responsibilities;[646] (6) provide a level playing field for business worldwide, avoiding the "first-mover disadvantages" and deducing the costs of corporate compliance;[647] (7) offer effective access to remedies for victims of corporate human rights violations.[648]

Recognizing the advantages, desirability, and promise of a BHR treaty, academia in the field proposes practical models, options, and taxonomies for conceptualizing such a LBI. For example, Olivier De Schutter recounts four mutually supported options for a BHR LBI, entailing: (1) clarification and enhancement of the states' duty to protect human rights, including extraterritorially; (2) requirements for state actors through a framework treaty to report on the adoption and implementation of BHR NAPs; (3) imposition of direct human rights obligations on business actors and establishment of a new oversight mechanism; and (4) imposition of duties of mutual legal assistance on states to ensure access to effective remedies for victims.[649] Douglass Cassell and Anita Ramasastry offer a thorough "toolkit" for constructing a BHR treaty, which can be grouped into four categories: (1) treaties mandating mainly national action; (2) treaties establishing international enforcement machinery; (3) treaties aiming to achieve policy coherency; and (4) treaties targeting particular business sectors or certain kinds of human rights violations.[650]

Besides these overarching and comprehensive recommendations, certain scholars offer concrete approaches to constructing a BHR treaty. Notably, Nadia Bernaz, drawing on existing international law practice with a focus on accountability, presents four possible models: the UN Gunding Principles Model, the UDHR Model, the progressive model, and the transformative model.[651] Surya Deva suggests alternative plans for the treaty, including the "Declaration plus specific instruments" path and the

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Business Enterprises: Moving Forward Strategically," in *Building a Treaty on Business and Human Rights: Context and Contours*, ed. David Bilchitz and Surya Deva (Cambridge University Press, 2017), 68-70.

643 See Macchi, "A Treaty on Business and Human Rights: Problems and Prospects," 82-83 (n.633).

644 Ibid, 83-84.

645 See Sheldon Leader, "Coherence, Mutual Assurance and the Rationale for a Treaty," in *Building a Treaty on Business and Human Rights: Context and Contours*, ed. David Bilchitz and Surya Deva (Cambridge University Press, 2017), 82; Simons, "The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises: Moving Forward Strategically," 66&67 (n.642).

646 See Bilchitz, "The Necessity for a Business and Human Rights Treaty," esp. 210-14 (n.134); Leader, "Coherence, Mutual Assurance and the Rationale for a Treaty," 79-102 (n.645).

647 Macchi, "A Treaty on Business and Human Rights: Problems and Prospects," 85 (n.633).

648 Bilchitz, "The Necessity for a Business and Human Rights Treaty," esp. 216-19 (n.134).

649 De Schutter, "Towards a New Treaty on Business and Human Rights," 41-67 (n.134).

650 See Douglass Cassell and Anita Ramasastry, "White Paper: Options for a Treaty on Business and Human Rights," *Notre Dame Journal of International & Comparative Law* 6, no. 1 (2016).

651 See Bernaz, "Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty," 45-64 (n.134).

willingness-based MSIs.[652] Some BHR scholars even advocate for the adoption of a framework convention as an alternative route to formulate a BHR treaty.[653] Most of these proposals have been incorporated into the drafts by the OEIGWG, underpinning the ongoing treaty process.

Overall, opposing voices have not overshadowed those in support or, at the very least, have maintained a balanced stance, allowing the treaty process to sustain its momentum. The characteristics of this consolidating BHR treaty process afford it more assurances and opportunities for eventual adoption. Serving as a significant "Third High Tide" in the international law-making efforts to regulate corporate activities in the globalized economy,[654] the ongoing BHR treaty process shares certain features with the UN draft Code of Conduct of 1982 and the UN draft Norms of 2003.[655] On one side, their proponents primarily consist of Global South countries and CSOs, while their opponents are predominantly from Global North countries and business sectors. On the other hand, all aim to address the governance gap of corporate human rights responsibility in international law through formal international legal instruments instead of relying on soft norms.

However, nuanced and apparent differences exist between the ongoing treaty process and its predecessors. As for the nuanced distinctions, the recently emerged BHR treaty process, unlike its predecessors, has not encountered staunch opposition from Global North countries and business associations.[656] For instance, despite bashing the proposal to formulate a BHR treaty, the US has exhibited a degree of openness to "a legally binding framework agreement."[657] While scholars have vehemently criticized

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652 See Surya Deva, "Alternative Paths to a Business and Human Rights Treaty," in *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty*, ed. Nicolás Carrillo-Santarelli and Jernej Letnar Cernic (Intersentia, 2018).

653 See Simons, "The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises: Moving Forward Strategically," 73-76 (n.642). Devid Nils-Hendrik Grohmann, "How to Avoid Politicised Monitoring?: Treaty-Design Suggestions for a Business and Human Rights Framework Convention," Völkerrechtsblog (23 June 2022), accessed 20 December 2023, https://voelkerrechtsblog.org/how-to-avoid-politicised-monitoring/.

654 Surya Deva categorizes the three major international law-making processes for corporate human rights obligations as the "First High Tide," "Second High Tide," and "Third High Tide," respectively. This classification is based on the chronological sequence of events involving the UN draft Code of Conduct, the UN Draft Norms, and the ongoing BHR Treaty Process. See Deva, "Alternative Paths to a Business and Human Rights Treaty," 17-22 (n.652).

655 In light of these similarities, the BHR treaty process has been regarded as a "resurrection" of the earlier UN draft Code of Conduct and the UN draft Norms. See, for example, De Schutter, "Towards a New Treaty on Business and Human Rights," 43 (n.134). See also Sections 1.1-1.2 of Chapter 2.

656 It is noteworthy that this shift is also evident in John Ruggie's stance on the BHR Treaty. He previously declared the 2003 UN Draft Norms as "dead" and, instead, anchored his approach in the development of non-legally binding UN Guiding Principles. Despite his repeated expressions of opposition to the current BHR treaty process, his objection was not directed at the treaty *per se* but rather against an all-encompassing treaty. See John Ruggie, "Business and Human Rights–Treaty Road Not Travelled," Global Policy Forum (6 May 2008), accessed 20 December 2023, https://archive.globalpolicy.org/social-and-economic-policy/social-and-economic-policy-at-the-un/un-and-business/32270-business-and-human-rights-treaty-road-not-travelled.html; John Ruggie, "Quo Vadis? Unsolicited Advice to Business and Human Rights Treaty Sponsors," Institute for Human Rights and Business (9 September 2014), accessed 20 December 2023, https://www.ihrb.org/other/treaty-on-business-human-rights/quo-vadis-unsolicited-advice-to-business-and-human-rights-treaty-sponsors.

657 U.S. Mission Geneva, *U.S. Statement at the Open-Ended Working Group on Transnational Corporations and Other Business Enterprises*, 25 October 2021, U.S. Mission to International Organizations in Geneva, https://geneva.usmission.gov/2021/10/25/u-s-statement-at-the-open-ended-working-group-on-transnational-corporations-and-other-business-enterprises/.

the motives and counterforce of the US alternative proposal,[658] it does signify a "thin" agreement within the US regarding the BHR international law-making process, rather than outright rejection. Additionally, the "form and content of legal norms is not all, in explaining outcomes."[659] And the feasibility of a framework convention, as discussed above,[660] has garnered support from a group of BHR scholars. Therefore, the alternative path proposed for a BHR treaty can be perceived as a limited yet positive signal for advancing the treaty process. More significantly, the EU has not only repeatedly expressed its position on strengthening cooperation with the OEIGWG to set principles and parameters for the treaty[661] but also put forth substantive proposals on the normative basis of the treaty,[662] the "added value" of the treaty,[663] etc. The varying degrees of engagement of the U.S. and the EU demonstrate that the thin yet wide consensus in the BHR treaty process is gaining momentum.

In terms of apparent distinctions, the BHR treaty process has opted not to directly impose international law obligations on business enterprises (direct model).[664] Instead, it seeks to outline and specify the duties of states to protect human rights from corporate abuse and to ensure that companies are held accountable for human rights violations. Put simply, the under-negotiated BHR treaty seeks to indirectly regulate business actors by directly imposing the duty to regulate companies on states. Therefore, this approach

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658 See Tara Van Ho, "Oops! They Did It Again-The USA's Counter-Diplomacy in Promoting the Framework Convention," Völkerrechtsblog (22 June 2022), accessed 20 December 2023, https://voelkerrechtsblog.org/oops-they-did-it-again/.

659 See Surya Deva et al., "A Framework Agreement in Business and Human Rights?: An Interview with Surya Deva and Claire Methven O'Brien," Völkerrechtsblog (24 June 2022), https://voelkerrechtsblog.org/a-framework-agreement-in-business-and-human-rights/.

660 Besides the forementioned contribution, some scholars submit that a framework agreement holds promise for transcending the hard and soft-law dichotomy in the realm of BHR, thereby fostering more policy coherence. See Giulia Botta, "Unpacking the Potentials of a Framework Agreement on Business and Human Rights: An Opportunity to Transcend the Hard and Soft-Law Dichotomy for More Policy Coherence," Völkerrechtsblog (20 June 2022), accessed 20 December 2023, https://voelkerrechtsblog.org/unpacking-the-potentials-of-a-framework-agreement-on-business-and-human-rights/. See also, Claire Methven O'Brien, "Transcending the Binary: Linking Hard and Soft Law Through a UNGPS-Based Framework Convention," AJIL Unbound 114 (2020): 186-91.

661 For example, see Inter-Governmental Working Group (IGWG) on the elaboration of an international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights, Submission of the European Union, pp.3&5, available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/EuropeanUnion.doc.

662 See Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to hum*an rights 3rd session (23-27 October 2017), Opening remarks by the European Union, page 5, available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/EUOpening_remarks.pdf.*

663 See Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights 5th session (14-18 October 2019), Opening remarks by the European Union, 14 October 2019, pp.1&3, available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/IO/EU_General.docx.

664 Nicolás Carrillo-Santarelli offers a robust defense of the direct model, challenging opposition to imposing direct obligations on companies in international law. He asserts that the existence of rules for corporate obligations in peremptory norms forms the basis for establishing direct corporate obligations under international law. See Nicolás Carrillo-Santarelli, "A Defence of Direct International Human Rights Obligations of (All) Corporations," in *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty*, ed. Nicolás Carrillo-Santarelli and Jernej Letnar Cernic (Intersentia, 2018), 33-62. A further detailed analysis in this regard, see David Bilchitz, "Corporate Obligations and a Treaty on Business and Human Rights: A Constitutional Law Model?," in *Building a Treaty on Business and Human Rights: Context and Contours*, ed. David Bilchitz and Surya Deva (Cambridge University Press, 2017), 185-215.

is termed the "indirect model" of a BHR treaty.[665] It holds true that the "indirect model" may frustrate the ambitiousness of any BHR Treaty to address corporate human rights unaccountability in GVCs.[666] However, the alignment of this model with the state-centric paradigm of international human rights law also mitigates opposition, both theoretically and practically, to the BHR treaty process.

Furthermore, the current BHR treaty process is characterized by relatively robust stakeholder engagement. Thanks to the rapid advancements in internet and communication technology, diverse avenues have been set for stakeholders to actively engage in the treaty process. Three primary channels, inter alia include, the OEIGWG Sessions, the "friends of the Chair," and the UN Forum on Business and Human Rights. Firstly, from 2015 to 2023, the OEIGWG conducted nine annual official sessions with informal discussions in Geneva.[667] The objective of these sessions is to involve stakeholders in discussions regarding the content of the draft of BHR treaty. Numerous actors from both Global North and South countries, representing governmental and non-governmental entities, actively participate in these sessions,[668] exchanging views and expressing concerns about the drafts.[669] This inclusive involvement has bolstered the legitimacy of the treaty process, as "the panelists represent all constituencies in the debate on a legally binding instrument on business and human rights in the global economy."[670] Crucially, for the first time in the hard history of regulating BHR, these Sessions offer increased opportunities for affected people and civil society, especially those in the Global South, to actively engaged in the official process of developing global rules for powerful business actors.[671]

Secondly, to advance the work on the draft BHR treaty and garner "the broadest possible cross-regional support" for the BHR treaty process, the "friends of the Chair" was established in 2021.[672] The "friends of the Chair," reflecting "a balanced regional representation," is tasked with convening and leading consultations among states and non-state stakeholders, such as CSOs, business organizations, and trade unions, on the draft BHR treaty.[673] This approach injects new impetus into the bumpy BHR treaty process and provides additional avenues to capture the perspectives of different regions

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665 Ibid, 186.

666 Ibid, 186-87.

667 For an overview of the nine OEIGWG sessions, see *History of the Process*, UN Human Rights Council, https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

668 For instance, the ninth session held from October 23 to 27, 2023, took place in a hybrid format, with the participation of 76 countries, numerous intergovernmental organizations, national human rights institutions, and NGOs from around the world.

669 Each session of the OEIGWG was followed by an official report presented by the Chair-Rapporteur, documenting the inputs from participants. All these reports are available at: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

670 Brigitte Hamm, "The Struggle for Legitimacy in Business and Human Rights Regulation—A Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty," *Human Rights Review* 23, no. 1 (2021): 118.

671 Flávia do Amaral Vieira, "The Struggles for Corporate Accountability in the UN: A Global South Perspective," in *The Wretched of the Global South: Critical Approaches to International Human Rights Law*, ed. Thamil Venthan Ananthavinayagan and Amritha Viswanath Shenoy (Springer, 2024), 249.

672 UN Human Rights Council, *Report on the Seventh Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights*, A/HRC/49/65, 20 December 2021, para. 20.

673 Ibid.

worldwide.

Thirdly, the UN Forum on Business and Human Rights (UN BHR Forum) also functions as a "megaphone" for stakeholders around the world, especially those in developing and least developed countries, to participate in and contribute to the BHR treaty process.[674] Established in 2011, the Forum seeks to offer a global platform for stakeholders to "discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights,"[675] including the international legalization process. To date, 12 annual Forums have been convened,[676] with at least nine of them featuring a specialized session to deliberate on the evolving BHR treaty process.[677] Stakeholders from different sectors have the chance to directly communicate with the OEIGWG regarding the content of the drafts of the BHR treaty.[678] These multidimensional stakeholder engagements, integrated into the development of the BHR treaty process, are beneficial both for fostering broader consensus and enhancing the legitimacy of the treaty.

To date, the OEIGWG has released six noteworthy documents for the BHR LBI, encompassing an instrument outlining the elements of a BHR treaty and five draft versions of the LBI (Table 9). The following analysis and discussion are based on the latest version of the draft, i.e., the *2023 Updated Draft Legally Binding Instruments to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (Updated Draft).[679]

Table 9 Core Instruments of the BHR LBI issued by the OEIGWG[680]

No.	Session	Title (Emphasis added)
1	3rd Session in 2017	*Elements* for the Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights
2	4th Session in 2018	*Zero Draft* Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises; Zero Draft Optional Protocol to the Zero

674 The UN Forum on Business and Human Rights has evolved into the world's largest annual gathering on BHR, attracting more than 2,000 participants from various sectors, including government, business, community groups, civil society, law firms, investor organizations, academia, media, and more. For more information, see *United Nations Forum on Business and Human Rights*, UN Office of the High Commissioner of Human Rights, https://www.ohchr.org/en/hrc-subsidiary-bodies/united-nations-forum-business-and-human-rights.

675 UN Human Rights Council, *17/4 Human Rights and Transnational Corporations and Other Business Enterprises,* A/HRC/RES/17/4, para.12.

676 For more detailed information on the agenda and report of the annual UN Forum on Business and Human Rights, see *United Nations Forum on Business and Human Rights*, UN Office of the High Commissioner of Human Rights, https://www.ohchr.org/en/hrc-subsidiary-bodies/united-nations-forum-business-and-human-rights.

677 Namely, from the 3rd to the 12th UN Forum on Business and Human Rights, except for the 7th Forum, all included a session dedicated to discussing the BHR treaty.

678 For example, see UN Human Rights Council, *Nineth Session of the Forum on Business and Human Rights, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/47/50, 27 April 2021, para.31.

679 OEIGWG, *Updated Draft Legally Binding Instruments to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, July 2023, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf.

680 All these documents are available at: https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

		Draft Legally Binding Instrument
3	5th Session in 2019	*Revised Draft* Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises
4	6th Session in 2020	*Second Revised Draft* Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises
5	7th Session in 2021	*Third Revised Draft* Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises
6	9th Session in 2023	*Updated Draft* Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises

2. Content of the Draft International Business and Human Rights Treaty

Acknowledging that "the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lies with the State,"[681] the Updated Draft seeks to elucidate the obligations of states concerning business-related human rights abuses. It aims to achieve multifaceted purposes, echoing the "protect-respect-remedy" framework of the UN Guiding Principles, including: (1) clarifying and facilitating implementation of states' human rights obligations in the business context; (2) defining and enforcing human rights responsibilities of business enterprises; (3) preventing the occurrence of human rights abuses in the business context; (4) ensuring access to justice and effective, adequate and timely remedy for victims concerned; and (5) enhancing mutual legal assistance and cooperation at the international level to prevent, mitigate and address business-related human rights abuses and to offer effective remedies for victims (Article 2). The modality of an international LBI determines the comprehensiveness yet ambiguity of the definitions and provisions in the Updated Draft.

2.1 Scope of Application

2.1.1 Personal Scope

Diverging from domestic mHRDD laws and EU CSDDD considered above, the personal scope of the Updated Draft focuses on business activities rather than business entities meeting specific turnover and/or employee thresholds. Article 3.1 of the Updated Draft specifies that the treaty "shall apply to all business activities, including business activities of a transnational character." The term "business activities," as outlined in Article 1.4, refers to "any economic and other activity, including but not limited to the manufacturing, production, transportation, distribution, commercialization, marketing and retailing of goods and services." These activities are

681 Preamble Paragraph (PP) 7, Updated Draft.

undertaken, including through electronic means, by any legal or natural person, "including State-owned enterprises, financial institutions and investment funds, transnational corporations, other business enterprises, joint ventures, and any other business relationship."

Article 1.5 denotes that "business activities of a transnational character" are activities covered by Article 1.4 and: (1) occur in more than one jurisdiction or state; (2) occur in one jurisdiction or state "but a significant part of its preparation, planning, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another state or jurisdiction"; or (3) occur in one state or jurisdiction "but has significant effect in another state or jurisdiction."

These definitions suggest that the ratione personae scope of the Updated Draft covers all kinds of business enterprises, provided their business activities fall within the purview of Articles 1.4 and 1.5. While aligning with the personal scope of the UN Guiding Principles,[682] this broad personal scope has sparked intense debates among states[683] and "is likely to remain one of the stickiest issues in the [BHR treaty] process."[684] In addition, Article 3.2 offers flexibility for states to adapt their domestic laws to different types of business enterprises. Specifically, it articulates that "State Parties may establish in their law a non-discriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context, or the severity of impacts on human rights."

2.1.2 Material Scope

The material scope of the Updated Draft, as pe*r* Article 3.3, "shall cover all internationally recognized human rights and fundamental freedoms binding on the State Parties." Regrettably, there is no further and clear elaboration on what constitutes "internationally recognized human rights and fundamental freedoms." According to the UN Guiding Principles, "internationally recognized human rights" should be understood, at least, "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."[685] If interpreted as per the Third Revised Draft, "internationally recognized human rights" include "those recognized in the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, all core international

682 Principle 14 of the UN Guiding Principles stipulates that "[t]he responsibility of business enterprises to respect human rights applies to *all* enterprises regardless of their size, sector, operational context, ownership and structure." Emphasis added.

683 The Resolution 26/9 narrowly defines the mandate of the OEIGWG to elaborate a BHR treaty for transnational corporations and other business enterprises with a transnational character, excluding domestic companies whose operations are completely confined to the territory of any one state. However, in practice, with the exception of the Zero Draft, all subsequent drafts intend to cover all business activities. For the different positions of states regarding the Updated Draft's personal scope, see OEIGWG, *Updated Draft Legally Binding Instrument with the Concrete Textual Proposals Submitted by States during the Ninth Session*, p.24, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-lbi-with-proposals.pdf.

684 Carlos Lopez, "Struggling to Take Off?: The Second Session of Intergovernmental Negotiations on a Treaty on Business and Human Rights," *Business and Human Rights Journal* 2, no. 2 (2017): 114.

685 Principle 12 of the UN Guiding Principles.

human rights treaties and fundamental ILO Conventions."[686]

Regardless of the interpretation, it is evident that the Updated Draft seeks to embrace a broad material scope. Nevertheless, in practice, the material scope may be more uncertain and narrower, given there is an important qualifier for "internationally recognized human rights—binding on the State Parties." This qualifier implies that the material scope of the Updated Draft is confined to "the instruments ratified by each state and excludes all non-binding instruments such as UN Declaration."[687]

2.2 Corporate Human Rights Due Diligence Obligations

Taking an indirect model, the Updated Draft makes the adoption of mandatory corporate HRDD the basis of state obligations. By Article 6.2, states are required to put in place appropriate legislative, regulatory, and other measures to "(c) ensure the practice of human rights due diligence by business enterprises." HRDD, defined in Article 1.8 of the Updated Draft, refers to "the process by which business enterprises identify, prevent, mitigate and account for how they address their adverse human rights impacts." This article also permits the variation of corporate HRDD processes based on factors such as "the size of a business enterprise, the risk of severe adverse human rights impacts, and the nature and context of the operations of that business enterprise." When considered alongside Article 3.2, this provision embodies the proportionality principle of the Updated Draft, allowing business enterprises certain policy space to determine and implement HRDD. Despite the recognition of the principle of proportionality, the Updated Draft sets certain general and specific requirements for HRDD.

In terms of general requirements, the Update Draft models the language of the UN Guiding Principles to delineate the standard process of HRDD. Article 1.8 stipulates four classic steps of HRDD, including: (1) identification and assessment of adverse human rights impacts[688] related to a business enterprise's own activities and its business relationships;[689] (2) adoption of preventive and mitigating measures; (3) evaluation of the effectiveness of the preventive and mitigating measures; and (4) regular and accessible communication regarding how the business enterprise addresses identified adverse human rights impacts, particularly to those who are affected.

Concerning specific requirements, Article 6.4 of the Updated Draft requires states to establish "legally enforceable requirements for business enterprises to undertake human rights due diligence," including the following six aspects: (1) undertake and report on human rights impact assessments prior and throughout their operations on a

686 Article 3.3 of the Third Revised Draft.

687 "Preliminary Comments on the Updated Draft Legally Binding Instrument in Preparation for the Ninth Session of the IGWG," FIDH (16 October 2023): 7, accessed 20 December 2023, https://www.fidh.org/IMG/pdf/fidh_s_preliminary_comments_ahead_of_9th_unbt_negotiation_session.pdf.

688 According to Article 1.2 of the Updated Draft, adverse human rights impact is "a harm which corresponds to a reduction in or removal of a person's ability to enjoy an internationally recognized human right."

689 Article 1.6 of the Updated Draft defines a business relationship as "any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship, including *throughout their value chains*, as provided under the domestic law of the State, including activities undertaken by electronic means." Emphasis added.

regular basis; (2) integrate a gender and age perspective, considering differentiated human rights-related risks and impacts on women and girls; (3) give particular consideration to the needs of those at heightened vulnerability or marginalization; (4) engage in meaningful consultations with potentially affected groups and other relevant stakeholders; (5) ensure the safety of human rights defenders, journalists, workers, members of indigenous peoples, and others at risk of retaliation; and (6) when engaging with indigenous peoples, follow internationally recognized standards of free, prior, and informed consent. These provisions underscore the Updated Draft's strong commitment to addressing the specific needs of vulnerable groups in the context of corporate human rights abuses.

Furthermore, Article 6.5 imposes an obligation on states to "take necessary measures to ensure that business enterprises take appropriate steps to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such abuse in appropriate cases." Consequently, business enterprises are required to exercise a general duty of care to prevent human rights abuses that may arise from third parties under their control, management, or supervision. However, the specific rules need to be fleshed out by domestic laws.

2.3 Rights and Protection of Victims

In addition to clarifying the obligations of states and business enterprises (indirectly), the Updated Draft dedicates several provisions to specifying the rights and protection of victims[690] in the context of corporate human rights abuses,[691] solidly reflecting a "victim-centered" approach.[692] Concerning the rights of victims, the Updated Draft employs a triple structure to reaffirm existing human rights and formulate new rights. The first dimension involves reaffirming that victims enjoy "all internationally recognized human rights and fundamental freedoms" (Article 4.1) and placing emphasis on the application of "any higher level of" human rights "under international, regional, or national law" (Article 4.3).

The second dimension, as outlined in Article 4.2, is the provisions of specific human rights and fundamental freedoms that hold significant importance in the realm of BHR. Among these specified human rights are: (1) the right to fair, adequate, effective, prompt, non-discriminatory, appropriate, and gender-sensitive access to justice; (2) the right to submit claims, either individually or through a representative, or through class action in appropriate cases, to both courts and non-judicial grievance mechanisms

690 Victim, defined in Article 1.1 of the Updated Draft, includes "any person or group of persons who suffered a human rights abuse in the context of business activities, irrespective of the nationality or domicile of the victim." It also covers "the immediate family members or dependents of the direct victim."

691 According to Article 1.3 of the Updated Draft, human rights abuse means "any acts or omissions that take place in connection with business activities and results in an adverse human rights impact."

692 Nadia Bernaz et al., "The UN Legally Binding Instrument and the EU Proposal for a Corporate Sustainability Due Diligence Directive: Competences, Comparison and Complementarity," Friend of the Earth (13 October 2022): 13, accessed 20 December 2023, https://friendsoftheearth.eu/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf.

established by states; (3) the right to be shielded from any unlawful interference affecting privacy, as well as from intimidation and reprisals; (4) the right to assured access to information held by business enterprises or relevant state agencies, along with legal aid essential for pursuing effective remedies; and (5) the right to guaranteed full participation, transparency, and independence in reparations procedures.

The third dimension, as articulated in Article 4.4, confers upon any victim the right to petition the state, during the adjudication process, "to adopt precautionary measures related to urgent situations that present a serious risk of or an ongoing human rights abuse." This proves especially pivotal given the protracted timelines characterizing the litigation of cases involving corporate human rights violations. And companies may oftentimes employ various strategies to prolong these proceedings, rendering it arduous for victims to secure prompt redress. Granting victims the capacity to solicit precautionary measures can efficaciously forestall the exacerbation of their predicament due to the continual occurrence of corporate activities.

Furthermore, the Updated Draft explicitly outlines the state's obligations to protect victims, including, inter alia, the rights mentioned above. In short, Article 5.1 requires the state to protect victims and relevant stakeholders from any unlawful interference with their human rights and fundamental freedoms. Article 5.2 demands that states implement adequate and effective measures to ensure a safe and enabling environment for exercising human rights, free from threats, intimidation, harassment, reprisals, and other impediments. Article 5.3 obligates states to investigate corporate human rights abuses and take responsive measures in a timely, effective, thorough, and impartial manner. Article 5.4 obliges states to adopt precautionary measures, either ex officio or upon request by the victim, against urgent and serious corporate human rights abuses. Considering Articles 4 and 5 collectively, the Updated Draft employs a strengthened approach to safeguarding victims of corporate human rights abuses, emphasizing the proactive involvement of states. This signifies a pivotal shift in recentering the role of states in the realm of BHR.

2.4 Public Oversight, Enforcement, and Implementation

States play a central role in monitoring, enforcing, and implementing corporate HRDD under the Updated Draft. In a broad sense, the role of states in this context can be categorized into five main areas: general obligations of implementation, prevention, remediation, mutual legal assistance, and international cooperation. Moreover, the Updated Draft proposes various institutional arrangements at the international level to ensure effective implementation.

2.4.1 State's Obligations

(1) General Obligations of Implementation: Article 16 of the Updated Draft delineates the general requirements for states to perform obligations therein, including: (a) undertaking all necessary legislative, administrative or other actions to effectively implement the Updated Draft; (b) providing copies of

domestic laws and regulations that give effect to the Updated Draft; (c) paying special attention to business activities in conflict-affected areas; (d) addressing the particular impacts of business activities on those facing heightened risks of corporate human rights abuses; (e) interpretating and implementing the Updated Draft in accordance with international law, such as international human rights and humanitarian laws; (f) safeguarding public policies and decisions making spaces from undue political influence by businesses in performing state obligations thereunder. The final point constitutes a crucial provision aimed at tackling the risk of corporate capture, which could exacerbate the governance gap and undermine the regulatory capacity of public authorities, as exemplified by the case study of the Rana Plaza tragedy.[693] Additionally, states are required to periodically submit reports to the Committee, discussed below, detailing the measures they have taken to give effect to their commitments (Article 15.2).

Realizing the reality that "[n]o new treaty in the twenty-first century can possibly claim to be an 'island' and hence must be consistent with all its predecessors,"[694] the Updated Draft incorporates a dedicated provision, i.e., Article 14, to ensure "consistency with international law." Article 14.1 underlines the imperative of "fully respecting" the foundational international law principles, induing the sovereign equality and territorial integrity of states. Building upon this, Article 14.2 underscores the necessity for states to refrain from exercising jurisdiction and performing functions exclusively reserved by the authorities of other states. Article 14.3 clarifies the primacy of other domestic laws, regional, or international instruments that are more conducive to upholding human rights in the business context. Article 14.4 specifically handles issues arising between the Updated Draft and the rules of general international law concerning state immunity and international responsibility.

Of particular significance is Article 14.5, which seeks to address the relationship between the Updated Draft and all existing international agreements, including trade and investment agreements. It requires interpreting and implementing all relevant bilateral and multilateral agreements "in a manner that does not undermine or restrict [states'] capacity to" perform obligations under this Updated Draft, as well as other relevant human rights conventions and instruments.[695] Once in effect, beyond fostering the harmonization of mHRDD laws at domestic, regional, and international levels, this provision is expected to prevail, or at the very least, rebalance the weight of human rights in international legal order. This is especially pertinent in the context of international economic law, which has long been criticized for prioritizing economic considerations over human rights protection. In this connection, Article 14.5 represents a concrete

693 See Section 2.3.3, "Powerful Fashion and Regulatory Capture," in Chapter 1 of this research.

694 Bantekas, Ilias. "Towards a Un Business and Human Rights Treaty." In *The Cambridge Companion to Business and Human Rights Law*, edited by Ilias Bantekas and Michael Ashley Stein, 583-610: (Cambridge University Press, 2021): 584.

695 Regrettably, Article 14.5(b) of the Third Draft was removed from the Updated Draft. It is intended to require all new bilateral and multilateral trade and investment agreements to be compatible with the states' human rights obligations, including both this Draft and other international human rights conventions.

step toward satisfying the normative requirements of vertical policy coherence envisioned by the UN Guiding Principles.[696]

(2) Prevention: Article 6.1 functions as an overarching clause specifying the obligations of states in terms of prevention. It requires states "shall regulate effectively the activities of all business enterprises within their territory, or otherwise under their control." Article 6.2 further mandates states to formulate appropriate legislative, regulatory, and other measures to prevent corporate involvement and engagement in human rights abuses, ensure corporate compliance with HRDD obligations, and "promote the active and meaningful participation of individuals and groups (…) in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse." Such individuals and groups, according to the same article, include trade unions, civil society, NGOs, indigenous peoples, and community-based organizations. By Article 6.6, states should regularly assess the adequacy of and appropriately revise the legislative, regulatory, and other measures required by Article 6.2. Moreover, to ensure the impartiality and functioning of competent authorities tasked with fulfilling obligations under Article 6.2, states should guarantee that these authorities possess the necessary independence in alignment with the domestic legal system.

(3) Remediation: Article 7 addresses the state's obligations to ensure access to remedies for victims. Despite its length and complexity, this article establishes a meticulously crafted framework for accessing remedies. Pursuant to Article 7.1, states must ensure that "relevant state agencies" possess the necessary competence to provide access and justice for victims,[697] with particular attention to the challenges faced by vulnerable and marginalized groups. Article 7.2 further delineates these obligations in three facets, i.e., the accessibility of relevant state agencies, the reduction of obstacles to accessing remedies, and the competence of relevant state agencies in terms of access to remedies. Articles 7.3–7.5 delve into these three facets, respectively.

Article 7.3 requires states to adopt policies to ensure the accessibility of relevant state agencies, addressing the availability of the agencies and reliable information,[698] the power asymmetry between victims and business actors, and the risk of reprisals against victims.

In terms of eliminating obstacles to accessing remedies, Article 7.4 requires states to implement measures progressively reducing legal, practical, and other relevant obstacles. These measures include: (a) alleviating the financial burden on victims associated with seeking a remedy; (b) undertaking measures, such as

696 Principles 9 and 10 and corresponding commentaries of the UN Guiding Principles.

697 Article 1.10 defines "relevant state agencies" as "judicial bodies, competent authorities and other agencies and related services relevant to administrative supervision and enforcement of the measures referred to in this (Legally Binding Instrument) to address human rights abuse, and may include *courts*, *law enforcement bodies*, *regulatory authorities*, *administrative supervision bodies*, and other *State-based non-judicial mechanisms*." Emphases added.

698 Article 7.3(b) indicates that policies with respect to information include facilitating requests for disclosure of relevant information about business-related activities or relationships linked to human rights abuse.

reversing the onus of proof, to facilitate evidence production; and (c) ensuring that civil procedural rules allow for group actions.

In the final aspect, Article 7.5 requires states to: (a) strengthen the capacity of relevant state agencies to provide, or contribute to the provision of, effective remedies; (b) guarantee meaningful consultations between relevant state agencies and victims concerning the design and delivery of remedies; and (c) empower relevant state agencies to oversee a company's implementation of remedies and to take appropriate steps to rectify any non-compliance.

(4) Mutual Legal Assistance: Article 12 of the Updated Draft is dedicated to mutual legal assistance among contracting states, which proves crucial in bridging the governance gap in the field of BHR. By Article 12.1, states should "afford one another the greatest measure of assistance in connection with criminal, civil, and administrative proceedings relevant to the enforcement of the measures" concerning the state's obligations in terms of prevention (Article 6), remedy (Article 7), and legal liability (Article 8).

The provision of mutual legal assistance should adhere to any existing treaties or other agreements between states regarding mutual legal assistance (Article 12.2). To guarantee collaboration between states in enforcing prevention, remediation, and liability regimes, Article 12.3 requires states to (a) establish, operate, and improve communication channels between their respective relevant state agencies; and (b) facilitate effective coordination between relevant state agencies and promote the exchange of personnel and information. Further, Article 12.4 seeks to institutionalize mutual legal assistance through inter-state treaties and arrangements.

(5) International Cooperation: Paragraph 8 of the Preamble of the Updated Draft "recalls" Articles 55 and 56 of the UN Charter on international cooperation, "including in particular with regard to universal respect for and observance of human rights and fundamental freedoms for all without distinction of any kind." Article 13 outlines the state's obligations with respect to international cooperation. By virtue of Article 13.1, all contracting states should "cooperate in good faith" to fulfil their obligations and achieve the objectives of this Updated Draft. According to Article 13.2, states are encouraged to participate in the provision of financial and technical assistance, capacity-building, and peer-learning programs, as well as engage in research collaboration and contribute to the International Fund for Victims, among other measures. The inclusion of the qualifier "as appropriate" allows states the necessary policy flexibility to determine how best to fulfil these obligations in practice.

2.4.2 Institutional Arrangements

In addition to obligations at domestic and inter-state levels, the Updated Draft aims to establish a general treaty Committee, a Conference of State Parties, and an International Fund for Victims to ensure effective implementation.

(1) Committee: The Updated Draft proposes to establish a treaty Committee, akin to human rights treaty bodies, to oversee implementation and ensure compliance with the proposed treaty. Except for the capacity to receive individual or group communications and conduct inquiries,[699] the Committee is mandated to: (a) issue general comments and normative recommendations on the interpretation and implementation of the LBI; (b) review and provide concluding observations on reports submitted by state parties; (c) assist state parties in compiling and communicating information necessary for implementation; (d) submit an annual report on its activities to the state parties and the UN General Assembly; and (e) recommend to the UN General Assembly to commission further research on specific issues of the LBI. Article 15.1 outlines detailed procedural rules concerning the formation and operation of the Committee, closely aligning with existing procedures for human rights treaty bodies.

(2) Conference of States Parties (CSP): Conference of Parties (COPs) has become an increasingly prevalent mechanism in international treaties since the 1990s,[700] particularly in the field of international environmental law.[701] The effective functioning of a COP can profoundly bolster the implementation and advancement of a specific treaty regime, contingent upon the powers endowed to the COP. The CSP under the Updated Draft mirrors the design of a COP. Article 15.5 provides that states should convene regularly in a CSP to deliberate on matters pertaining to the implementation of the LBI and any further development needed. In accordance with Article 15.6, the initial CSP should be held by the UN Secretary-General within six months following the entry into force of the LBI. Subsequent CSPs are to be convened by the UN Secretary-General biennially or as decided by the CSP.

(3) International Fund for Victims (IFV): Article 15.7 imposes an obligation on states to establish and operate an IFV, marking one of the most progressive measures envisioned by the BHR treaty process.[702] The design of the IFV is inspired by the intergovernmental trust in international law, particularly the trust fund under the Statute of International Criminal Court (ICC). However, the IFV differs significantly from the ICC's trust fund. While the former focuses on providing "legal and financial aid to victims" to facilitate access to justice, the latter emphasizes providing reparations to the victims.[703] To fulfil the purpose of the IFV, state parties should properly consider the additional barriers faced by

699 Besides the Committee, Conference of State Parties, and International Fund for Victims, the optional protocol of the Zero Draft envisioned a "National Implementation Mechanism" tasked with promoting compliance, monitoring, and implementing the Draft. Notably, Article 6 of the protocol grants the "National Implementation Mechanism" the authority to receive, consider, and investigate complaints from victims.

700 For an insightful introduction to the COP in international law see, Sebastián Rioseco, "Conferences of the Parties beyond international environmental law: How COPs influence the content and implementation of their parent treaties," *Leiden Journal of International Law* 36, no. 3 (2023).

701 See, for example, Annecoos Wiersema, "The New International Law-Makers?: Conferences of the Parties to Multilateral Environmental Agreements," *Michigan Journal of International Law* 31, no. 1 (2009).

702 Article 8.7 of the Zero Draft, under the title "rights of victims," formally proposed to establish an "International Fund for Victims." Since the Revised Draft, "International Fund for Victims" has been incorporated into the title "Institutional Arrangements," and relevant provisions have received little debate and without substantial changes.

703 See Bantekas, "Towards a UN Business and Human Rights Treaty," 605 (n.694).

vulnerable and marginalized groups, such as women, children and refugees. The CSP is responsible for defining and establishing procedures for the IFV's functioning.

2.5 Legal Liability Regime

Holding business enterprises legally liable is one of the essential value additions of a BHR treaty. The Updated Draft contains dedicated articles dealing with legal liability, jurisdiction, statute of limitations, and applicable law. These articles collectively establish the liability regime under the Updated Draft, ensuring effective remedies for victims.

2.5.1 Legal Liability

Regarding legal liability, Article 8 establishes principled requirements for state parties to set up domestic legal liability regimes. Article 8.1 outlines general rules that impose legal liability on legal and natural persons engaged in business activities "for human rights abuses that may arise from their business activities or relationships." The scope of business activities and business relationships, as seen above, is intentionally broad, covering "any economic and other activity" and "any relationship between natural or legal persons, (…) as provided under the domestic law of the State."

In line with Article 8.2, legal liabilities applicable to both legal and natural persons "shall be criminal, civil, or administrative." Moreover, these liabilities are required to be "responsive to the needs of victims as regards remedy" and "commensurate to the gravity of the human rights abuse." These provisions suggest that both legal and natural persons should be accountable for criminal, civil, or administrative liability in instances where human rights abuses arise from their own activities and their business relationships.

Furthermore, Article 8.4 elucidates the distinct relationships between the liability of a legal person and a natural person, criminal liability versus civil liability, and the liability of either a legal or natural person versus that of the main perpetrator for the wrongdoings. This provision introduces multiple avenues for establishing legal liability for violations, potentially serving as a deterrent against human rights abuses in the business context.

Lastly, Article 8.5 requires contracting states to properly allocate burdens of proof in judicial and administrative proceedings. Article 8.6 obliges states to ensure that persons held liable receive penalties or other sanctions that are effective, proportionate, and dissuasive.

Considering all the provisions under Article 8, it is apparent that the Updated Draft outlines general requirements for state parties to establish a legal liability regime. Irrespective of criminal, civil, or administrative liability, state parties are obligated to meet the minimum thresholds specified in these provisions, particularly in Articles 8(1), 8(4), 8(5), and 8(6). However, state parties retain ample policy space to determine, in accordance with their legal principles and domestic legal and administrative systems, the most suitable means of establishing a legal liability regime. This flexibility can, to a certain extent, alleviate resistance and opposition from countries towards a BHR treaty.

2.5.2 Jurisdiction

An intricate aspect common to most legally binding international legal instruments is the matter of jurisdiction. Article 9 of the Updated Draft necessitates that state parties implement specific measures allowing them to assert jurisdiction over instances of human rights abuse. By Article 9.1, jurisdictions should be established in cases where: (1) the human rights abuse occurred, or relevant harm was sustained, either wholly or partially, within the territory or jurisdiction of the state; (2) the human rights abuse was perpetrated by a legal person domiciled in the state's territory or jurisdiction, or by a natural national or resident within that territory or jurisdiction; and (3) a victim seeking redress through civil law proceedings is someone who is a national of the state or has their habitual residence within the territory or jurisdiction of that state.

Article 9.2 sets forth rules for determining the domiciled status of a legal person.[704] Article 9.3 appears to embody the principle of forum non conveniens,[705] but its language is intricate and does not straightforwardly endorse the application of this doctrine in practice.[706] Article 9.4, on the other hand, broadens the regulations, permitting relevant state agencies in different countries to engage in consultations for the purpose of coordinating their actions. This is particularly relevant when judicial proceedings are ongoing in the jurisdiction of another state party, relating to the same human rights abuse or any aspect thereof.

2.5.3 Statute of Limitations

Article 10 of the Updated Draft prescribes the statute of limitations. By Article 10.1, states should ensure that no limitation period applies to the initiation of legal proceedings concerning human rights abuses categorized as "the most serious crimes of concern to the international community as a whole," which includes war crimes, crimes against humanity, or genocide. These crimes are commonly referred to as "core

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704 Namely, a legal person is deemed domiciled within the territory or jurisdiction of a state when the legal entity has its: (1) place of incorporation or registration; (2) principal assets or operations; (3) central administration or management; or (4) principal place of business or activity.

705 The Second Revised Draft and the Third Revised Draft explicitly articulate the principles of forum non conveniens and forum necessitatis in both Articles 9.3 and 9.5. For instance, Article 9.3 of the Second Revised Draft stipulates, "Where victims choose to bring a claim on a court as per Article 9.3, jurisdiction shall be obligatory, and therefore the courts shall not decline it on the basis of forum non conveniens." Article 9.5 thereunder states that "Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the State Party concerned."

706 Article 9.3 of the Updated Draft reads, "State Parties shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that decisions by relevant State agencies relating to the exercise of jurisdiction in the cases referred to in Article 9.1 shall respect the rights of victims in accordance with Article 4, including with respect to: (a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter; or (b) the coordination of actions as contemplated in Article 9.4." For a comment to this article, see "Preliminary Comments on the Updated Draft Legally Binding Instrument in Preparation for the Ninth Session of the IGWG," (2023):10 (n.687).

international crimes," falling under the jurisdiction of the ICC.[707]

For all other cases, as per Article 10.2, a reasonable period for the commencement of legal proceedings is required. This entails that limitation periods should: (1) align with the severity of the human rights abuse; (2) not unduly restrict considering the context and circumstances, including the location of the relevant abuse or harm sustained and the time required to identify the harms; and (3) be determined in a way that respects the rights of victims under Article 4 of the Updated Draft. Accordingly, the Updated Draft requires no statute of limitations for core international crimes but provides a general requirement for all other cases.

2.5.4 Applicable Law

The question of applicable law is another critical aspect affecting effective access to remedies for victims.[708] In line with Article 11.1 of the Updated Draft, all procedural matters related to claims before the competent court that are not explicitly addressed in the Draft "shall be governed by the law of that court seized of the matter." Additionally, as per Article 11.2, substance matters not specifically regulated under the Draft may, at the request of the victim, be governed by the law of another state where the acts or omissions occurred or had effects, or where the natural or legal person alleged to have committed the acts or omissions is domiciled. "The core point of this article is to put the victim in the driver's seat in terms of choosing which substantive law would be applied."[709] Therefore, the Updated Draft grants victims significant discretion, allowing them to seek redress by choosing the substantive law most favorable to their cases.

3. Evaluation of the Draft International Business and Human Rights Treaty

(1) **A Smart-mix Approach**: From the above discussion, the Updated Draft does not explicitly mention voluntary measures for corporate HRDD. However, it does require states parties to "adopt appropriate legislative, regulatory, and *other measures* to," e.g., prevent corporate human rights abuses, which includes ensuring the practice of HRDD (Article 6.2(c), emphasis added). In the prevailing state practice, such "other measures" typically include voluntary guidelines, either general or sector-specific, encouraging and facilitating business enterprises to undertake HRDD. Therefore, the Updated Draft is awarded 1 point under Indicator 1.

As an international instrument designed to navigate the complex terrain of multiple aspects of international law, encompassing human rights and transnational

707 See "Helping Build a More Just World: Understanding the International Criminal Court," International Criminal Court, p.9, https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf.

708 See Axel Marx et al., "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries," European Parliament (February 2019): 112-114, accessed 20 December 2023, https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf.

709 Nadia Bernaz et al., "The UN Legally Binding Instrument and the EU Proposal for a Corporate Sustainability Due Diligence Directive: Competences, Comparison and Complementarity," 28 (n.692).

business activities, adherence to existing international legal frameworks becomes a precondition for both the adoption and implementation of a BHR treaty. In this context, the Updated Draft not only addresses pertinent international rules in specific articles, such as Article 12.2 and Article 16.5, but also dedicates an entire article, Article 14, to ensuring coherence with international law. Consequently, the Updated Draft garners 1 point under Indicator 2.

Like the EU CSDDD, the Updated Draft must undergo ratification and transposition by state parties to come into force. Although the precise methods that different states will employ to adopt and integrate the LBI into their domestic legal systems remain unclear, the Updated Draft establishes certain minimum criteria. For instance, Article 7.4(f) requires the incorporation of group actions into domestic civil procedures. Article 8.2 necessitates the establishment of a robust domestic criminal, civil, or administrative liability regime. But it is still challenging to precisely assign a point value to the Updated Draft, given the absence of a concrete rule. Nonetheless, considering the prevailing practices of countries in aligning with mHRDD laws and other domestic legislation, which might signify the baseline level of implementation following ratification, this study opts to assign the Updated Draft a score equivalent to the lowest observed among domestic mHRDD laws under Indicator 3, specifically, 2 points.

Regarding incentive mechanisms, the Updated Draft lacks explicit requirements for states to adopt measures encouraging corporate compliance. As a result, it accrues 0 points under Indicator 4.

The Updated Draft contemplates oversight mechanisms at both the domestic and international levels. In the domestic plane, states are required to designate “relevant State agencies” to enforce the Updated Draft, which include “judicial bodies, competent authorities and other agencies and related services relevant to administrative supervisor and enforcement” (Article 1.10). Moreover, it proposes the establishment of a treaty Committee and the CSP mechanism, both endowed with monitoring functions. As a result, the Updated Draft garners 1 point under Indicator 5.

(2) **Policy Coherence**: As highlighted earlier, the Updated Draft emphasizes the vital necessity of both horizontal and vertical policy coherence, aligning with the normative framework outlined in the UN Guiding Principles. Of particular note is the groundbreaking provision in Article 14.5, which requires states to interpret and implement “all existing bilateral or multilateral agreements, (…), including trade and investment agreements” in a manner that “does not undermine or restrict their capacity to fulfil their obligations under this [LBI].” This significant provision contributes to the Updated Draft achieving 1 point under Indicator 6.

The UN HRC plays a pivotal role as a central global hub in advocating for and assisting states in the formulation of BHR NAPs. It articulates expectations for states to adopt BHR NAPs. Concurrently, the Updated Draft mandates states to report on the measures taken to fulfil their obligations to the Committee (Article

15.2). States are also required to periodically assess the adequacy of domestic measures, revising and extending them as necessary (Article 6.6). In this connection, BHR NAPs offer a suitable modality for states to meet reporting and evaluation obligations. Furthermore, since the publication of the first BHR NAP by the United Kingdom in 2013, there has been a growing global momentum for states to formulate BHR NAPs. States increasingly embrace BHR NAPs as an interim measure for further actions, such as enacting mHRDD laws or engaging in the BHR treaty process.[710] Presently, at least 31 countries have officially published their BHR NAPs, while approximately 20 countries are developing BHR NAPs.[711] Overall, the formulation of a BHR treaty is likely to encourage more countries to adopt and implement BHR NAPs. Therefore, the Updated Draft merits 1 point under Indicator 7.

(3) **Extraterritorial Regulation**: Discussing the extraterritoriality of an international treaty might be improper. However, given the potential global applicability of the Updated Draft, it earns 1 point under Indicator 8.

Examining the background of the BHR treaty process reveals the involvement of actors from both the Global North and South in preparing and negotiating various drafts of the BHR LBI, including the Updated Draft. Notably, the OEIGWG Sessions, the "friends of the Chair," and the UN BHR Forum, among other channels, provide diverse avenues for stakeholders worldwide to engage in the BHR treaty process. This holds particular significance when compared with the scrutinized domestic mHRDD laws in Chapter 4. Consequently, the Updated Draft accrues 1 point under Indicator 9.

(4) **Remedial Mechanism**: According to Article 1.10, "relevant State agencies" that are responsible for ensuring access to remedies under the Updated Draft include "courts, law enforcement bodies, regulatory agencies, administrative supervision bodies, and other State-based non-judicial mechanisms." However, it does not explicitly require states to support business enterprises in establishing operational-level grievance mechanisms. Hence, the Updated Draft merits 2 points under Indicator 10.

Concerning the civil liability regime, the Updated Draft sets general requirements for state parties to establish and maintain a responsive and commensurate criminal, civil, or administrative liability regime, rather than explicitly requiring a dedicated civil liability regime. Of note, the Updated Draft makes direct reference to "civil litigation" (Article 7.4(a)), "civil procedure" (Article 7.4(f)), "civil liability" (Article 8.4(b)), and the like on multiple occasions. These provisions, when considered collectively, suggest the need for a civil liability regime. They offer guidance for states to align their existing civil liability systems with the specifications outlined in the Updated Draft. In this regard, one could argue

710 See Li, "Operationalising the UN Guiding Principles on Business and Human Rights through Human Rights Due Diligence: A Critical Assessment of Current States Practices," 11-12 (n.229).

711 Periodically updated statistics on the progress of BHR NAP globally are available at: https://globalnaps.org/.

that it is likely, if not inevitable, for some or all state parties to institute a dedicated civil liability regime to facilitate access to remedies under the Updated Draft. As a result, the Updated Draft receives 1 point under Indicator 11.

In the foresaid analysis of the Updated Draft's content, it is apparent that it embraces a well-crafted victim-centered approach. This is notably manifested through numerous requirements placed on states to alleviate legal, practical, and other relevant obstacles impeding access to effective remedies. For example, Article 4.2(f) confirms victims' right to information, including relevant information held by business enterprises. Article 7.4 obliges states to lessen the financial burdens associated with seeking remedies, discourage reprisals against victims, and facilitate the production of evidence. Expanding beyond the domestic sphere, Article 12.1 requires states to engage in mutual legal assistance, including the collection of evidence in civil proceedings. Article 15.7 even envisions the establishment of an IFV, aimed at providing legal and financial aid to victims in their pursuit of access to remedies. Hence, the Updated Draft achieves 1 point under Indicator 12.

(5) **Ongoing Process**: Among the specific requirements for corporate HRDD obligations, Article 6.4(a) explicitly requires states to introduce legally enforceable measures ensuring business enterprises "undertake and publish on a regular basis human rights impact assessments prior and throughout their process." Therefore, the Updated Draft garners 1 point under Indicator 13.

(6) **Broad Coverage**: In addressing personal scope, the Updated Draft closely adheres to the UN Guiding Principles. A comprehensive interpretation of Articles 1.4, 1.5, and 3.1 suggests that the ratione personae scope of the Updated Draft covers all kinds of business enterprises if their business activities fall within the purview of Articles 1.4 and 1.5. As a result, the Updated Draft secures 1 point under Indicator 14.

Regarding the ratione materiare scope, the Updated Draft seeks to comprehensively cover all internationally recognized human rights and fundamental freedoms that are binding on state parties. The qualifier "binding on the State Parties" might imply a limitation; but given that all 193 UN member states have ratified at least one core international human rights treaty since the adoption of the UDHR in 1948, and 80 percent have ratified four or more,[712] it still covers a broad range of human rights. Furthermore, the influence of the UDHR has extended far beyond international human rights law. It has functioned as an essential source for numerous domestic laws, constitutions, regulations, as well as international and regional instruments designed to protect fundamental human rights. Over time, many, if not all, provisions of the UDHR have evolved into customary international law, which is binding on all states.[713] Therefore, the Updated Draft obtains 1 point

712 *UN Treaty Body Database*, Office of High Commissioner for Human Rights, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Home.aspx.

713 See Hurst Hannum, "The UDHR in National and International Law," *Health and Human rights* 3, no. 2 (1998): 147-52.

under Indicator 15.

Article 6.5 of the Updated Draft clearly outlines corporate obligations “to prevent human rights abuse by third parties where the enterprise controls, manages, or supervises that third party.” However, the specific details of these obligations and the distinctions between these obligations and corporate HRDD for their own activities are not clearly specified. Consequently, under Indicator 16, the Updated Draft is assigned 0 point due to the lack of clarity in these aspects.

(7) **Contextual Particularity**: The Updated Draft absorbs the proportionality principle of the UN Guiding Principles, affording business enterprises the necessary latitude to determine the most appropriate manner to undertake HRDD. This commitment to proportionality is stated in Article 1.8, where HRDD is elucidated, and in Article 3.2, which requires the incorporation of the proportionality principle into domestic laws. Thus, the Updated Draft attains 1 point under Indicator 17.

The victim-centered approach is one of the most prominent features of the Updated Draft. This is evident in provisions that require states and business enterprises to pay special attention to vulnerable groups. For example, under Article 6.4, states should have in place legally enforceable rules for business enterprises to conduct HRDD, integrating a gender and age perspective, addressing the risks faced by vulnerable and marginalized groups, and protecting the safety of human rights defenders and journalists. Regarding access to remedies, Article 7.2 obliges states to consider the needs and interests of individuals at risk of vulnerability or marginalization. This rule extends to the operation of the proposed IFV under Article 15.7. Accordingly, the Updated Draft achieves 1 point under Indicator 18.

Regrettably, the Updated Draft neither explicitly requires business enterprises to assist SMEs in conducting HRDD nor prohibits them from leveraging their advantageous position to unevenly transfer the burden and cost of HRDD. Consequently, the Updated Draft obtains 0 point under Indicator 19 and Indicator 20.

(8) **Top-management Engagement**: The legal liability regimes outlined in the Updated Draft provide a framework for potentially holding corporate directors and senior management legally accountable, as stipulated in Article 8.1. This mandates states to establish comprehensive and adequate legal liability for both legal and natural persons. However, there is a notable absence of explicit requirements in the Draft concerning the formal endorsement of senior management in corporate human rights policies or the allocation of HRDD responsibilities to corporate directors. This oversight results in the Updated Draft receiving 0 point under Indicators 21 and 22.

(9) **Stakeholder Participation**: According to Article 6.4(d), states are obligated to establish legally enforceable requirements ensuring that business enterprises undertake “meaningful” consultation with potentially affected groups and other relevant stakeholders during the HRDD process. The term “meaningful” implies a

more elevated standard of stakeholder consultation, surpassing mere general discussions. This reflects a strong commitment to the "perspective of rights-holders" within the Updated Draft,[714] thereby meeting the criteria for earning 1 point under Indicator 23.

As demonstrated in the evaluation of Indicator 23, business enterprises are expected to engage in meaningful consultations with stakeholders throughout the HRDD process. Notably, the Updated Draft extends a similar requirement for public participation to states parties. In accordance with Article 6.2(d), states are mandated to facilitate the "active and meaningful participation" of relevant individuals and groups "in the development and implementation of laws, policies, and other measures" aimed at preventing corporate human rights abuses. Similarly, Article 7.5(b) obliges states to establish "legislative and other measures" ensuring that victims are meaningfully consulted by relevant State agencies regarding the design and delivery of remedies. Regarding the definition of "stakeholder," although the Updated Draft lacks a definitive explanation, numerous provisions encompass crucial stakeholders in the domain of BHR. For instance, Article 6.2(d) explicitly references "trade unions, civil society, [NGOs], indigenous peoples, and community-based organizations," while Article 6.4(e) includes "human rights defenders, journalists, workers, members of indigenous peoples." Consequently, despite the absence of a definition, the Updated Draft earns 2 points under Indicator 24 due to its clarification of the scope of stakeholder engagement and the inclusion of essential types of stakeholders.

Although the tangible outcomes resulting from meaningful stakeholder engagement remain unclear, the Updated Draft indeed grants indigenous peoples a certain degree of decision-making power during the engagement process in corporate HRDD. By Article 6.4(f), states should ensure that business enterprises adhere to "internationally recognized standards of free, prior, and informed consent" when engaging with indigenous peoples in terms of HRDD. Free, prior, and informed consent (FPIC) is the "most consistent elaboration of an authentic participatory process," entrenched in various international human rights and environmental instruments, particularly those related to the protection of indigenous peoples.[715] FPIC entails that consent must be given freely and obtained prior to the approval of any project and the commencement of relevant activity. The core idea behind FPIC is to afford affected communities the right to participate in and influence project decisions when their interests may be impacted.[716] Hence, through the introduction of Article 6.4(f), the Updated Draft provides indigenous peoples with a certain level of decision-making power in the HRDD process. While its scope may be very limited, this incremental step carries significant practical

714 Nadia Bernaz et al., "The UN Legally Binding Instrument and the EU Proposal for a Corporate Sustainability Due Diligence Directive: Competences, Comparison and Complementarity," 14 (n.692).

715 See Damilola S. Olawuyi, "Corporate Accountability for the Natural Environment and Climate Change," in *The Cambridge Companion to Business and Human Rights Law*, ed. Ilias Bantekas and Michael Ashley Stein (Cambridge University Press, 2021), 245.

716 Ibid, 244-45.

implications, addressing the longstanding power asymmetries in the domain of BHR. Consequently, the Updated Draft earns 1 point under Indicator 25.

(10) **Operational-level Grievance Mechanisms**: Regrettably, the Updated Draft does not explicitly require business enterprises to establish and maintain an operational-level grievance mechanism. As a result, the Updated Draft accrues 0 point under Indicator 26.

Summing up the above evaluation, the Updated Draft eventually receives a score of 22 out of 26 points (Table 10), visualizing its pros and cons. Its strengths lie in adopting a victim-centered approach, ensuring effective remedial mechanisms, and actively involving stakeholders. Likewise, its merits for policy coherence are observed. In this connection, the Updated Draft displays a discerning acknowledgement of the imperative to be consistent with existing international legal frameworks. It seeks to address longstanding disparities between human rights protection and economic development within the realm of international law. More ambitiously, it aspires to recalibrate the prioritization of human rights in the international legal system. If successfully ratified, there is no doubt that the BHR LBI will have a profound impact on international legal order and transnational business activities, particularly within the context of GVCs.

However, the Updated Draft is not without shortcomings, notably manifest in the parameters of "contextual particularity," "top-management endorsement," and "operational-level grievance mechanisms." The neglect of requiring corporate top management to endorse human rights policies and the absence of a mandatory obligation for the establishment of operational-level grievance mechanisms may substantially undermine their efficacy. One plausible explanation for this phenomenon lies in the formality of an international legally binding instrument. It results in numerous articles within the Updated Draft formulating overarching and vague requirements for state parties, directing attention towards more general issues rather than delving into specific and nuanced matters.

Finally, although the BHR treaty process is still advancing, it has not yielded satisfactory and substantial outcomes thus far. Concurrently, legislation related to mHRDD in Europe, including both the EU and individual countries, is rapidly evolving and consolidating. It is foreseeable that the fast-moving mHRDD laws in Europe will profoundly shape the negotiations surrounding the BHR treaty process.[717] This "bottom-up" permeation necessitates a timely comparison between domestic and regional mHRDD laws in Europe and the Updated Draft of a BHR treaty. Such a comparison becomes crucial as it facilitates the exchange of best practices and lessons learned between treaty drafters and domestic lawmakers. This exchange serves to enhance future legislation and mitigate the risk of any undesirable dilution of the stringency of mHRDD laws.

717 See Mares, "Regulating Transnational Corporations at the United Nations–the Negotiations of a Treaty on Business and Human Rights," 1531-32 (n.137).

Table 10 Scores of the Updated Draft of BHR LBI Across Key Indicators

Parameters	Indicators		Scores
1. A Smart-mix Approach	1	Law contains mandatory and voluntary measures	1
	2	Law integrates international rules	1
	3	Law refers to other domestic laws and policies	2
	4	Law includes incentive mechanisms	0
	5	Law encompasses regulatory oversight mechanisms	1
2. Policy Coherence	6	Law contains provisions requiring the state to factor in human rights due diligence in bilateral and/or multilateral instruments	1
	7	Whether a state enacting mHRDD has established a BHR NAP	1
3. Extraterritorial Regulation	8	Law has extraterritorial implications	1
	9	Whether the formulation of an mHRDD law with extraterritorial implications involves consultation with third parties outside the jurisdiction of the state	1
4. Remedial Mechanisms	10	Law includes state-based judicial mechanisms, state-based non-judicial mechanisms, and the requirement for government support to facilitate operational-level grievance mechanisms	2
	11	Law contains a dedicated civil liability regime	1
	12	Law provides support to reduce barriers to access to remedies	1
5. Ongoing Process	13	Law mandates companies to consistently engage in human rights due diligence	1
6. Broad Coverage	14	Law applies to all business entities	1
	15	Law adopts a comprehensive definition of human rights	1
	16	Law imposes distinct obligations for different types of corporate human rights abuses	0
7. Contextual Particularity	17	Law permits companies to tailor human rights due diligence measures based on their specific business context	1
	18	Law mandates companies to give special consideration to vulnerable groups	1
	19	Law requires businesses to support SMEs in conducting human rights due diligence	0
	20	Law prohibits companies from exploiting their advantageous status to unevenly transfer human rights responsibilities	0
8. Top-Management Endorsement	21	Law mandates top-management endorsement of corporate human rights policies	0
	22	Law assigns human rights due diligence responsibilities to corporate directors	0
9. Stakeholder Participation	23	Law compels companies to engage with stakeholders in implementing human rights due diligence	1
	24	Law clarifies the scope of stakeholder engagement and defines the term "stakeholder"	2
	25	Law confers decision-making powers to stakeholders during the	0

		consultation process	
10. Operational-level Grievance Mechanisms	26	Law mandates companies to establish an operational-level grievance procedure	1
		Total	22

Chapter 7 Comparative and Critical Scrutiny of Mandatory Human Rights Due Diligence Laws

In recent years, mHRDD legislation has been taken up across domestic, EU, and international spheres. These legislative efforts share certain features, but there are manifest differences among them, swirling together to advance the development of GVC regulations for responsible business conduct. In the absence of a fully established regulatory ecosystem, any mHRDD legislative endeavor has the potential to assume a dominant role in the future, reconfiguring the international legal order and reshaping the business environment. This chapter addresses the central inquiry of this study—identifying a plausible option for enacting mHRDD laws in the foreseeable future. The chapter offers a comparative analysis and critical evaluation of various mHRDD legislative practices. In Section 1, the advantages and drawbacks of these laws are set out, and the best practices are identified for each indicator. Section 2 builds a multidimensional argument, and the EU CSDDD is assessed in terms of whether it can feasibly shape the mHRDD regulatory landscape in the short term. Finally, in Section 3, insights are drawn from an examination of the mHRDD laws in Europe to further optimize the forthcoming EU CSDDD.

1. Identifying an Optimal Solution: A Comparative Evaluation of Mandatory Human Rights Due Diligence Laws

1.1 A Comparison of Mandatory Human Rights Due Diligence Laws

The evaluations in Chapters 4 to 6 yield a nuanced and comprehensive understanding of the prevailing mHRDD legislative practices across several jurisdictions, including the domestic contexts of France, Germany, and Norway, as well as the EU and the international sphere. The analytical framework proposed suggests a pragmatic approach for the comparison of these nascent but complex mHRDD laws. While the framework aids in visualizing the strengths and weaknesses of each item of legislation (Figures 3 and 4), its coverage may not be exhaustive, focusing instead on the laws' most pivotal aspects. Analyzed through this framework, the EU CSDDD performs well, followed, in turn, by the German Supply Chain Act, the Updated Draft of a BHR treaty, the French Duty of Vigilance Law, and the Norwegian Transparency Act.

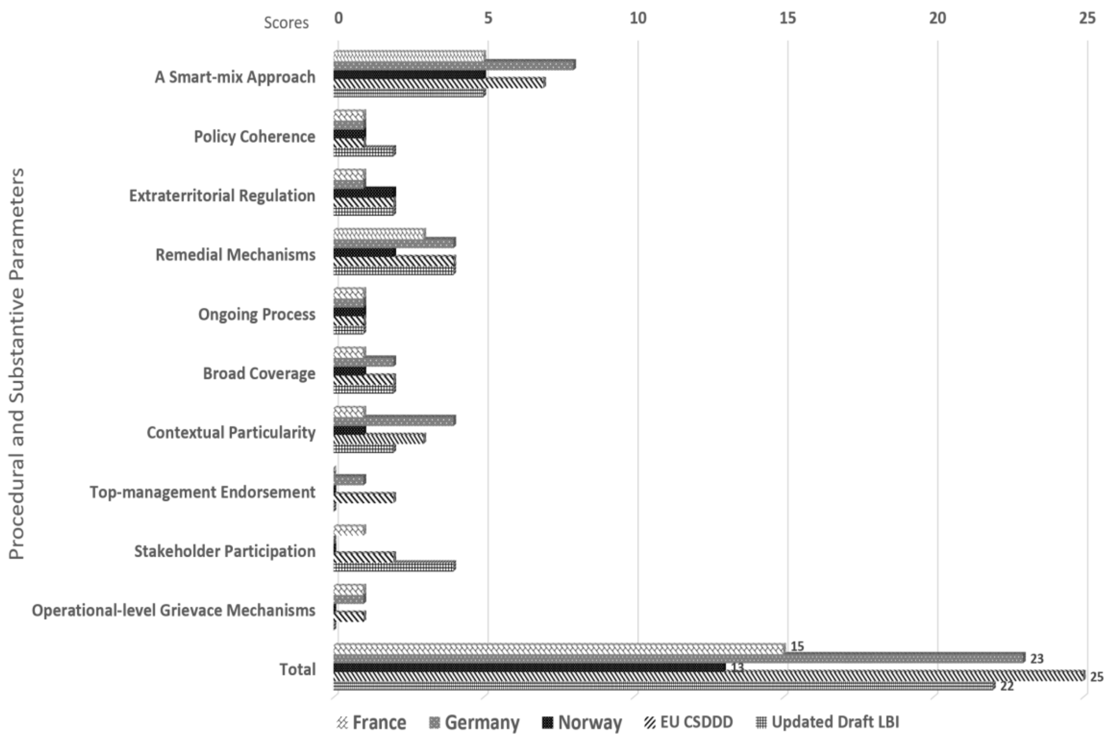

Figure 3 Comparison of mHRDD Laws Across Key Parameters (1)

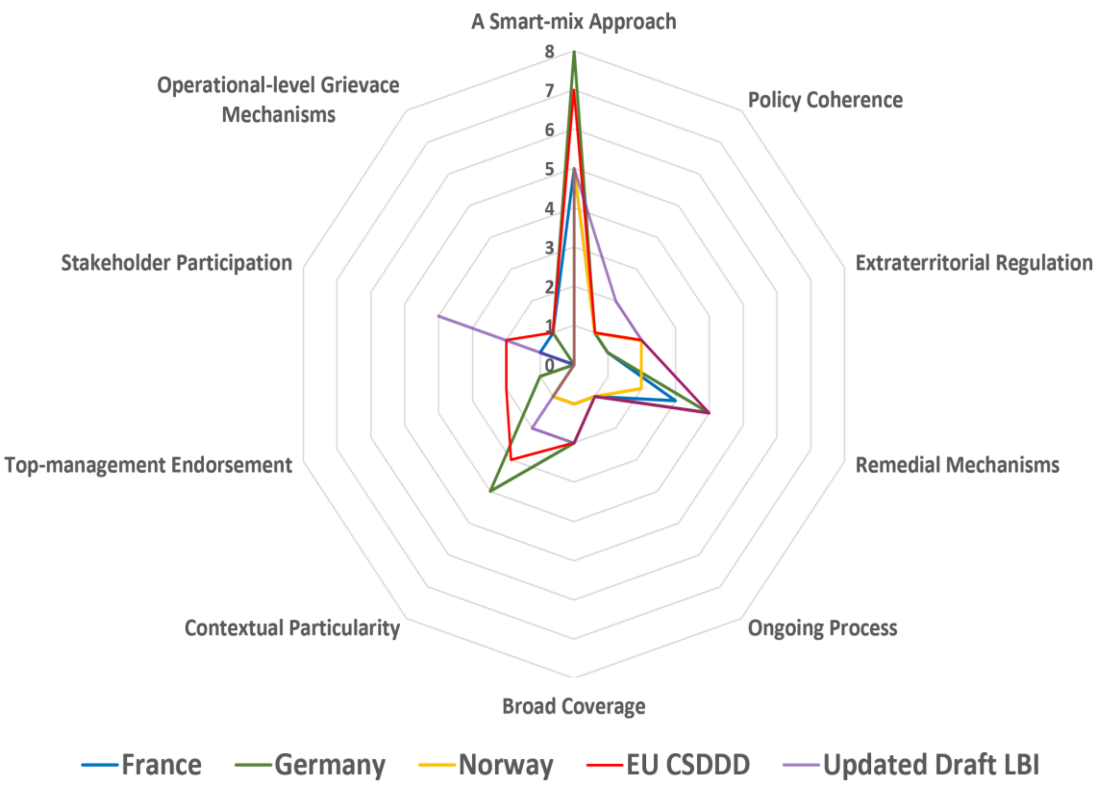

Figure 4 Comparison of mHRDD Laws Across Key Parameters (2)

1.1.1 The EU CSDDD

The EU CSDDD is the most well-established of the mHRDD legislation examined. Its performance across the ten parameters reflects a balanced approach to legislating mHRDD, and it is the only law among those considered that scores across all parameters (Figure 4). It follows the normative requirements of the UN Guiding Principles and embraces a smart-mix approach, providing remedial mechanisms, and acknowledging contextual particularity. Among other things, the EU CSDDD introduces a crucial rule of overriding mandatory application, allowing victims abroad to initiate legal proceedings against EU-based parent companies through this legislative framework.

The EU CSDDD requires Member States to put in place a civil liability regime for violations of corporate due diligence obligations. It also mandates the Commission and Member States to support companies, especially SMEs, in the implementation of complaints procedures. The law explicitly stipulates that business entities must support SMEs in their value chains in operationalizing HRDD, concurrently prohibiting these entities from unfairly transferring human rights responsibilities to others. Compared to other mHRDD laws, the EU CSDDD has notable strengths in parameters related to top-management endorsements. It is the singular mHRDD law that mandates that senior managers actively participate in corporate human rights policies, and it formulates directors' duties concerning human rights and environmental due diligence.

Despite these positive aspects, it is worth noting that the EU CSDDD has several weaknesses, as evidenced by the scores obtained for several indicators. Foremost among these is its failure to adequately address efforts to reduce barriers to victims accessing remedies and its omission of an explicit obligation on the part of businesses to pay special attention to vulnerable groups during the HRDD process. Second, because of its limited scope of application, most EU companies are excluded from the mHRDD obligations in the EU CSDDD, given that approximately 99% of EU companies are SMEs and are not covered by the law.[718] More troubling is the exclusion of the financial sector from the law's scope, which accentuates a troubling governance gap. This is particularly disconcerting in light of the widely acknowledged systematic human rights risks associated with the financial industry.[719] Third, the EU CSDDD does not require Member States to incorporate human rights protections in their bilateral and multilateral agreements, leaving unaddressed the long-standing asymmetry in international law between human rights values and economic targets. Fourth, the absence of provisions requiring companies to engage with stakeholders during HRDD implementation, and the failure to confer decision-making powers on stakeholders during consultation are problematic. Finally, the frequent qualifiers in the legal text, such as "where relevant" and "where necessary," introduce legal uncertainty

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718 EU CSDDD, p.14.

719 For a general introduction to the adverse human rights impacts of banking and financial industry, see "Human Rights Briefing Paper: How Banks Contribute to Human Rights Violations," BankTrack (8 December 2017), accessed 20 December 2023, https://www.banktrack.org/download/how_banks_contribute_to_human_rights_abuses/180416_how_banks_contribute_human_rights_1.pdf.

and excessive leeway for interpretation and implementation. These deficiencies threaten the EU CSDDD's status as a landmark regional mHRDD law, undermining its capacity to shape the regulatory ecosystem of GVCs.

1.1.2 The German Supply Chain Act

Ranked second among the mHRDD laws considered here, the German Supply Chain Act has notable merits and demerits across various parameters. Beyond offering a comprehensive articulation of the essential elements of corporate HRDD obligations, a salient feature of the German Supply Chain Act is its well-designed framework for public monitoring and enforcement. The competent authority responsible for overseeing and enforcing the German Act, i.e., BAFA, is charged with implementing a comprehensive set of mandatory and voluntary measures to ensure corporate compliance. This approach, characterized as "supervisory accountability",[720] stands as a significant contribution of the German Supply Chain Act to the evolving mHRDD regulatory landscape.

The Act's main strengths are its smart-mix approach, remedial mechanisms, and contextual particularity; it achieves the highest score on these parameters among the five mHRDD laws (Figure 4). In its smart-mix approach, the German Supply Chain Act stands apart by broadly referring to other domestic legal arrangements and policies. This includes provisions for a special capacity to sue, public procurement and a well-crafted public monitoring and enforcement mechanism. These initiatives contribute to the assimilation of international BHR norms into the German legal system and ensure effective implementation and corporate compliance.

Turning to the parameter of "remedial mechanisms," despite the lack of a dedicated civil liability regime, the German Supply Chain Act introduces unique provisions, including a special capacity to sue and proceedings under the general tort regime. While the threshold for initiating proceedings through this special capacity to sue poses challenges, the mechanism undeniably creates avenues for expanding access to remedies and alleviates some of the power imbalance between companies and victims. More importantly, the Act mandates BAFA to offer guidance to business enterprises to facilitate the establishment of complaint procedures and the means for victims and stakeholders to file a grievance.

Regarding "contextual particularity," the German Supply Chain Act is the only mHRDD law that scores under every indicator within this parameter. Apart from permitting business enterprises to adapt HRDD in light of specific contexts and requiring special consideration be given to vulnerable groups, the Act explicitly obliges business enterprises to assist SMEs in conducting HRDD and prohibits them from unevenly transferring their human rights responsibilities to other entities. These provisions have been absorbed by the EU CSDDD.

The most obvious drawback of the German Supply Chain Act is that it receives 0

720 See Gustafsson, Schilling-Vacaflor, and Lenschow, "Foreign Corporate Accountability: The Contested Institutionalization of Mandatory Due Diligence in France and Germany," 15-16 (n.135).

point for “stakeholder participation.” This deficiency arises from its failure to expressly require business enterprises to involve stakeholders in the HRDD process, and as a result, it overlooks the crucial role of stakeholders and rightsholders in this context. Additionally, the Act may be somewhat inadequate concerning “extraterritorial regulation.” However, this deficiency is not directly tied to the Act’s extraterritorial implications. Rather, it arises because of the failure to engage third parties outside Germany in the process of legislative consultation. This oversight, coupled with the Act’s deficiencies in stakeholder participation, results in the exclusion of relevant stakeholders in the Act’s formulation. Furthermore, the Act does not contain provisions integrating corporate human rights responsibility into bilateral and multilateral instruments. This is a deficiency shared among the four mHRDD laws within Europe.

1.1.3 The Updated Draft LBI

The Updated Draft is the latest version of a BHR LBI. This draft, which has faced criticisms from its proponents and opponents, centers victims and prioritizes a right-holder perspective. Specifically, it excels in parameters related to “stakeholder participation” and “policy coherence,” as depicted in Figure 4.

Concerning “stakeholder participation,” the Updated Draft is the only one of the mHRDD laws that is assigned points under Indicators 23 and 25. This achievement can be attributed to its stipulation for states to enact legally enforceable rules around stakeholder participation. These rules require businesses to engage in meaningful consultation with potentially affected groups and other pertinent stakeholders throughout the HRDD process. Moreover, it requires business enterprises to comply with international standards concerning FPIC when interacting with indigenous peoples during the HRDD process. This provision provides the opportunity for indigenous communities disproportionately affected by transnational business activities to actively engage and exert influence over project decisions that could impact their interests.[721]

As regards policy coherence, the Updated Draft is notable for its efforts to reposition human rights within the extant international legal order, particularly in the realm of international economic law. It stands as the sole mHRDD law that requires states to interpret and implement all existing bilateral and multilateral agreements, such as trade and investment agreements, with proper regard for the BHR LBI and relevant international human rights conventions.

The Updated Draft also has advantages over the other four mHRDD laws in its remedial mechanisms. It distinguishes itself by providing substantial support for victims to reduce legal, practical, and other barriers hindering redress.

Last but not least, the BHR treaty process channels diverse avenues, such as the OEIGWG Sessions, “friends of the Chair,” and the UN BHR Forum, for stakeholders worldwide to participate constructively in the negotiation of the BHR LBI. This feature sets the Updated Draft apart from other mHRDD laws, especially the other (regionally)

721 For a concise yet precise discussion in this aspect, see Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 92-94 (n.21).

international instrument, i.e., the EU CSDDD.

Nevertheless, the Updated Draft has multiple shortcomings concerning the parameters of “top-management endorsement” and “operational-level grievance mechanism”—these are the only two parameters for which the Updated Draft receives a score of 0. These shortcomings stem from the Updated Draft’s failure to explicitly require that senior management endorse the formulation of corporate human rights policies and establish a grievance mechanism at the operational level. The formulation of the Updated Draft warrants careful consideration in future revisions.

1.1.4 The French Duty of Vigilance Law

The French Duty of Vigilance Law, the earliest mHRDD law, has served as an example for its inventive formulation of a specialized civil liability regime to address breaches of corporate HRDD obligations. Like the German Supply Chain Act and the EU CSDDD, it expressly makes the establishment of operational-level grievance mechanisms compulsory for the targeted business enterprises. Beyond these aspects, it has few noteworthy characteristics (Figure 4).

The limitations of the French Duty of Vigilance Law are primarily related to “contextual particularity” and “top-management endorsement.” The French Law follows a conservative approach to defining contextual factors. It permits companies to reasonably adjust HRDD measures but refrains from obligating that they pay specific attention to the needs of vulnerable groups, provide assistance to SMEs in the value chain, or attempt to prohibit the unfair transfer of human rights responsibilities. Similarly, the Law does not require the involvement of senior management in the HRDD process or in the formulation of corporate human rights policies. Additionally, by adopting a “legal accountability” model, [722] distinct from the “supervisory accountability” approach of its German counterpart, the French Duty of Vigilance Law lacks a mechanism for public oversight and enforcement, making it less effective in supervising corporate compliance. The lack of an official list of targeted companies confirms this assessment. There was also criticism over the removal of provisions in its draft aimed at reducing legal obstacles for victims, such as reversing the onus of proof. These shortcomings, at least partly, overshadow the promise of the French Duty of Vigilance Law to substantively humanize GVCs.

1.1.5 The Norwegian Transparency Act

The Norwegian Transparency Act—the most recent domestic contribution to the mHRDD legal landscape—receives a relatively reserved assessment under the study framework. Like the French Duty of Vigilance Law, it has few standout merits. Its distinctive features lie in how it addresses information asymmetry among businesses and individuals through the provisions of a “duty to provide information” and a “right to information.” It also establishes a comprehensive public monitoring and enforcement framework, much like the German Supply Chain Act, by assigning to the competent

722 See Gustafsson, Schilling-Vacaflor, and Lenschow, "Foreign Corporate Accountability: The Contested Institutionalization of Mandatory Due Diligence in France and Germany," 14-15 (n.135).

authority the power to adopt voluntary and mandatory measures to foster and ensure corporate compliance.

The deficiencies in the Norwegian Transparency Act closely parallel those in the German Supply Chain Act. In addition to lacking a dedicated civil liability regime, it falls short by not explicitly compelling businesses to involve stakeholders in the HRDD process, neglecting the importance of stakeholder and rightsholder participation. It also lacks compulsory requirements for engagement by top-management and does not assign HRDD responsibilities to corporate directors.

Interestingly, the Norwegian example, in adopting the “supervisory accountability” model, ranks lowest in “contextual particularity,” a high-scoring parameter in the case of the German Supply Chain Act. Instead, the Norwegian Transparency Act seems to align with the conservative approach of its French counterpart. Specifically, it permits companies to reasonably adjust HRDD measures but refrains from obligating specific attention to the needs of vulnerable groups, assistance to SMEs in the value chain, or attempting to prohibit the unfair transfer of human rights responsibilities by companies.

1.1.6 Further Reflections

The comparison among the various mHRDD laws at the domestic, EU and international levels offers insights into the current mHRDD legal landscape. First, all the laws assessed are, to varying degrees, fashioned on the fundamental requirements laid out in the UN Guiding Principles, exemplifying the normative influence and “enabling function” of the UN Guiding Principles within the realm of BHR.[723] The rapid consolidation of mHRDD legislation resembles a norm cascade or a process of internalization in the life cycle of the UN Guiding Principles. It appears to be a transformative moment in international law in which there is an attempt to relocate human rights values and redefine responsible business conduct.

Second, the laws each have merits and demerits, and there is no existing optimal legislative solution. The different mHRDD laws are better viewed as being complementary and mutually reinforcing. This perspective resonates with the lessons learned from the case study on the Rana Plaza tragedy, emphasizing the need for a holistic transnational approach to mitigate the governance gap in GVCs. More significantly, the considerable limitations in these laws reflect long-lasting problems in the BHR domain that have yet to be satisfactorily resolved. The existence of these issues poses a threat and undermines the effectiveness of further implementation.

For instance, despite the EU CSDDD’s overriding applicability, the dearth of measures addressing the legal and practical obstacles faced by victims seeking redress may leave them incapable of pursuing legal action. This argument also applies to the French Duty of Vigilance Law, where there is a dedicated civil liability regime but no additional measures to remove the legal and practical barriers to accessing civil

723 The term "enabling function" denotes the capacity of the UN Guiding Principles to foster subsequent formal legislative practices, thereby providing soft norms with legally binding force. For an instructive discussion in this aspect, see Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 176-78 (n.21).

proceedings. The German Supply Chain Act and the Norwegian Transparency Act both fall short by not requiring stakeholder involvement in the HRDD process, limiting businesses and stakeholders in acquiring timely and effective information. Likewise, the legitimacy of corporate human rights policies and the effectiveness of HRDD measures are undermined by the omission of provisions for top-management endorsement in the Updated Draft, the French Duty of Vigilance Law, and the Norwegian Transparency Act.

Lastly, and closely linked to the preceding points, there is no absolute correlation between the pre-eminence of an mHRDD law and the order of its enactment. In other words, the older legislation does not necessarily transcend earlier efforts. Indeed, a perfect mHRDD law may not yet exist. However, current legislative practices offer opportunities for insight. Elucidating the best practices of existing mHRDD legislation provides helpful reference points for future legislation to avoid design flaws and aid in the prevention of avoidable industrial disasters, such as the Rana Plaza tragedy.

1.2 The Best Practices of Mandatory Human Rights Due Diligence Laws

This section sets out the best practices from among the five mHRDD laws for each indicator of the proposed analytical framework. While the coverage may not be exhaustive, it offers valuable insights into the characteristics that an optimal mHRDD law should possess to effectively protect and promote human rights in GVCs. Therefore, in designing mHRDD laws, legislators should conscientiously consider the following elements.

(1) **A Smart-mix Approach**: The smart-mix approach stands as a fundamental necessity for operationalizing the UN Guiding Principles. It requires the astute combination of mandatory and voluntary, domestic and international, incentive and dissuasive, and judicial and administrative measures at the state’s disposal to ensure businesses respect human rights. The German Supply Chain Act and the EU CSDDD are notable examples of this approach. They place sufficient emphasis on the integration of mandatory and voluntary elements, in particular, sector-based voluntary measures for HRDD obligations. This combination establishes a unified threshold for corporate due diligence while allowing enterprises the flexibility to determine the optimal method for fulfilling their obligations.

Legislators should integrate the UN Guiding Principles, OECD Guidelines, and other internationally recognized BHR standards into the legal framework to ensure that mHRDD laws align with international standards and provide the legal certainty required for transnational business. For example, before listing the basic elements of the corporate duty to carry out due diligence, the Norwegian Transparency Act explicitly requires targeted businesses to undertake HRDD “in accordance with the OECD Guidelines for Multinational Enterprises.”[724]

Future mHRDD legislation should also carefully integrate domestic laws and

724 Section 4, Norwegian Transparency Act.

policies to enhance incentive and dissuasive measures. Incentive measures, especially those linked to public procurement, are present in the French Duty of Vigilance Law, the German Supply Chain Act, and the EU CSDDD. However, the laws' incentives should extend to include export credit, investment guarantees, taxation policies, and other instruments at the disposal of a state.

In addressing regulatory oversight, potential mHRDD legislation could draw on the institutional designs of the German Supply Chain Act and the EU CSDDD. They set out detailed mandates for the competent authorities to facilitate and ensure corporate compliance. For example, the German Supply Chain Act confers on the competent authority, i.e., BAFA, mandates to monitor and enforce the Act. These mandates include receiving and reviewing corporate due diligence reports, providing guidelines for compliance, detecting and preventing violations, and imposing financial penalties on noncompliant entities.

There is also an emphasis on the accountability of public authorities, with the German Supply Chain Act requiring annual accountability reports from BAFA. This report should properly "refer to and explain any violations identified and remedial measures ordered as well as contain an evaluation of the submitted enterprise reports."[725] More importantly, to ensure internal compliance, the German Act makes the designation of a human rights officer compulsory for business enterprises. The EU CSDDD further obliges corporate human rights officers or representatives to receive communications from supervisory authorities and equip them with the necessary powers and resources to cooperate with supervisory authorities.

A twofold regulatory framework encompassing the national and international spheres is crucial for ensuring transnational compliance and enforcement of any international mHRDD law. It is certainly feasible to establish a general international institution, such as the European Network of Supervisory Authorities, responsible for further clarifying the law, establishing guidelines for compliance and enforcement, coordinating inter-state collaboration, and carrying out other essential mandates. In the context of international treaties, a committee modeled on the UN human rights treaty bodies, such as the proposed BHR ILB Committee, is desirable. Additionally, irrespective of whether an mHRDD law is regional or international, it is strongly recommended that an annual conference be established, similar to the CSP under the BHR LBI or the UN BHR Forum. Such a conference mechanism would enhance the implementation of mHRDD laws, promote the exchange of best practices among public authorities, provide a common platform for diverse stakeholders to express concerns and demands, and ensure continuous legislative improvement and implementation for the benefit of all.

(2) **Policy Coherence**: Consistent with the UN Guiding Principles, it is imperative that states uphold policy coherence along both vertical and horizontal dimensions. Regarding the former, prospective mHRDD legislation should properly navigate the relationship between domestic mHRDD laws and international agreements, especially

725 Section 21(2), German Supply Chain Act.

those related to investment and trade. In this context, international, regional, and domestic mHRDD legislators can draw insights from the Updated Draft, which requires the interpretation and implementation of international agreements in a manner that "does not undermine or restrict [states'] capacity fulfil their obligations" under mHRDD laws.[726]

Concerning horizontal coherence, in addition to integrating domestic laws and policies to strengthen the implementation of mHRDD laws, states should establish a BHR NAP as an overarching strategy directing a more holistic approach to regulating corporate human rights responsibilities. Furthermore, any future mHRDD law should expressly mandate relevant authorities to "periodically evaluate the legislative, regulatory, and other measures" pertinent to mHRDD and "revise and extend such measures as appropriate."[727]

(3) **Extraterritorial Regulation**: Extraterritoriality is a feature shared among the mHRDD laws examined here. It is considered essential for any mHRDD law intending to address human rights challenges in GVCs. States can address needless legal uncertainty by precisely defining the legal meaning of terms such as "value chain" and "supply chain." Given the diverse human rights risks associated with each GVC layer and the pressing need to transition to a circular economy, a comprehensive definition of "value chain" should be adopted, as exemplified by the EU CSDDD. In this context, a value chain may encompass "activities related to the production of goods or the provision of services by a company, including the development of the product or service and the use and *disposal* of the product as well as the related activities of upstream and downstream established business relationships of the company."[728]

Another crucial aspect of extraterritoriality is the inclusion of foreign third parties that may be affected by mHRDD laws in their formulation and implementation; this inclusion affects the legitimacy and effectiveness of mHRDD laws.[729] While the EU CSDDD and the Norwegian Transparency Act both contain some consultations with external stakeholders, these are insufficient and have been criticized. The diverse channels in the BHR treaty process offer vivid examples for European legislators to actively engage with relevant stakeholders. Furthermore, prospective mHRDD laws, particularly those adopted regionally or internationally, can be modeled on the Updated Draft and require relevant authorities to, at the very least, "*promote* the active and meaningful participation of individuals and groups, such as trade unions, civil society, [NGOs], indigenous peoples, and community-based organizations, in the *development* and *implementation* of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse."[730]

(4) **Remedial Mechanism**s: An optimal domestic remedial ecosystem should involve state-based judicial mechanisms and non-judicial mechanisms and non-state-

726 Article 14.5, Updated Draft.
727 Article 6.6, Updated Draft.
728 Article 3(g), EU CSDDD. Emphasis added.
729 See Section 3.4.3 below.
730 Article 6.2(d), Updated Draft. Emphasis added.

based grievance mechanisms. A best practice in the aspect of non-state-based grievance mechanisms is for states to support their establishment. As a first step, this requires that mHRDD laws mandate such mechanisms as an integral part of corporate due diligence.[731] Second, states should actively help businesses establish and operate these non-state-based grievance mechanisms. For instance, the German Supply Chain Act mandates BAFA to provide guidance and recommendations for business enterprises in the establishment of complaint procedures. The EU CSDDD goes further, encouraging Member States to financially support sustainability due diligence by SMEs. It further urges the Commission to complement Member States' support for corporate sustainability due diligence, including those for the establishment and operation of complaint procedures.

In the context of establishing a dedicated civil liability framework, both the French Duty of Vigilance Law and the EU CSDDD are exemplary models. Irrespective of the direction of future mHRDD laws, these should (a) clearly specify that due diligence does not automatically absolve companies from liability; (b) ensure that the establishment of civil liability does not affect criminal or administrative liability; (c) ensure that the establishment of civil liability for natural persons is independent of that for legal persons; and (d) take measures to reduce legal, financial, and other obstacles hindering victims from seeking civil redress.

Regarding points (b) to (d) above, the Updated Draft serves as a valuable reference. In particular, prospective mHRDD laws could require states to "progressively reduce the legal, practical, and other relevant obstacles that, individually or in combination, hinder the ability of a victim from accessing (…) an effective remedy."[732] It is also strongly advised that postdated mHRDD laws "ensure that victims are *meaningfully* consulted by relevant State agencies with respect to the design and delivery of remedies."[733]

Crucially, given the persistent and somewhat irreparable nature of businesses' human rights violations, victims endure prolonged adverse consequences in seeking recourse. Accordingly, any subsequent mHRDD laws should consider permitting victims to petition judicial, administrative, or other public authorities to implement precautionary measures. In this vein, the EU CSDDD empowers supervisory authorities to issue orders halting infringements and implement interim measures to prevent the occurrence of severe and irreparable harm.[734] Similarly, the Updated Draft obliges states to "adopt, either ex officio or on request by the victim, precautionary measures related to urgent situations that present a serious risk of or an ongoing human rights abuse."[735]

Furthermore, and intimately connected to the above considerations, the stipulations

731 The following discussion of the last parameter, namely, the "Operational-level Grievance Mechanisms," addresses this issue in detail.
732 Article 7.2(b), Updated Draft.
733 Article 7.4(b), Updated Draft. Emphasis added.
734 Article 18.5, EU CSDDD.
735 Article 5.4, Updated Draft.

in the Norwegian Transparency Act pertaining to the “right to information” and the concomitant “duty to provide information” could be combined with a civil remedy.[736] This integration is significant because of the asymmetry of information between individuals and companies, oftentimes obstructing victims in their efforts to establish a causal link between corporate conduct and damages. The imposition of mandatory disclosure obligations on companies offers a viable way to address this challenge.

(5) **Ongoing Process**: An ongoing process is one of the three indispensable characteristics of HRDD.[737] The five mHRDD laws in this study show the continuity of corporate HRDD measures (Figure 3). In this context, lawmakers crafting future mHRDD laws should explicitly require that businesses perform HRDD annually and on an ad hoc basis. Specifically, HRDD should be required “once a year as well as on an ad-hoc basis if the enterprise must expect a significantly changed or significantly expanded risk situation in the supply chain, for example, due to the introduction of new products, projects or a new business field.”[738]

(6) **Broad Coverage**: While the UN Guiding Principles, in addressing the ratione personae scope, advocates for universal applicability across all types of enterprises, this conceptualization seems unattainable in the case of a mandatory legal framework. The five mHRDD laws scrutinized in this study have been criticized for the limited scope of their jurisdiction. Nevertheless, they offer lessons for prospective legislators. Legislators may introduce a phase-in scheme, as is the case in the German Supply Chain Act. In such a scheme, the law would initially apply to large enterprises meeting certain thresholds and would progressively extend to cover specific groups of SMEs. However, a risk-based approach similar to that employed by the EU CSDDD could be contemplated for SMEs during the phase-in process, avoiding creating an undue burden for these entities. Additionally, cautious deliberation is required to resist the pressure of corporate lobbying and external pressures and prevent the exclusion of specific high-risk industries, such as the financial and banking sectors.

Other issues closely linked with the personal scope of a mHRDD law are the extent and nature of corporate human rights responsibilities. The UN Guiding Principles prescribe varied levels of corporate human rights responsibilities, contingent upon a company’s degree of involvement in human rights infringements—whether it causes, contributes to, or is directly linked to such infringements.[739] This framework aligns with the principle of proportionality. However, of those laws analyzed, only the German Supply Chain Act and the EU CSDDD, albeit to a limited extent, distinguish between a company’s responsibilities to direct and indirect suppliers. This deviates somewhat from the normative requirements of the UN Guiding Principles and is something that future mHRDD laws should rectify.

Similarly, each mHRDD law has received its share of criticism concerning its

736 Sections 6 and 10, Norwegian Transparency Act.

737 Two additional characteristics are "risk to rights-holders" and "actual and potential impacts." See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 144-45 (n.21).

738 Section 5(4), German Supply Chain Act.

739 Principles 13 and 19, UN Guiding Principles.

ratione materia scope. It is widely acknowledged that crafting an all-encompassing list of human rights is a challenge. However, confining the scope to a specific category of human rights is inadequate. Empirical evidence shows that corporate activities can violate almost every single right,[740] and human rights are interrelated and indivisible, with infringements on one right often impacting the enjoyment of others. While there is no precise and perfect solution at present, examining the experience of the German Supply Chain Act is helpful. As observed above, the German Act contains an open-ended indicative list of human rights, a method that allows a balance between legal certainty and the openness of human rights.

Although this research is primarily concerned with human rights issues in GVCs, the consolidating trend of mHRDD laws to cover environmental dimensions is relevant. Apart from the Updated Draft,[741] the three domestic mHRDD laws examined address environmental issues to varying degrees. The EU CSDDD goes further, employing a holistic approach to integrate the dimensions of human rights, environment and climate change into its ambit. It also introduces provisions concerning climate due diligence and formulates an overarching notion of sustainability due diligence. Recognizing the ever-deepening connection between human rights and the environment, particularly within the context of climate change,[742] the UN HRC has explicitly affirmed the right to a clean, healthy, and sustainable environment as a fundamental human right.[743] All these may pave the way for prospective mHRDD laws to incorporate environmental and climate change issues[744] and possibly even broader environmental concerns, such as biodiversity,[745] into corporate HRDD processes.

(7) **Contextual Particularity**: All five mHRDD laws adopt the principle of proportionality, reflected in the UN Guiding Principles.[746] The Norwegian Transparency Act provides a concise yet precise illustration, specifying that "[d]ue diligence shall be carried out regularly and in proportion to the size of the enterprise, the nature of the enterprise, the context of its operations, and the severity and

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740 See Section 1 in Chapter 1 of this research.

741 Article 6.4 of the Third Updated Draft explicitly incorporated environmental climate change elements into the purview of corporate HRDD. However, this provision was subsequently omitted in the Updated Draft.

742 See Olawuyi, "Corporate Accountability for the Natural Environment and Climate Change," esp. 234-43 (n.715).

743 UN Human Rights Council, *48/13. The Human Rights to a Clean, Healthy and Sustainable Environment*, A/HRC/RES/48/13, 18 October 2021. Remarkably, this resolution explicitly cites the UN Guiding Principles in its preamble.

744 For an in-depth discussion on the environmental dimension of HRDD, see Chiara Macchi, *Business, Human Rights and the Environment: the Evolving Agenda* (Springer, 2022). It is also important to note that the UN BHR Working Group issues an Information Note to explain the applicability of the UN Guiding Principles to climate change issues, see Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Information Note on Climate Change and the Guiding Principles on Business and Human Rights*, June 2023, accessed 20 December 2023, https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf.

745 Indeed, the 2023 version of OECD Guidelines has incorporated several pivotal environmental issues, such as climate change, biodiversity loss degradation of land, marine and freshwater ecosystems, into the scope of corporate due diligence. More information concerning business, human rights and biodiversity see, "Business Involvement in Biodiversity-related Human Rights Impacts," GBI, accessed 20 December 2023, https://gbihr.org/business-human-rights-biodiversity.

746 Principle 17, UN Guiding Principles.

probability of adverse impacts."[747]

In addressing the concerns and interests of vulnerable groups, both the German Supply Chain Act and the Updated Draft offer crucial insights, with the latter being more progressive and the former's provisions being overly vague and abstract. Article 6.4(b)–(f) of the Updated Draft mandates contracting states to adopt legally binding rules to ensure that businesses: (a) integrate a gender and age perspective; (b) pay particular attention to vulnerable and marginalized groups; (c) guarantee meaningful consultation with potentially affected groups and other relevant stakeholders; (d) protect the safety of human rights defenders, journalists, workers, and indigenous communities; and (e) comply with international standards concerning FPIC when engaging with indigenous groups. These provisions offer a lodestar for future legislation, directly referencing the groups most often vulnerable to corporate human rights violations and proposing targeted solutions that mirror international best practices.

In response to the prevalence of power imbalances between lead firms and suppliers in GVCs, the German Supply Chain Act and the EU CSDDD offer preliminary solutions. In addition to explicitly requiring Member States and the Commission to assist SMEs in implementing sustainability due diligence, the EU CSDDD obliges enterprises to provide such assistance. In particular, businesses are required to bear the costs for SMEs to undergo independent third-party verification. These two mHRDD laws also require business enterprises to ensure responsible purchasing and contracting, thereby preventing the unjust transfer of human rights responsibilities from lead firms to suppliers.

There are differences in this regard between the German Supply Chain Act and the EU CSDDD. Specifically, the former emphasizes procurement practices, and the latter focuses on contractual content. Given that not all procurement activities take place through direct and formal contractual relationships, as evidenced by the prevalence of informal subcontracting in the Bangladeshi garment sector,[748] a harmonized approach could be a judicious option for prospective mHRDD laws. Specifically, business enterprises should be required to ensure: (a) "[w]hen contractual assurances are obtained from, or a contract is entered into, with an SME, the terms used shall be fair, reasonable and non-discriminatory;"[749] and (b) "the development and implementation of appropriate procurement strategies and purchasing practices that prevent or minimize (human rights risks)."[750]

(8) **Top-management Endorsement**: The legislators of various mHRDD laws differ in their recognition of the importance of senior management's engagement in HRDD processes. However, there is a widespread consensus within the academic community in the BHR field. For instance, Florian Wettstein asserts that a corporate human rights policy "will only be taken and implemented seriously if its message is

747 Section 4, Norwegian Transparency Act.
748 See Section 2.3.1 in Chapter 1 of this research.
749 Article 7.4, EU CSDDD.
750 Paragraph 2 of Section 6(3), German Supply Chain Act.

perceived to come straight from the top. Conversely, if a human rights policy is perceived as not having the support of top management, it will likely fail to have any real impact on the daily operations of the company."[751] Likewise, it is argued that only a corporate human rights policy acknowledged and supported by senior management has the legitimacy and authority to be binding on both the company and its employees.[752] The Rana Plaza tragedy case study also underlines the crucial significance of the acknowledgment and support of human rights by top management.[753]

In light of these considerations, ensuring the effectiveness of a corporate human rights policy necessitates that any mHRDD law explicitly mandates top-management endorsement as integral to corporate HRDD. The German Supply Chain Act offers a basic example, requiring that "[t]he enterprise must issue a policy statement on its human rights strategy. Senior management *must* adopt the policy statements (…)."[754] A more "advanced" version can be observed in the EU CSDDD, which requires specific corporate directors to "pu[t] in place" and "overse[e]" due diligence actions "in particular the due diligence policy"[755] and to "take steps to adapt the corporate strategy to take into account the actual and potential adverse impacts identified."[756]

Although the idea of assigning HRDD responsibilities to corporate directors is garnering support in BHR scholarship, it remains one of the most contested issues in the enactment of mHRDD laws, as exemplified by the EU CSDDD.[757] Nevertheless, for an mHRDD law to have a transformative impact, the trajectory set by the EU CSDDD should be followed, and the momentum of ESG investing[758] should be employed to effectively link corporate human rights performance with executive responsibility.

(9) **Stakeholder Participation**: The Updated Draft excels in respect of stakeholder participation. Prospective mHRDD laws may build on this foundation to clarify that the meaningful engagement of stakeholders throughout the HRDD process is an indispensable corporate obligation. In certain circumstances, legislators might also consider granting stakeholders the power to participate in decision-making to ensure their substantive involvement. A best practice in this regard is how the Updated Draft gives legal enforceability to FPIC for indigenous communities.

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751 Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 146 (n.21).

752 See Liang Xiaohui, Fu Lanke, and Xu Cha, "Practical Effects and Theoretical Significance of Enterprises' Human Rights Policies——Taking Fortune Global 500 as an Example," *The Journal of Human Rights* 21, no. 3 (2022): 606-09.

753 For instance, if Mohammad Sohel Rana in his capacity as the top manager, could adopt and endorse human rights policies, it is conceivable that the factory managers might not compel workers to return to the factory after the building showed cracks, thereby potentially averting the occurrence of this tragedy.

754 Section 6(2), German Supply Chain Act. Emphasis added.

755 Article 26.1, EU CSDDD.

756 Article 26.2, EU CSDDD.

757 See Agostini and Corgatelli, "Art. 25 of the Proposed Due Diligence Directive: Quo Vadis?," (n.587).

758 The ESG investing, especially the social dimension, is mutually reinforcing with the UN Guiding Principles. For an insightful discussion of the relationship between ESG and the UN Guiding Principles, see Ruggie, Rees, and Davis, "Ten Years After: From UN Guiding Principles To Multi-Fiduciary Obligations," 197-98 (n.201). Also see Section 3.4.1 below.

Crucially, existing mHRDD laws do not adequately define the scope of the "stakeholder" concept. A potential approach could be to fuse the open-ended definition provided in the EU CSDDD with the detailed list in the Updated Draft. Specifically, prospective mHRDD laws could define stakeholders as "the company's employees, the employees of its subsidiaries, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business relationships,"[759] including "trade unions, civil society, [NGOs], indigenous peoples, and community-based organizations."[760]

(10) **Operational-level Grievance Mechanisms**: Operational-level grievance mechanisms serve a multifaceted role, including risk alerting and mitigation, providing remedies, channeling communication between businesses and communities, and promoting stakeholder engagement.[761] Any mHRDD law should explicitly require the establishment and maintenance of an operational-level grievance mechanism as an integral part of corporate HRDD due diligence. For example, "an alert and complaint mechanism" is a compulsory element of a company's vigilance plan under the French Duty of Vigilance Law.[762] The German Supply Chain Act takes a more comprehensive approach than the EU CSDDD, but both have overarching provisions regarding complaint procedures,[763] accompanied by a dedicated article specifying their detailed requirements.[764] This approach can not only highlight the indispensability of operational-level grievance mechanisms in the HRDD process but also provide guidance for their operation.

Finally, these mechanisms are uniquely positioned to promptly address human rights risks and rectify corporate infringements, potentially even supplanting state-based grievance mechanisms in certain instances. Nevertheless, the latter remains paramount in most scenarios. As stipulated by the UN Guiding Principles, "[s]tate-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy."[765] More fundamentally, affording access to a remedy is an essential component of a state's duty to protect human rights. Hence, irrespective of the existence and efficacy of operational-level grievance mechanisms, states must take appropriate measures to provide access to remedies. Equally important, "states should not rely on OGMs (operational-level grievance mechanisms) to avoid their regulatory responsibilities for upholding human rights and environmental justice."[766]

2. Shaping the Future: The Possibility of the EU Corporate Sustainability

759 Article 3(n), EU CSDDD.
760 Article 6.2(d), Updated Draft.
761 See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 148-51 (n.21).
762 Article 1, French Duty of Vigilance Law.
763 Paragraph 7 of Section 3(1), German Supply Chain Act; Article 4.1(d), EU CSDDD.
764 Section 8, German Supply Chain Act; Article 9, EU CSDDD.
765 Commentary to Principle 25, UN Guiding Principles.
766 Peter T. Muchlinski, *Advanced Introduction to Business and Human Rights* (Cheltenham: Edward Elgar Publishing, 2022), 143.

Due Diligence Directive

Recalling the central inquiry of this research, the following question arises: what is the most likely and promising mHRDD law in the foreseeable future? The analysis above suggests that there is currently no perfect legislative mHRDD solution. However, this does not mean that a satisfactory legislative solution will not emerge over time. Academic research on mHRDD laws, including the present study, along with the continued implementation of existing mHRDD laws, will give legislators a better sense of the possibilities and steer any legislation in the right direction. Certainly, as the proverbial adage suggests, "Rome was not built in a day." A satisfactory mHRDD law evidently will not materialize in the short term.

Although there is a recognized need for a BHR treaty, and the identified flaws of treaty drafts would be addressed in the BHR treaty process, its immediate adoption poses a formidable challenge. As aptly noted by David Bilchitz, "[t]he path to advances in the realm of fundamental rights is never an easy one."[767] John Ruggie also expressly warned that while "[f]urther international legalization in business and human rights is inevitable as well as being desirable in order to close global governance gaps,"[768] "treaty-making can be painfully slow."[769] Indeed, even after almost a decade of negotiations, the BHR LBI remains an uncertain prospect. This uncertainty is evident in the wide but extremely thin consensus among states on different versions of the draft treaty—"there are hardly any provisions within the draft that are not subject to disagreements and controversies."[770] Despite the BHR LBI being addressed in a "right (yet slow) process," the foreseeable future does not appear to be the "right time" for the "right treaty",[771] and "the challenges of business and human rights are immediate and urgent."[772] There is a clear need for a more practical and timely solution to close the governance gap in GVCs.

Reflecting on the above, in the short term, the EU CSDDD appears to be the most likely candidate for humanizing GVCs. This assertion is supported by the demonstrated (relative) maturity and highest score among the laws considered in this study and the fact that the legislative process of the EU CSDDD is approaching its conclusion.[773] The EU CSDDD also serves as a crucial "relay," which can expedite the development of mHRDD rules within the EU and globally in the near future. This is seen in its capacity to advance internal legal harmonization and foster external legal dissemination

767 Bilchitz, "The Necessity for a Business and Human Rights Treaty," 203 (n.134).

768 John Ruggie, "Get Real or We'll Get Nothing: Reflections on the First Session of the Intergovernmental Working Group on a Business and Human Rights Treaty," Business and Human Rights Resources Centre (22 July 2015), accessed 20 December 2023, https://www.business-humanrights.org/en/blog/get-real-or-well-get-nothing-reflections-on-the-first-session-of-the-intergovernmental-working-group-on-a-business-and-human-rights-treaty/.

769 John Ruggie, "Business and Human Rights–Treaty Road Not Travelled," (n.656).

770 Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 313 (n.21).

771 Chip Pitts argued for the necessity of a BHR treaty, stressing that "[i]t must be the right treaty, after the right process, and at the right time." For a video recording, see "Does the World Need a Treaty on Business and Human Rights? Weighting the Pros and Cons," Business and Human Rights Resources Centre and the University of Notre Dame (14 May 2014), at 00:12:04-00:24:44, http://business-humanrights.org/en/binding-treaty/event-by-business-human-rights-resource-centre-univ-of-notre-dame-may-2014.

772 John Ruggie, "Business and Human Rights–Treaty Road Not Travelled," (n.656).

773 See "Corporate Sustainability Due Diligence: Council and Parliament Strike Deal to Protect Environment and Human Rights," (n.567).

with respect to mHRDD.

2.1 The Capacity to Harmonize Domestic Mandatory Human Rights Due Diligence Laws

As for internal legal harmonization, it is anticipated that EU Member States will transport the EU CSDDD into domestic law within two years from its entry into force.[774] In this context, the varying mHRDD laws of EU Member States, such as the French Duty of Vigilance Law and the German Supply Chain Act, are poised to converge. Other EU Member States that have not yet enacted mHRDD laws are expected to formulate legislation in line with the EU CSDDD. This will usher in a new wave of mHRDD legislation, facilitating the elimination of legal fragmentation and enhancing legal certainty, at least within the EU. This development will mark a milestone in the life cycle of the UN Guiding Principles, formally embedding them in domestic and international law, even if only as regional international law. Substantively, this will further "harden" the normative quality of the UN Guiding Principles and refine the regulatory universe for GVCs.

2.2 The Potential to Humanize GVCs Through the "Brussels Effect"

In addressing the external dimension, the adoption of the EU CSDDD will expedite the enforcement of mHRDD within the EU internal market and catalyze its global implementation to spur global mHRDD legislative coverage. This possibility is articulated more fully in the "Brussels Effect," conceptualized by Anu Bradford. Referring to the EU's unilateral power to police global markets, the term vividly explains how the EU capitalizes its market forces, without relying on international institutions or inter-state cooperation, to promulgate regulations that shape the global business environment, resulting in a discernible "Europeanization."[775] Bradford elaborates on five determinants underpinning the Brussels Effect: market size, regulatory capacity, stringent standards, inelastic targets, and non-divisibility.[776] A preliminary observation shows that these criteria are met by the EU CSDDD, implying that the EU could become the prominent global regulator in the field of BHR, following the success of the Brussels Effect in areas such as market competition, the digital economy, consumer health and safety, and the environment.[777]

The cornerstone of a country's global regulatory capacity is widely recognized to depend on the size of its market. Speaking in unison on the global stage, the EU has claimed the title of the world's largest trading bloc and outpaces the combined imports

774 Article 30.1, EU CSDDD.
775 See Bradford, *The Brussels Effect: How the European Union Rules the World*, xiv (n.621).
776 For the purpose of this research, this section only provides a concise explanation of these determinants and briefly expounds on the alignment of the EU CSDDD with these criteria. For an in-depth examination of these determinants, Ibid, 23-65.
777 Ibid, 99-231.

of the US, Canada, Japan, and China from Global South countries.[778] Concurrently, the EU holds the position of the primary trading partner for 80 countries, nearly four times more than that of the US.[779] The EU's substantial market share allows the EU CSDDD to exert influence in GVCs. However, Bradford underscores the limitation of the Brussels Effect in the realm of human rights regulation, as "the EU has little leverage over targets of regulation that are not subject to market access,"[780] including human rights. The EU CSDDD strategically addresses this limitation by tying corporate human rights performance to market access. Enterprises not in compliance with the EU CSDDD may face sanctions or even be precluded from accessing the internal market. As a result, the imminent adoption of the EU CSDDD is expected to significantly bolster the Brussels Effect, suggesting the value-added of mHRDD regulation at the EU level.

Within the theoretical construct of the Brussels Effect, regulatory capacity denotes a jurisdiction's ability to promulgate and enforce regulations, which is intricately connected to the government's political will to establish stringent rules and build robust regulatory institutions.[781] Concerning human rights governance in GVCs, the EU has developed a fairly comprehensive regulatory framework.[782] Principal EU institutions, such as the European Parliament, European Council, European Commission, and the Council of the EU, have taken clear stances and played substantive roles in advancing BHR regulation.[783] In addition, the EU has openly embraced its role as a "global leader" in regulating corporate human rights responsibility.[784] This ambition is explicitly articulated in the *EU Action Plan on Human Rights and Democracy 2020-2024*, which gives priority to strengthening the EU's global leadership in this area, particularly through "enhance[ing] coordination and coherence of actions at the EU level."[785] The above comparative evaluation of mHRDD laws also highlights the pre-eminence of the EU CSDDD as a legislatively mature and balanced framework. Thus, the EU CSDDD satisfies the determinants of regulatory capacity and stringent standards.

The fourth determinant of the Brussels Effect, "inelastic targets," refers to "products or producers that are non-responsive to regulatory change and hence tied to a certain regulatory regime."[786] In the case of the EU CSDDD, and as in the case of areas such as food safety and data protection, the primary regulatory targets are products or services sold to consumers located in the EU internal market. The inelastic nature of

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778 *EU Position in World Trade*, European Commission, accessed 19 December 2023, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en.
779 Ibid.
780 Bradford, *The Brussels Effect: How the European Union Rules the World*, 30 (n.621).
781 Ibid, 31.
782 See McCorquodale, "Human Rights Due Diligence Instruments: Evaluating the Current Legislative Landscape," 131-33 (n.118).
783 See Gatta, "From Soft International Law on Business and Human Rights to Hard EU Legislation?," 248-75 (n.537).
784 *Business and Human Rights: Upholding Human Rights is a Responsibility of All Actors of Society, including Business Enterprises*, European Union External Action, 28 September 2021, https://www.eeas.europa.eu/eeas/business-and-human-rights_en.
785 *EU Action Plan on Human Rights and Democracy 2020-2024*, p.24, https://www.eeas.europa.eu/sites/default/files/eu_action_plan_on_human_rights_and_democracy_2020-2024.pdf.
786 Bradford, *The Brussels Effect: How the European Union Rules the World*, 48 (n.621).

the EU's extensive consumer market significantly restricts the flexibility of producers to shop jurisdictions. Put differently, producers "cannot 'shop' for favorable regulations without losing access to" the EU internal market.[787] The "inelasticity" of the EU internal market constitutes a substantial advantage for the region in advancing mHRDD law within the context of GVCs.

As articulated by Bradford, "non-divisibility" involves the willingness of TNCs to undertake "the practice of standardizing—as opposed to customizing—production or business practices across jurisdictions and hence applying a uniform standard to govern the corporation's global conduct."[788] While most mHRDD laws derive their substantive obligations from global standards set by the UN Guiding Principles, the EU CSDDD is expected to remain one of the most rigorous and widely applicable mHRDD laws in the short term. Consequently, compliance with the EU CSDDD implies conformity with other mHRDD laws in most cases. Additionally, the EU CSDDD requires targeted businesses to cascade standards for sustainability due diligence along certain tiers of their global supply chain. These factors together provide ample incentives for TNCs to model the EU CSDDD to govern their GVCs.

The EU CSDDD thus emerges as a highly viable and imminent mHRDD law for the short term, with the additional prospect of initiating the Brussels Effect. The adoption of this law will harmonize the mHRDD regulations of EU Member States, notably France and Germany, and have a substantive influence on jurisdictions with connections to the EU market. Its potential influence extends to shaping the regulatory ecosystem of GVCs, thereby impacting the ongoing developments in the BHR treaty process. A more detailed examination of the law is necessary to optimize its effects and fortify its legitimacy and efficacy. This entails comprehensive rectification of the identified deficiencies, mindful consideration of best practices gleaned from other mHRDD laws, and, more importantly, judicious evaluation of the EU CSDDD from an external perspective.

3. Thinking from the Outside: A TWAIL Perspective on Mandatory Human Rights Due Diligence Laws in Europe

As discussed above, the legislative process of the EU CSDDD has been significantly influenced by the mHRDD laws of its Member States as well as the Norwegian Transparency Act. This influence is likely to continue shaping the final legal text and potential revisions of the EU CSDDD. Therefore, a comprehensive examination of the four mHRDD laws in Europe is crucial to obtaining a holistic understanding. Moreover, these laws, though enacted at the domestic or regional level, carry profound extraterritorial implications that extend to Third World countries.[789]

787 Ibid.
788 Ibid, 54.
789 Domestic measures with extraterritorial implications are domestic norms adopted by a state to regulate domestic actors, but with the intention of shaping their conduct and that of their subsidiaries and contractors beyond borders; many of them are in the Third World. Through domestic TNCs, such measures provide an avenue for issuing

Despite this, most discussions surrounding these mHRDD laws, including the EU CSDDD, currently stem from European academia. The dearth of non-European perspectives may fail to uncover subtle issues ingrained in European norms, jeopardizing their future implementation and triggering unintended ripple effects in GVC regulation. Consequently, thinking outside the "European" box is significant to unlocking the full potential of the EU CSDDD, addressing potential confrontations, and providing a more nuanced understanding. In this context, this section employs a non-European perspective, viz., the Third World Approach to International Law (TWAIL), to critically evaluate mHRDD laws in Europe, thereby providing complementary knowledge of and critical analysis on these laws.

3.1 Revisiting the Concept of TWAIL and Its Significance

TWAIL, a critical approach to international law, which can be read generally as an effort to understand the history, structure, and process of international law from the perspective of the Third World.[790] The bedrock of TWAIL is the perception that international law "is the product of a long engagement between the industrialized Western and former colonized populations, which perpetuates structured inequality and domination under different guises."[791] This includes human rights, which are "being manipulated to further and legitimize neo-liberal goals" set by the Global North.[792] While the perspectives of TWAIL are not univocal, "they all condemn the existing unjust order and aspire to justice."[793] Differently put, the twailian scholarship is united not in their forms but in thoughts that "eliminate or alleviate the harm or injury that the Third World would likely have suffered as a result of the unjust international legal, political, and economic order."[794] Such scholarship and associated political action seek to address "justice or the fairness of norms, institutions, processes, and practices in the *transnational* arena."[795] Accordingly, the regulation of multinationals and the promotion of BHR in GVCs consistently rank among the priorities of twailian intellectuals.[796] And the mHHRD laws "made in the First World", primarily in Europe,

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countries to set standards in host countries, particularly those in the Global South. See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 229-33 (n.21); see also, Sarfaty, "Shining Light on Global Supply Chains," 420-21 (n.291).

790 Prof. B.S. Chimni drew a distinction between the TWAIL and Critical TWAIL by highlighting that the former utilizes the viewpoint of the third world nations, whilst the latter focuses on the "lived experiences of the ordinary peoples of the third world." Given that the purpose of this article is to reveal the disappointments and even repercussions that the mHRDD laws in Europe have on third world people and states, the usage of TWAIL has implications for third world people and states. See B. S. Chimni, "The Past, Present and Future of International Law: A Critical Third World Approach," *Melbourne Journal of International Law* 8, no. 1 (2007): 499-515.

791 John D. Haskell, "TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law," *Canadian Journal of Law & Jurisprudence* 27, no. 2 (2015): 386.

792 B.S. Chimni, "Third World Approaches to International Law: A Manifesto" *International Community Law Review* 8, no. 1 (2006): 3.

793 Emmanuel Roucounas, *A Landscape of Contemporary Theories of International Law* (Leiden: Brill Nijhoff, 2019), 207.

794 Makau Mutua, "What is TWAIL," *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2000): 36.

795 Ibid. Emphasis added.

796 For example, Prof. Upendra Baxi's early research on the Bhopal disaster has been perceived as a starter of BHR as a new academic field. See Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 21-23 (n.21); see also Chimni, "Third World Approaches to International Law: A Manifesto" 23 (n.792).

to regulate GVCs naturally fall within the purview of twailers' scrutiny.[797] In more detail, the utilization of a TWAIL lens for assessing mHRDD laws in Europe holds significance for the following reasons:

First, the existing mHRDD laws in Europe may exert negative impacts on both governments and the populations situated in the Global South, who have been conspicuously excluded from the processes of legislating and implementing these laws. As aptly articulated by Dehbi and Martin-Ortega, "[t]he importance of considering a TWAIL lens in an analysis of [mHRDD] legislation lies in the potential of these laws to further entrench existing power-imbalances to the detriment of Global South peoples."[798] In light of this, embracing a TWAIL perspective becomes indispensable for achieving a holistic comprehension of the real implications of mHRDD laws for non-Western peoples, contributing to averting further unfairness and subordination in GVCs.

Second, a TWAIL perspective, characterized as "a broad dialectic (or large umbrella) of opposition to the generally unequal, unfair, and unjust character of an international legal regime,"[799] inherently possesses the capacity to expose and caution against the exploitative nature of mHRDD laws in Europe. This assumes paramount importance in the present context, where many take the legitimacy of the extraterritorial implications of mHRDD laws for granted,[800] despite others,[801] including UN human rights experts, having highlighted the imperialistic tendency of these unilaterally made mHRDD laws.[802]

Third, a TWAIL lens can offer a useful discourse through which governments, businesses, and individuals located in the Global South can amplify their voices in the processes of formulating and implementing mHRDD laws, from which they have long been excluded. This assertion holds significance due to TWAIL's fundamental objective, which is to systematically present the viewpoints that have historically been underrepresented in mainstream discourse.[803] By empowering groups that have long been marginalized in the transnational arena with counter-narratives from Eurocentric

797 Caroline Omari Lichuma, "(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains," 81 (n.140).

798 Fatimazahra Dehbi and Olga Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 3 (n.118).

799 Obiora Chinedu Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective," *Osgoode Hall Law Journal* 43, no. 1 (2005): 176.

800 See for example, Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 292-93 (n.21).

801 See Sara L. Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?," (n.391); Bose, "Decentring Narratives around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law," (n.140); Fatimazahra Dehbi and Olga Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL perspective,"(n.118).

802 *International Solidarity and the Extraterritorial Application of Human Rights: Prospects and Challenges—Report of the Independent Expert on Human Rights and International Solidarity*, Obiora Chinedu Okafor, April 19, 2022, A/HRC/50/37, paras.38-42.

803 James Thuo Gathii, "The Agenda of Third World Approaches to International Law (TWAIL)," in *International Legal Theory: Foundations and Frontiers*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge University Press, 2011), 153-73.

perspective, TWAIL "crystallizes a third world voice in international law."[804] The anti-hegemonic narratives advanced by TWAIL serve as a critical reflection on the consolidating yet West-centric critical scholarship on mHRDD laws and "to make visible what is otherwise invisibilized by mainstream discourses."[805] It aids in identifying, with a dialectic acumen, the pitfalls and lessons derived from current mHRDD legislation in Europe. These insights ought to be duly considered in any future endeavors aimed at legalizing mHRDD.

Fourth, the marginalization of substantive stakeholder engagement from the Global South during the formulation and implementation of mHRDD laws may weaken their legitimacy and effectiveness, as "legitimacy and effectiveness deficits emerge in supply chain governance when actors' preferences from producing regions are not represented in policy-making processes and absent from the design of standards and sanctions that affect their rights and livelihoods."[806]

3.2 Using Domestic/Regional Laws to Codify "Universal" Norms in GVCs

The foresaid analysis reveals a common nature of domestic and EU-level mHRDD laws, i.e., they are domestic (regional) laws with extraterritorial implications, aiming to shape GVC regulations unilaterally. Further to the unilateral nature, another characteristic of such laws is associated with the clear objective of promoting Western-defined "universal" norms within GVCs. This is achieved by translating such norms into tangible and enforceable legal provisions that often reflect a Eurocentric viewpoint. These provisions include inclusive definitions of "value chain," the selective adoption of human rights standards, and the delocalization of remedial mechanisms.

3.2.1 The Legal Notion of "Value Chain"

As discussed above, mHRDD laws, notwithstanding their differences in many aspects, share comprehensive definitions of the term "value chain" or "supply chain" within their provisions. In essence, these laws encompass the entire production and distribution process within the supply chains of target companies, leaving almost no relevant actor outside their scope. Additionally, they go beyond the traditional focus on a company's immediate suppliers and extend to include downstream suppliers, subcontractors, and other entities within the GVCs. For example, French Duty of Vigilance Law extends its jurisdiction to cover all subsidiaries under the control of a company, as well as any subcontractors and suppliers with established commercial relationships.[807] The German Supply Chain Act includes the entire lifecycle of a product or service, and covers all entities involved in the steps necessary to produce the

804 James Thuo Gathii, "TWAIL: Brief History of Origins, Its Decentralized Network, and a Tentative Bibliography," *Trade, Law and Development* 3, no. 1 (2011): 46.
805 Lichuma "Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South," (n.562).
806 Mason, Partzsch, and Kramarz, "The Devil Is in the Detail—the Need for a Decolonizing Turn and Better Environmental Accountability in Global Supply Chain Regulations: A Comment," 2 (n.387).
807 Article 1, French Duty of Vigilance Law.

product.[808] The Norwegian Transparency Act includes business partners that supply goods or services directly to a company but are not part of the supply chain.[809] The EU CSDDD even seeks to cover the disposal chain.[810] On the one hand, the inclusive definition of the value chain in mHRDD laws should be necessary to address the human rights abuses that occur across multiple tiers of GVCs. On the other hand, they characterize how "national legislators are vying to conceptualize global value chains through local hard law," demonstrating the Western legislators' taking for granted the extraterritoriality of mHRDD laws, as if they have the unquestionable authority to enforce these laws globally.[811]

3.2.2 The Codification of Westernized "Universal" Values

Looking beyond the definitions of value chains is the material scope of mHRDD laws, which addresses what human rights standards are protected by these laws. Then, it becomes evident that most existing mHRDD laws tend to prioritize selective national human rights and environmental standards yet label them as "internationally recognized standards of universal validity."[812] For instance, the German Supply Chain Act emphasizes its solid roots in internationally recognized standards and its genuine concern for people in the Global South, especially women and children.[813] However, many internationally recognized human rights standards for the protection of women and children, such as the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of the Child,* are absent from the Act's material scope.[814] Similarly, when defining "violations of internationally recognized objectives and prohibitions," the EU CSDDD selectively refers to specific provisions of international treaties at its discretion rather than the treaties themselves.[815] Additionally, despite proposing sustainability due diligence, the EU CSDDD falls short of incorporating the most recognized international environmental treaties, such as the *UN Framework Convention on Climate Change* and the *Paris Agreement*.[816] In the case of the French Duty of Vigilance Law, the absence of a clear definition for "human rights and fundamental freedoms" allows companies to interpret and perform their due diligence duties as per their subjective judgment.[817] This is likely to result in a

808 Section 2(5), German Supply Chain Act.

809 Section 3 b), Norwegian Transparency Act.

810 Article 3(g), EU CSDDD.

811 Salminen and Rajavuori, "Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and A Framework for Analysis," 603 (n.142).

812 *See* Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 293 (n.21); *See also* Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 6 (n.118).

813 *The Federal Ministry of Labor and Social Affairs, Development Minister Schulze and Labor Minister Heil are travelling to Ghana and Côte d'Ivoire Together*, Joint press release by the Federal Ministry for Economic Cooperation and Development (BMZ) and the Federal Ministry of Labor and Social Affairs (BMAS), February 20, 2023, https://www.bmas.de/EN/Services/Press/recent-publications/2023/ministers-schulze-and-heil-travel-to-ghana-and-cote-d-ivoire.html.

814 Arts.1-11 of Conventions in the Annex, German Supply Chain Act.

815 Annex Part II, EU CSDDD.

816 Ibid.

817 See Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 5 (n.118).

reflection of Eurocentric values, which target companies are most familiar with,[818] instead of the human rights and environmental standards that are significant for victims on the ground. In the end, the mHRDD laws' claim to uphold universal values often appears to be more selective, "elite-driven and (often) disconnected from local realities," than truly universal.[819]

One may argue that laws, by their nature, are seldom flawless. The incomplete coverage of all human rights and environmental standards does not ipso facto render the material scope of mHRDD laws devoid of universality. However, this argument overlooks a crucial reality: major domains of international law—including international human rights law and environmental law—still bear indelible marks of their colonial origins.[820] Furthermore, there is a long history of Global North exploiting international law to advance its interests in the Third World.[821] Consequently, mHRDD laws that claim to be based on universal norms would inevitably "operate in the shadow of the legacy of the imperial project."[822] They risk perpetuating existing unequal power structures and continuing to uphold Eurocentric values in the emerging regulatory sphere of GVCs. Therefore, the assertion that the material scope of mHRDD laws—predominantly championed by Western nations—aligns with "internationally recognized standards of universal validity" warrants scrutiny.[823]

3.2.3 The European Jurisdiction of Human Rights Abuses

The Eurocentricity of mHRDD laws is also evident in their enforcement and remedy provisions. Civil liability serves as one of the most effective mechanisms for rightsholders to seek redress.[824] However, most mHRDD laws—except for the French law and the EU CSDDD—fail to establish robust civil liability regimes to provide meaningful relief for victims of human rights abuses. While each mHRDD law imposes administrative fines, the fines ultimately flow into public coffers rather than directly remedying the victims.[825] Even in the case of the French Duty of Vigilance Law and EU CSDDD, attempts to provide effective remedies for victims are still limited. On the one hand, civil liability under these laws is fault-based in that companies are held accountable only if they have been negligent or intentionally failed to fulfill their due

818 Ibid.

819 Nadia Bernaz, *Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap*, 241 (n.25).

820 Antony Anghie, "Imperialism and International Legal Theory," in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford and Florian Hoffmann (Oxford University Press, 2016), 156-72.

821 Penelope Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights," *Journal of Human Rights and the Environment* 3, no. 1 (2012): 19-29.

822 Lichuma, "(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains," 500 (n.140).

823 Wettstein, *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*, 293 (n.21).

824 For a general discussion on the roles and options of civil liability in terms of remedies, *see* Gabrielle Holly and Methven O'Brien Claire, "Human Rights Due Diligence Laws: Key Considerations. Briefing on Civil Liability for Due Diligence Failures," Danish Institute for Human Rights (2021), accessed 20 December 2023, https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Human_rights_due_diligence_laws_-_briefing_on_civil_liability_for_due_diligence_failures_2021_accessible.pdf.

825 Quijano and Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?," 244 (n.118).

diligence obligations.[826] Thus, companies are able to evade civil liabilities by undertaking minimal or superficial due diligence measures, even if actual harm has been caused. In other words, the process-oriented due diligence duty, in turn, provides a shield for companies to evade liabilities.[827] On the other hand, both laws do not shift the burden of proof from victims to lead companies, nor do they offer any form of assistance to rightsholders in overcoming the barriers to accessing civil remedies. In contrast, when faced with claims brought by host country plaintiffs against domestic multinational corporations, the legal principles in developed countries often prevent or create procedural barriers for such claims.[828] These altogether "result in a denial of justice."[829]

More troubling is that the mHRDD laws considered in this study may give rise to a pernicious phenomenon known as "delocalized justice."[830] This phenomenon refers to the transfer of the locus of justice away from the community in which harm was suffered (typically situated in the Global South) to the judicial and non-judicial institutions of other countries (usually the Global North). Such transnational litigations to hold businesses accountable have become a common practice in the realm of BHR.[831] Yet, delocalized justice also raises concerns regarding the judicial sovereignty of the Global South.[832] It hinders the advancement of local judiciaries and facilitates the extraterritorial application of human rights and other standards set by the Global North.[833] Additionally, delocalized justice has the potential to consolidate and popularize a deleterious stereotype that portrays the regulation of GVCs "as problems where the most serious or common abuses are to be found in the Global South, and the effective remedies mostly need to be found in the Global North."[834] This narrative may further solidify a biased perception of the Global South as barbaric and the Global North as civilized, attributing the governance gap in BHR to regulatory and judicial failures

826 Bueno and Bright, "Implementing Human Rights Due Diligence through Corporate Civil Liability," 802-04 (n.403).

827 Quijano and Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?," 250-51 (n.118).

828 Philip I Blumberg, "Asserting Human Rights Against Multinational Corporations under United States Law: Conceptual and Procedural Problems," *American Journal of Comparative Law* 50 (2002); Hassan M Ahmad, "The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States," *The American Journal of Comparative Law* 70, no. 2 (2022).

829 Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 11 (n.118).

830 Duval Antoine and Plagis Misha, "Delocalized Justice: The Delocalization of Corporate Accountability for Human Rights Violations Originating in Africa," Afronomics Law (4 October 2021), accessed 20 December 2023, https://www.afronomicslaw.org/index.php/category/analysis/delocalized-justice-delocalization-corporate-accountability-human-rights.

831 Bose, "Decentring Narratives around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law," 32 (n.140).

832 Ibid, 32-33.

833 For example, the US Alien Tort Statute has been criticized for extending the application of American human rights laws, principles, and values to the global stage, with a particular impact on the Global South. *See* V Rock Grundman, "The New Imperialism: The Extraterritorial Application of United States Law," *International Lawyer* 14, no.2 (1980): 257-66; Robert McCorquodale, "Waving Not Drowning: Kiobel Outside the United States," *American Journal of International Law* 107, no. 4 (2013): 847.

834 James Fowkes, "Adjusting the North-South balance: Southern Judicial Boldness and Its Implications for the Regulation of Global Supply Chains," *Deakin Law Review* 23 (2018): 119.

in the Third World.[835] It is just that the root cause of such failures, at least in part, is a result of systematic undermining by developed countries for trade competitiveness.[836]

3.3 Third World Suppliers Are Disproportionately Burdened by mHRDD Laws

Although mHRDD laws primarily target domestic TNCs, the cost of implementing such laws is disproportionately burdened by suppliers in the Third World. From a legal perspective, GVCs can be understood as a mixture of structurally separate entities constituted through equity ownership or contractual relationships but centrally controlled by lead firms, most of whom are TNCs from the Global North.[837] On the other hand, dispersed suppliers from Global South "are linked together by the variety of governance techniques that a lead firm has at its disposal and which it uses to fuse together the value chain for its own purposes."[838] The dominant position of lead firms allows them, in pursuit of profit maximization, to coordinate sourcing, establish commercial conditions, and enforce codes of conduct on suppliers.[839] Such a control typically results in a transfer of monetary and non-monetary costs incurred in the production process from lead firms to global suppliers.[840] The costs of implementing mHRDD laws, which can be resource-intensive and require significant investments of time and expertise, are not likely to be an exception.[841]

As shown in Figure 5 below, the enforcement regime of European mHRDD laws is a hierarchical two-tier regulatory framework. Within this framework, lead firms at the top of the chain are commonly mandated to establish contractual controls, codes of conduct, or other mechanisms over their suppliers, which create a framework transforming domestic legal requirements into contractual obligations along GVCs. This approach enables lead firms to exercise monitoring and control over suppliers to ensure compliance with established legal requirements throughout the supply chain, even if suppliers themselves are not directly subject to those legal obligations.[842] Extraterritorial suppliers, despite not being a direct target of existing mHRDD laws, are

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835 See Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights," *Harvard International Law Journal* 42, no. 1 (2001); However, there have been numerous examples that substantiate the merits of the Global South's regulatory regimes and judicial institutions in dealing with BHR issues. See e.g., Fowkes concludes that some Southern countries are distinctive and more effective than their counterparts in the Global North in addressing corporate human rights responsibility, Fowkes, "Adjusting the North-South balance: Southern Judicial Boldness and Its Implications for the Regulation of Global Supply Chains," 119-42 (n.834); see also discussion on Global South's innovative approach to human rights-based climate litigation, see Joana Setzer and Lisa Benjamin, "Climate Litigation in the Global South: Constraints and Innovations," *Transnational Environmental Law* 9, no. 1 (2020): 77-101.

836 Ilias Bantekas, "The Linkages Between Business and Human Rights and Their Underlying Root Causes," *Human Rights Quarterly* 43, no. 1 (2021): 117-37; Simons, "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights," 19-29 (n.821).

837 Kevin B Sobel-Read, "Global Value Chains: A Framework for Analysis," 364 (n.3).

838 Jaakko Salminen and Mikko Rajavuori, "Private International Law, Global Value Chains and the Externalities of Transnational Production: Towards Alignment?" *Transnational Legal Theory* 12, no. 2 (2021): 233.

839 Rawling, "Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment," 663-64 (n.32).

840 See Rahim, "Humanising the Global Supply Chain: Building a Decent Work Environment in the Ready-made Garments Supply Industry in Bangladesh," 130-50 (n.42). See also, discussions concerning "sustainable fashion and cost transfer" in Section 2.3.2 of Chapter 1 in this research.

841 Richard M. Locke, "We Live in a World of Global Supply Chains," in *Business and Human Rights: From Principles to Practice*, ed. Dorothée Baumann-Pauly and Justine Nolan (London: Routledge, 2016), 420-25.

842 Sarfaty, "Shining Light on Global Supply Chains." 434-37 (n.291).

effectively compelled to become the sub-regulatee of these laws. For example, the German Supply Chain Act contains a contractual control clause that requires companies to adopt preventive measures against direct suppliers to outline human rights and environmental expectations and verify compliance. The EU CSDDD models the contractual control clauses in the German Act and further explicitly requires an independent third-party verification process. And in the case of suppliers failing to adhere to the outlined commitments set by lead firms in the contract, lead firms often have the legal option of "cut and run" to unilaterally terminate their business relationships without extra costs and risks.[843]

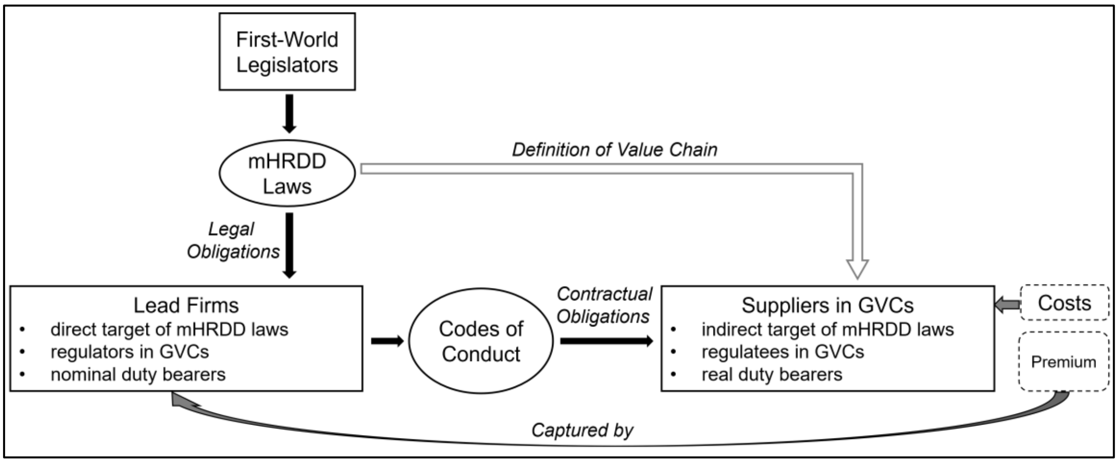

Figure 5 The Two-tier Regulatory Framework of mHRDD Laws in Europe

Due to the apparent gap between bargaining power and leverage, Third World suppliers would find it hard to resist the contractual legal obligations negotiated by lead firms unequally. Even worse, lead firms dictate favorable terms that align with their expectations without substantially increasing purchasing prices or offering material assistance.[844] In fact, lead firms always have a tendency to prioritize profit-related factors over substantial improvements in human rights when balancing commercial interests with social concerns.[845] Under most of the mHRDD laws in Europe, there are no substantive obligations on the part of lead firms to share the financial burdens or make necessary investments to ensure suppliers' fulfillment of HRDD.[846] Instead,

843 See V. Nelson, O. Martin-Ortega, and M. Flint, "Making Human Rights Due Diligence Work for Small Farmers and Workers in Global Supply Chains," Fair Trade Advocacy Office and Brot für die Welt (2020): esp. pp.I-V, accessed 20 December 2023, https://fairtrade-advocacy.org/ftao-publications/publications-statements/making-human-rights-due-diligence-frameworks-work-for-small-farmers-and-workers/?preview=true.

844 This phenomenon is termed "policy schizophrenia," denoting the fact that global buyers aim to purchase high-quality products at low prices that are manufactured in a socially responsible manner but are very reluctant to increase production costs and effectively assist in building a decent working environment for this industry. *See* Rahim, "Humanising the Global Supply Chain: Building a Decent Work Environment in the Ready-Made Garments Supply Industry in Bangladesh," 132-33 (n.42).

845 Peter Pawlicki, "The Electronics Industry: Governance of Business and Human Rights against a Background of Complexity," in *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar Publishing, 2022), 326.; Sven Helin and Maira Babri, "Travelling with a Code of Ethics: A Contextual Study of a Swedish MNC Auditing a Chinese Supplier," (n.83).

846 It could be argued that the EU CSDDD has acknowledged the disproportionate compliance burden on Third World businesses, which requires buyers to cover the cost of verification. However, unless buyers are explicitly obligated to equally share the costs and benefits of improving human rights, such as using purchasing practices to reward compliance, the potential for lead firms to exploit suppliers remains. Similarly, the vague language in the German Supply Chain Act regarding the formulation and implementation of appropriate procurement strategies and

suppliers are often compelled to shoulder additional costs to enhance their human rights and environmental performance.[847] In the worst case, even the costs of verifying human rights compliance for Third World suppliers can be indirectly transferred to businesses in the Global South as a whole, as the social audit industry is predominantly dominated by Global North.[848] Yet, the additional gains derived from improved social performance are appropriated by lead firms.[849] In this complicated context, suppliers on the ground bear a substantial burden in complying with human rights requirements, incurring disproportionate costs and becoming the "real duty bearers" for implementing HRDD within the supply chain. Meanwhile, lead firms act as "nominal duty bearers" by superficially complying with these standards, but transferring the burden of costs to suppliers. This cost-shifting from lead firms to suppliers ultimately results in reduced profit margins and workers' wages in the Third World, undermining the protection of human rights within their communities.[850]

Hence, the two-tier structure of mHRDD laws has risks of cementing and legitimizing the exploitative supply chain governance model dominated by lead firms and further exaggerating their competitive advantage.[851] Enabling lead firms to establish contractual controls suggests a growing privatization of public law, granting domestic TNCs the seemingly legitimate authority to arbitrate "sanctions" on Third World suppliers under the guise of human rights. In fact, the OHCHR recently urged EU legislators to reevaluate their excessive reliance on contractual controls, calling for reconfiguration of the prevailing business practices.[852] Consequently, it should come as no surprise that Global South nations perceive the First World-made mHRDD laws as a form of legal imperialism and hidden protectionism that aims to retain Western

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purchasing practices undermines its practical capacity to bring about substantive change. For this reason, the earlier discussion on "contextual particularity" in Section 1.2 suggests combining relevant provisions of the EU CSDDD and the German Supply Chain Act.

847 Mark Anner, "CSR Participation Committees, Wildcat Strikes and the Sourcing Squeeze in Global Supply Chains," *British Journal of Industrial Relations* 56, no. 1 (2018).

848 Social audits, verification processes, and other third-party auditing mechanisms should be seen as integral components of global capitalism rather than purely regulatory instruments. These services, typically provided by Western companies, have evolved into a sophisticated profit-driven industry. Despite charging significant auditing fees from suppliers, the structural flaws embedded in the auditing and verification industry, such as non-transparency, conflicts of interest, monitoring incapability, and lack of accountability. Furthermore, they often function as tools for corporate whitewashing or greenwashing, rather than driving substantial human rights improvements. Sometimes, they may even pose human rights risks, particularly for vulnerable groups such as indigenous communities. See José Carlos Marques, "Private Regulatory Capture via Harmonization: An Analysis of Global Retailer Regulatory Intermediaries," *Regulation & Governance* 13, no. 2 (2019); Quijano and Wilde-Ramsing, "A Piece, Not a Proxy: The European Commission's Dangerous Overreliance on Industry Schemes, Multi-stakeholder Initiatives, and Third-party Auditing in the Corporate Sustainability Due Diligence Directive," (n.592); Peter Pawlicki, "The Electronics Industry: Governance of Business and Human Rights against a Background of Complexity," 326 (n.845); Claudia Müller-Hoff, "Human Rights Fitness of the Auditing and Certification Industry?" (n.86).

849 De Janvry, McIntosh, and Sadoulet, "Fair Trade and Free Entry: Can a Disequilibrium Market Serve as a Development Tool?." (n.82); Donella Caspersz et al., "Modern Slavery in Global Value Chains: A Global Factory and Governance Perspective," *Journal of Industrial Relations* 64, no. 2 (2022): 184-86. World Bank, "Trading for Development in the Age of Global Value Chains," 86 (n.9).

850 See Section 2.3.2 in Chapter 1 of this research.

851 Mason, Partzsch, and Kramarz, "The Devil Is in the Detail—the Need for a Decolonizing Turn and Better Environmental Accountability in Global Supply Chain Regulations: A Comment," 6 (n.387).

852 UN OHCHR, *Final Call for Alignment of the EU Corporate Sustainability Due Diligence Directive with the UN Guiding Principles on Business and Human Rights*, October 27, 2023, https://www.ohchr.org/sites/default/files/documents/issues/business/final-call-for-alignment-cs3d-ungps.pdf; UN Working Group also made alert, see *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, July 16, 2018, A/73/163, para. 14(a); *See also*, Sarfaty, "Shining Light on Global Supply Chains," 434-37 (n.291).

dominance in global trade.[853]

3.4 Unveiling the Disguise of mHRDD Laws in Europe

The above sections 3.2 and 3.3 employs a TWAIL perspective to analyze and criticize contemporary mHRDD laws made in Europe, with a focus on how the features of these laws, in terms of both their values and practices, entail oppression and exploitation against the Third World. These critiques have theoretical implications for the debate surrounding the substantive nature of mHRDD laws. Indeed, mHRDD laws have brought about transformative changes and innovations in global human rights protection, reflecting the Europe's credible commitment to addressing the unfair treatment of the developing world in global trade.[854] However, the legislative process of mHRDD laws is often influenced by underlying motivations.[855] Through their domestic legislative process, which is typically referred to as "a contested, multilevel process" that involves the struggles of given society's unique cultural, political and social factors,[856] mHRDD laws provide a window for competing economic and political motivations of domestic stakeholders with vested self-interests. Ultimately, the legal instruments aimed at implementing "universal" human rights values, despite their good intentions, are at risk of being alienated into tools that reinforce power imbalances and exacerbate human rights crises in GVCs.[857] Stepping further, this section provides an analysis of domestic interest groups' motivations that hinder mHRDD laws within Europe from becoming an optimal solution for protecting substantive human rights in GVCs.

3.4.1 The Business Case of mHRDD Laws

Despite the legislative process of mHRDD laws in Europe being driven by various motives and values, economic considerations stand as one of the most important factors in shaping them. The last decade has witnessed how corporate investors' economic demands for long-term value-creation have spurred the accelerated development of regulation and legislation in the field of BHR. In particular, mHRDD laws have been successively established in France, Germany, and Norway, and the legislative efforts at the EU level are reaching their final stage. Here, the 2008 global financial crisis (GFC) was an important watershed moment for corporations to consider the interests of other

853 Mason, Partzsch, and Kramarz, "The Devil Is in the Detail—the Need for a Decolonizing Turn and Better Environmental Accountability in Global Supply Chain Regulations: A Comment," 7 (n.387).

854 Daniel Augenstein and David Kinley, "When Human Rights 'Responsibilities' Become 'Duties': the Extra-territorial Obligations of States that Bind Corporations," In *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect*, ed. Surya Deva and David Bilchitz, (Cambridge University Press, 2013): 271-94.

855 Glen Whelan, "Political CSR: The Corporation as a Political Actor," in *Corporate Social Responsibility: Strategy, Communication, Governance*, ed. Andreas Rasche, Mette Morsing, and Jeremy Moon (Cambridge University Press, 2017).

856 Marc Schneiberg and Sarah A. Soule, "Institutionalization as a Contested, Multilevel Process: The Case of Rate Regulation in American Fire Insuranc," in *Social Movements and Organization Theory*, ed. Doug McAdam et al., Cambridge Studies in Contentious Politics (Cambridge University Press, 2005), 122.

857 *International Solidarity and the Extraterritorial Application of Human Rights: Prospects and Challenges—Report of the Independent Expert on Human Rights and International Solidarity*, Obiora Chinedu Okafor, April 19, 2022, A/HRC/50/37, paras. 37–42.

stakeholders beyond shareholder value in their business practices.[858] At that time, the risk-taking behavior of firms and their management, which aims to maximize the welfare of shareholders, resulted in systemic risks for the global economy.[859] Consequently, people began questioning the ethics and responsibility of corporations, thereby triggering concerns about the impacts of their business activities on people and the planet.

Following the GFC, corporate leaders united in calling for action to require firms to invest in long-term sustainable value and serve the benefit of all stakeholders.[860] Investors now pay increasing attention to companies' performance in environmental, social, and corporate governance (ESG) aspects to reduce risks and improve long-term investment returns.[861] This includes requiring the protection of human rights discussed at the firm level. Global responsible investment grew from $13.6 trillion in 2012 to $30.7 trillion in 2018, thereby marking a growth of over 125%.[862] The adoption of the UN Principles for Responsible Investment has also expanded significantly, with signatory institutions increasing from 100 in 2006 to over 3,826 in 2021.[863] These pieces of evidence reveal that investment institutions, most of them domiciled in the First World, are increasingly aware of the importance of ESG and corporate social investment.

Corporate human rights responsibility, as one of the core elements of ESG investment, then became a topic du jour.[864] Enthusiasm for social investing has prompted investors to demand that firms adopt HRDD measures to ensure their portfolios align with human rights standards. Subsequently, governments also adopted legislative and regulatory measures to encourage CSR actions.[865] Since the 2008 GFC, the introduction of UN Guiding Principles and the adoption of mHRDD laws in many countries suggest a trend for BHR norms to transform from soft law to hard law, driven by investors' pursuit of sustainable shareholder values.[866] In other words, HRDD could be perceived, at least in part, as a concept that originated from investment needs for sustainable development and long-term value creation. And over time, it evolved into hard law obligations that are now enforced at the production and consumption ends,

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858 See Colin Mayer, *Prosperity: Better Business Makes the Greater Good*, (Oxford University Press, 2018).

859 Luca Enriques and Alessandro Romano, "Rewiring Corporate Law for an Interconnected World," *Arizona Law Review* 64, no. 1 (2022). (noted that due to market changes in the era of globalization, such as the rise of common ownership and GVCs that connect the economies of many countries, risks originating from individual companies or regions have the potential to harm the entire economic system).

860 "Statement on the Purpose of a Corporation," Business Roundtable (2019), accessed 20 December 2023, https://opportunity.businessroundtable.org/ourcommitment/.

861 Michal Barzuza, Quinn Curtis, and David H. Webber, "ESG and Private Ordering," *The University of Chicago Business Law Review* 1, no. 1 (2022). (mentioned millennial investors' ESG preferences promote asset owners to value ESG agendas).

862 "2018 Global Sustainable Investment Reveiw," Global Sustainable Investment Alliance (2019), accessed 20 December 2023, http://www.gsi-alliance.org/wp-content/uploads/2019/03/GSIR_Review2018.3.28.pdf.

863 "About the PRI," United Nations Principles for Responsible Investment (2023), accessed 10 October 2023, https://www.unpri.org/about-us/about-the-pri.

864 John Gerard Ruggie, Caroline Rees, and Rachel Davis, "Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations," 196-97 (n.201).

865 See Jean-Pascal Gond, Nahee Kang, and Jeremy Moon, "The Government of Self-Regulation: on the Comparative Dynamics of Corporate Social Responsibility," *Economy and Society* 40, no. 4 (2011).

866 See M. Tina Dacin et al., "Business Versus Ethics? Thoughts on the Future of Business Ethics," *Journal of Business Ethics* 180, no. 3 (2022).

rather than occurring spontaneously.

By nature, due diligence is a disclosure-based approach aimed at protecting the interests of corporate investors.[867] As existing mHRDD legislation originates primarily from Western countries located at the investment and consumption ends of the GVCs, mHRDD laws also tend to primarily protect the property and economic interests of corporations and their investors, rather than genuinely safeguard against human rights abuses. These abuses are predominantly prevalent in Third World countries situated at the production end of the GVCs. For example, like other mHRDD laws, the French Duty of Vigilance Law strengthens corporate responsibility for human rights through public law-sanctioned private enforcement that mandates companies to establish, implement and disclose a vigilance plan for human rights protection in their annual reports.[868] On the one hand, the French law essentially provides an excellent tool for socially responsible investors and financial institutions to evaluate their investment decisions by understanding the human rights risks and sustainability performance capacity of their investee companies.[869] On the other hand, the enforcement and sanctions of the French Duty of Vigilance Law are deliberately weak.[870] The primary purpose of the law is by no means to facilitate judicial proceedings that redress the victims of human rights abuses by French TNCs.[871] Rather, it protects rightsholders only to the extent that it encourages lead companies to engage with them, thereby avoiding the risks of litigation initiated by rightsholders.[872] Moreover, the court has no obligation to assess the reasonableness of the vigilance plan, which is considered an internal matter between the company and its shareholders.[873] In other words, mHRDD laws protect victims of human rights abuses to the extent of evading investors-concerned risks, at the margin of the costs for mHRDD exceed the generated returns.[874]

867 The concept of due diligence refers to a process of collecting information regarding the investment target. It is a disclosure-based approach that allows investors to make informed investments after understanding any material information that could potentially impact the purchase price of the target business. The origin of due diligence as well as corporate disclosure under the corporate and securities law footings, on the foundation of which mHRDD is based, can be traced back to the 1934 Act following the Great Depression. The emergence of mHRDD following the GFC is just a continuation of the ongoing evolution of corporates' due diligence responsibilities to protection their investors. See John Gerard Ruggie and John F. Sherman, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale," *European Journal of International Law* 28, no. 3 (2017); See also, George J. Benston, "Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934," *The American Economic Review* 63, no. 1 (1973).

868 Rachel Chambers and Anil Yilmaz Vastardis, "Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability,"133 (n.400).

869 A discussion on the role of mandatory disclosure for investors, *see* Frank H. Easterbrook and Daniel R. Fischel, "Mandatory Disclosure and the Protection of Investors," *Virginia Law Review* 70, no. 4 (1984); for the limitations of investor-oriented disclosure, see generally, Ann M. Lipton, "Not Everything Is about Investors: The Case for Mandatory Stakeholder Disclosure," *Yale Journal on Regulation* 37 (2020).

870 See Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?," 116-17 (n.130).

871 "Business and Human Rights: First French Case-law on the Duty of Vigilance – Judges Adopt a Cautious Approach to Avoid Judicial Interference in Corporate Management," Mayer Brown (March 2023), accessed 23 October 2023, https://www.mayerbrown.com/en/perspectives-events/blogs/2023/03/business-and-human-rights-first-french-caselaw-on-the-duty-of-vigilance--judges-adopt-a-cautious-approach-to-avoid-judicialinterference-in-corporate-management.

872 Ibid.

873 Ibid.

874 Wesley Cragg, "Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the UN Framework," *Business Ethics Quarterly* 22, no. 1 (2012); Helin and Babri, "Travelling with a Code of Ethics: A Contextual Study of a Swedish MNC Auditing a Chinese Supplier." (n.83).

Consequently, they become less effective as regulatory instruments through which lead firms exercise delegated regulatory authority to promote human rights practices in GVCs.[875]

Further, the EU CSDDD faced strong pressure from France and Germany during its legislative process, resulting in the dilution of provisions regarding obligations and the scope of companies covered by the legislation to protect the interests of domestic multinationals.[876] For example, France refused to include financial services, including any investment activities, within the personal scope of the EU CSDDD, to make Paris a hub for international finance services.[877] Germany met with significant resistance from its domestic lobbying groups representing SMEs that pushed for legislation that lowered reporting obligation standards, thereby excluding companies with fewer than 1,000 employees from the Directive.[878] These examples showcase how lawmakers invited economic considerations to influence the codification of mHRDD laws. This intertwining of economic and human rights considerations reflects the complex dynamics and challenges associated with balancing competing interests and priorities in the legislative process.

Consequently, mHRDD laws either maintain the advantageous position of TNCs based in Western countries in the supply chains or enable them to capture a larger proportion of the long-term value, as a reward for their advocacy and implementation of the law. Thus, the criticisms raised by TWAIL scholars are not unfounded that mHRDD legislation, through its packaging of human rights values, conceals and rationalizes the pursuit of economic objectives while maintaining a façade of upholding universal values.[879]

3.4.2 The Politics of mHRDD Laws

Another implication of the competition among countries for their economic interests during the legislative process of mHRDD laws in Europe is the political motivation behind it. These binding regulations aim to hold multinationals accountable for their human rights and environmental impacts across GVCs, originating primarily from the home countries of the multinationals in the Global North. The drafting, implementation, and enforcement of these mHRDD laws entail a highly politicized process, where various actors and the competing interests embedded within each

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875 Marques, "Private Regulatory Capture via Harmonization: An Analysis of Global Retailer Regulatory Intermediaries," 157-76 (n.845); Helin and Babri, "Travelling with a Code of Ethics: A Contextual Study of a Swedish MNC Auditing a Chinese Supplier," (n.83).

876 III John F. Sherman, "Human Rights Due Diligence: Is It Too Risky?," *Harvard Kennedy School Corporate Social Responsibility Initiative Working Paper No. 55* (2010).; "Law and Global Order: EU Legislation on Human Rights Due Diligence," European Council on Foreign Relations (2022), accessed 23 October 2023, https://ecfr.eu/article/law-and-global-order-eu-legislation-on-human-rights-due-diligence/.

877 "EU Countries Still Divided Over Proposed Corporate Accountability Rules," EURACTIV.com (2023), accessed 10 October 2023, https://www.euractiv.com/section/economy-jobs/news/eu-countries-still-divided-over-proposed-corporate-accountability-rules/.

878 Ibid.

879 See discussion, *supra* Section 3.2.2.

jurisdiction's institutional environment shape the current legal framework.[880]

First, one important reason for the emergence of hard-law instruments related to mHRDD, primarily and predominantly from the EU and its member states, is due to the EU's political aspirations and efforts to become a global leader in environmental protection and human rights. As the world's largest trade bloc for goods and services, the EU has a longstanding tradition of leveraging its economic and political advantages to establish provisions and standards in trade relationships that promote its values. This approach, known as value-based trade rather than purely interests-based trade, has long been an integral part of the EU's trade policy.[881] Through comprehensive frameworks and policies, such as the EU Green Deal and Global Gateway, the EU promotes its core values and principles—such as human rights, environmental sustainability, political ideology, national security, etc.—among its trade partners.[882] Similarly, the EU CSDDD serves as a political tool to enhance EU influence in global trade and shape its image as a global leader by safeguarding human rights and leading the global green transition, thereby projecting European values to the entire GVC.[883] Through binding mHRDD legislation, European countries exert strong pressures on third-world nations situated downstream in their supply chains to comply with the prescribed standards in these mHRDD laws and, thus, compelling them to align their policies and ideologies with those of the First World.[884] Ultimately, this caused Western-defined values to dominate and suppress alternative views in the Global South, thereby resulting in ideological subordination.

Second, the legislative process of mHRDD laws is primarily a political process that takes place within the borders of the issuing states/jurisdictions through which the interests and demands of domestic interest groups are translated into policy implementation. As mentioned previously, the EU CSDDD was weakened in its substance due to Member States' national interests. Similarly, the legislative process of national mHRDD laws has also witnessed significant lobbying activities by various domestic political and economic interest groups representing the benefits of their voters. Due to apparent divergences in interests among different interest groups and the varying compositions of interest groups in each state, there are evident differences in the specific provisions of the currently enacted legislation and drafts regarding the material scope of HRDD, liability, procedures, and enforcement.[885]

The legislative process of the German Supply Chain Act provides a vivid example

880 Maria-Therese Gustafsson, Almut Schilling-Vacaflor, and Andrea Lenschow, "The Politics of Supply Chain Regulations: Towards Foreign Corporate Accountability in the Area of Human Rights and the Environment?," (n.231).

881 Peter Draper; et al., "The Political Economy of Due Diligence Legislation," *University of Adelaide Institute for International Trade Policy Brief* 21 (24 February 2023), accessed 10 October 2023, https://iit.adelaide.edu.au/news/list/2023/02/23/the-political-economy-of-due-diligence-legislation.

882 "Global Gateway," Europen Union (2023), accessed 10 October 2023, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world/global-gateway_en.

883 "Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains," European Union (2023), accessed 10 October 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

884 See above Section 3.2.2 of this Chapter.

885 See above Section 1.1 of this Chapter.

of political compromises among domestic interest groups. During the process, despite the support from the Social Democratic Party and the Christian Social Union for robust mHRDD legislation and the Geren Party for strict civil liability, the legislative bill had to dilute the scope and obligations of German enterprises for mHRDD under the influence of powerful business lobbying and "thus fell short of international human rights standards." [886] Similar to Germany, Switzerland's Responsible Business Initiative, which sought to establish due diligence obligations and legal liability provisions for businesses, was derailed after an intense political battle and corporate lobbying, resulting in lenient legislation. [887] The liability regimes proposed in the French Duty of Vigilance Law draft were watered down and succumbed to corporate lobbying.[888] Ultimately, legislative proposals aimed at maximizing the protection of human rights are often labeled as radical and replaced by compromised actionable legislation in which the interests of domestic stakeholders are reflected based on their varying degrees of involvement and lobbying capacity.[889] This should explain why the current mHRDD laws "end up prescribing no or very limited actual accountability measures."[890]

However, the impact of such laws is not limited to the domestic stakeholders involved in the legislative process. On the contrary, mHRDD laws have universal extraterritoriality, rendering human rights practices in the Third World a part of normative targets. Consequently, when mHRDD laws are enforced in the GVCs, the complex political demands of domestic interest groups embedded in these laws are imposed on Third World countries. For instance, French lawmakers emphasized the application of French domestic laws to safeguard vulnerable populations worldwide, who strive for universal French values.[891] This is precisely the source of inequality in mHRDD laws that we discussed previously: the unilaterally defined human rights values being universalized and imposed on entities operating in exterritorial jurisdictions. [892] Such an approach reflects deep-rooted ideological biases within Western culture, as it portrays the legislating countries as superior saviors who shape the world at their will and come to rescue the savage cultures and victims in the Third World. [893] This narrative in mHRDD laws justifies their extraterritorial reach by insinuating that norms and values in the Global South are naturally unjust, thereby implying that they must adhere to the standards of the "civilized" Global North. These mHRDD laws highlight the privilege and centrality of domestic interest groups and

886 Krajewski, Tonstad, and Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?," (n.135); "German Parliament Passes Human Rights Due Diligence Law," European Center for Constitutional and Human Rights (11 June 2021), accessed 10 October 2023, https://www.ecchr.eu/en/press-release/bundestag-verabschiedet-lieferkettengesetz/.

887 Bueno and Kaufmann, "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics," 542 (n.132).

888 See Section 2.1 of Chapter 4 in this research.

889 Bueno and Kaufmann, "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics,"542 (n.132).

890 Quijano and Lopez, "Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?," 248 (n.118).

891 Bose, "Decentring Narratives around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law," 35-40 (n.140).

892 See above Section 3.2.2 of this Chapter.

893 See Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights," (n.835).

European ideology while failing to capture the interests and values of non-European states, thereby resulting in injustice.[894]

By consistently demonstrating the domestic political interests of the First World, mHRDD laws in Europe have become a policy tool for multinational corporations to shape the human rights and environmental standards in Global South countries according to the political orientations of their home countries.[895] Undoubtedly, this is vehemently opposed by TWAIL scholars to avoid setting a precedent where developed countries utilize legal and trade tools to interfere in the Third World's domestic human rights practices that do not align with the values of the developed countries, they will soon find themselves subject to more similar interferences in other domestic affairs, as they already did.

3.4.3 The Need to Give the Third World a Voice

By examining the economic and political motivations underlying mHRDD laws in Europe through the TWAIL lens, a potential criticism is that such unilateral laws function more as a sharp sword reinforcing an unequal GVC order than a shield to protect human rights. The current version of mHRDD laws exemplifies a typical home state regulation, placing Eurocentric economic, legal, and sociocultural norms above the social and cultural norms of the Global South.[896] It allows European countries, in provisions that "apply primarily to developing countries,"[897] to establish environmental and human rights standards that encourage their own political and economic interests, thereby reinforcing a power hierarchy in GVCs.

Thus, mHRDD laws made in Europe are somewhat nationalist and neo-colonialist in nature, packaged under the guise of "universal" values that have clear boundaries of interests. Phrase it differently: when lawmakers decide to adopt unilateral legislative actions, they inevitably invite national interest claims that conflict with universal values into the mHRDD laws. Given the inherent domestic interests in mHRDD legislation, the values and norms it advocates cannot be universally applicable. Instead, it represents a revival of the neoliberal end-of-history ideology in corporate regulation, holding that regulatory rules generated from the Global North will be universally applicable.[898] To this end, the pursuit of mHRDD laws can be viewed as part of the broader movement that "[a]n emerging transnational capitalist class seeks to unify the world market through the instrument of international law."[899] Thus, it is not difficult to

894 Bonny Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African History* (State University of New York Press, 2008), 23.

895 Lichuma, "(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains," 502 (n.140); Sarfaty, "Shining Light on Global Supply Chains," 419-20 (n.291).

896 See Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities," *Third World Quarterly* 27, no. 5 (2006); James Thuo Gathii, "TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography," *Trade Law & Development* 3 (2011); Okafor, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective," (n.799).

897 Timothy Meyer, "Consumption Governance: The Role of Production and Consumption in International Economic Law," *Brigham Young University Law Review (Forthcoming)* (2023).

898 Henry Hansmann and Reinier Kraakman, "The End of History for Corporate Law," *The Georgetown Law Journal* 89, no. 2 (2001).

899 Chimni, "The Past, Present and Future of International Law: A Critical Third World Approach," 502 (n.790).

understand why European mHRDD laws lack structural measures to include the participation of the Global South. Ultimately, the legislation that was supposed to correct unequal relationships and mitigate the governance gap in BHR potentially consolidated power asymmetry. Therefore, it is unrealistic to uphold human rights within GVCs through the current unilateral mHRDD laws made in Europe but applied universally.

However, mHRDD laws, as they aim to protect human rights—a shared value of all humanity—should be both domestic and international in nature. Unilateral legislation with extraterritorial effects could succeed if it aligns with well-recognized international standards, involves meaningful consultations with potentially affected nations, and takes into account the interests and values of other international stakeholders.[900] Here, a major concern for these mHRDD laws is that the Global South has been excluded from the formulation and implementation processes of these laws.[901] Even in the case of the EU CSDDD, where intensive public consultations have been conducted, the absence of stakeholders from the Global South is glaring.[902] This absence highlights an ironic paradox of European mHRDD laws—that the laws created for the benefit of Third World populations were crafted without their input. In other words, "the suffering of impoverished people is irrelevant to the ruling standards" of these laws.[903] The marginalization of the voices of the Global South may weaken both the legitimacy and effectiveness of mHRDD laws because accountability holders on the ground, who bear the true brunt of corporate human rights transgressions, typically exhibit a more profound grasp of the substantive issues and intricacies necessitating redress. The marginalized voices of these people and the prevalent influence of domestic economic and political interests in shaping mHRDD laws can only lead to vague or narrow human rights protection. Thus, the legitimacy and effectiveness of mHRDD laws ultimately "depend upon the extent to which [they give] a voice to host state local communities."[904] Without robust mechanisms to ensure meaningful engagement of the Global South in both the legislative and implementation phases of mHRDD laws, the persistent "democratic deficit of (unilateral) extraterritoriality" remains unaddressed.[905]

The second concern is more profound—that mHRDD laws could potentially mainstream the European discourse in norm-making, academic debates, and practical aspects of BHR, a domain originally employed by the Global South to address the adverse human rights impacts of TNCs in the North. Similar to the traditional concern

900 Jennifer Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas," (2010): 212–214, accessed 10 December 2023, https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_59_zerk.pdf.

901 Lichuma, "(Laws) Made in the 'First World': A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains," 518-24 (n.140); Dehbi and Martin-Ortega, "An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and TWAIL Perspective," 6-11 (n.118).

902 Lichuma "Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South," (n.562). See also discussions concerning the "extraterritorial regulation" of the EU CSDDD in Section 3 of Chapter 5 in this research.

903 Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2007), 252.

904 Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?," 568 (n.391).

905 Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2015), 194.

within TWAIL about "who speaks international law," the question of "who speaks Business and Human Rights" has become a burning issue that warrants the attention of twailian scholarship.[906] In this context, without substantial inputs from the Global South, it is not surprising that the unilaterally created mHRDD laws, which are applied globally, could profoundly "re-center Europe as the axis of knowledge production on business and human rights norms."[907] This, in turn, may enable the European nations to conceal the dominance they exert, potentially mainstreaming legal processes that prioritize their interests over collectively agreed-upon initiatives.[908] Eventually, the Global South will be further marginalized, and other promising solutions—such as the negotiated BHR LBI—risk being concealed and silenced.

However, the effectiveness of human rights and business ethics norms relies heavily on the recognition of and respect for cultural relativism.[909] The complex dynamics of the global nature of GVCs require consideration of legal pluralism.[910] Thus, mHRDD laws must break free from the grip of Eurocentricity to unleash their untapped potential. This should preferably be done if the law is adopted through negotiations among equals in the Global South and North. In fact, the under-negotiated multilateral BHR treaty has proven to be better suited, in the long term, than existing unilateral mHRDD laws to provide access to remedies for victims.[911] It includes a wide range of protections that outline victims' rights to remedies, access to information, legal assistance, and protection from unlawful interference, thereby representing an approach rooted in international solidarity,[912] rather than neocolonialism, in the realm of BHR.[913] Therefore, viewed from a TWAIL perspective, the regulation for a more equitable protection of human rights by TNCs ultimately requires international and multilateral cooperation within the UN framework.

Consequently, on the one hand, mHRDD laws in Europe should not replace a BHR treaty or other consensus-based instruments in favor of multilateralism over the long term. On the other hand, for the EU CSDDD to become substantively transformative, it needs to not only draw insights from the best practices of the examined mHRDD laws but also effectively address the criticisms raised by twailers—"reconsider the assumptions, arguments and narratives that are often taken for granted in the Western circle."[914] This requires EU legislators to seriously consider and respond to the concerns put forth from a TWAIL perspective.

906 Lichuma "Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South," (n.562).
907 Bose, "Decentring Narratives around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law," 34 (n.140).
908 Phoebe Okowa, "The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation," 716 (n.390).
909 Tom L. Beauchamp, "Relativism, Multiculturalism, and Universal Norms: Their Role in Business Ethics," in *The Oxford Handbook of Business Ethics*, ed. George G. Brenkert (Oxford University Press, 2009), 235-66.
910 Bertram Turner, "Supply-Chain Legal Pluralism: Normativity as Constitutive of Chain Infrastructure in the Moroccan Argan Oil Supply Chain," *The Journal of Legal Pluralism and Unofficial Law* 48, no. 3 (2016): 378-414.
911 See Section 1.1.3 of this Chapter.
912 See Section 2 of Chater 6 of this research.
913 See A/HRC/50/37, paras. 52–53 (n.857).
914 Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017), 254.

Chapter 8 Concluding Remarks

This study considers how to enact a satisfactory mHRDD law in the upcoming years to effectively combat the escalation of corporate human rights abuses in GVCs. The study develops a progressive three-layered critique of mHRDD laws. Chapters 1 and 2 constitute the first layer of critical reflection, laying down the factual basis for enacting mHRDD laws. Chapter 1 begins by mapping the empirical complexities of human rights governance in GVCs, which should be the target of any mHRDD legislation. As the case study of the Rana Plaza tragedy suggests, there are many reasons that such extensive human rights abuses take place.

The willingness and capacity of governments to regulate transnational business activities have been a fundamental impact on the status of human rights in the business context. Business models and the power dynamics along a specific value chain also play a role in determining that status; these models and dynamics can lead to the exploitation of workers, unfair transfer of corporate human rights responsibility from lead firms to suppliers, and regulatory capture. Whether and how the voices of workers and other stakeholders on the ground are heard can also impact their human rights conditions. The existing unequal international legal order favors TNCs, and human rights protection is often subordinated to economic considerations in the globalized production networks. Accordingly, any regulatory efforts aimed at addressing corporate human rights abuses in GVCs should, at the very least, consider the identified complexities at the international, domestic, industrial, and corporate levels that may impede regulatory effectiveness.

Chapter 2 explores the BHR movement, highlighting how the field, particularly in the form of the UN Guiding Principles and HRDD, takes a transnational approach to addressing the multifaceted complexities of human rights governance in GVCs. Section 1 sets out the genealogy of the BHR movement, laying the foundation for understanding the current legislative development of mHRDD. This includes a tracing of the precursors, beginnings, and formative periods of the BHR movement and an examination of its recent institutionalization. This retrospective discussion highlights the hard history of regulating TNCs and conceptualizing corporate human rights responsibility and identifies the "irresistible rise" of HRDD norms globally. Section 2 acknowledges the significance of the UN Guiding Principles in regulating corporate human rights responsibilities and configuring HRDD norms and offers a detailed discussion of their content. It concludes by pointing out that, regardless of the path chosen for institutionalizing HRDD norms, the UN Guiding Principles should be a common starting point for policymakers worldwide. This is especially significant in enacting mHRDD laws, as a shared normative framework based on the UN Guiding Principles may mitigate the risk of confrontation and enhance the legitimacy of mandatory measures. Therefore, the empirical complexities inherent in GVCs and the normative foundations of the UN Guiding Principles should be factored into mHRDD legislation.

Chapter 3 addresses the second layer of critique. It scrutinizes the theoretical debates on the effectiveness of HRDD and proposes an analytical framework to evaluate the emerging yet intricate mHRDD laws. This chapter draws inspiration from Surya Deva's qualitative method of assessment to formulate the analytical framework for the subsequent comparison of mHRDD laws. The three sections in this chapter correspond to the first three steps of Surya Deva's method, namely, identification of normative foundations, establishment of criteria for analysis, and quantification of the criteria. In Section 1, the HRDD principles and practices in the legal and business domains are explored to identify normative foundations. The section argues that HRDD is not only the kernel of corporate human rights responsibility but also a cornerstone of the state's duty to protect human rights in the globalized business context. The UN Guiding Principles provides general principles and operational rules for states to support and/or require companies to undertake HRDD.

Section 2, grounded in the three pillars of the UN Guiding Principles, establishes ten parameters for evaluating mHRDD legislative practices. The procedural dimension includes the following four parameters: a smart-mix approach, policy coherence, extraterritorial regulation, and remedial mechanisms. The six substantive parameters are an ongoing process, broad coverage, contextual particularity, top-management endorsement, stakeholder participation, and operational-level grievance mechanisms. These parameters constitute the normative criteria for assessing mHRDD laws.

Section 3 takes a step further to quantify the ten parameters and provides detailed methods for evaluating mHRDD laws in the subsequent chapters. It draws insights from the case study of the Rana Plaza tragedy and important academic debates to refine the ten parameters into a more detailed scoring scheme. This scheme comprises 26 indicators. Each indicator is transformed into a question, allowing an affirmative (1 point) or negative response (0 point). As such, this chapter develops Surya Deva's qualitative method of assessment and establishes an analytical framework for evaluating and comparing mHRDD laws.

The third layer of critical analysis is at the core of this study. In this layer, the existing mHRDD laws are assessed, and the study's central inquiry is taken up. Firstly, Chapters 4 to 6 are devoted to evaluating the five mHRDD laws at the domestic level in France, Germany, and Norway (Chapter 4), in the EU sphere (Chapter 5), and internationally (Chapter 6). Beyond introducing the legislative background of each law and elaborating on their principal provisions, these chapters employ the analytical framework proposed in Chapter 3 to comprehensively evaluate the laws.

Secondly, in Chapter 7, further comparative and critical research on mHRDD laws is considered. In Section 1, the five laws are compared, and best practices are identified for each indicator in the proposed framework. In terms of this framework, the EU CSDDD achieves the best score, followed by the German Supply Chain Act, the Updated Draft of BHR LBI, the Franch Duty of Vigilance Law, and the Norwegian Transparency Act. However, given the evident flaws in each of the five mHRDD laws, there is, at present, no optimal legislative solution for mHRDD. The mutual complementarity and reinforcement observed among these laws offer valuable insights for future legislative efforts.

Acknowledging that crafting an optimal mHRDD law or a BHR treaty within the next few years seems unattainable, Section 2 considers the urgent need for a timely and practical solution to address the growing governance gap. In this section, the EU CSDDD emerges as a highly viable and prominent mHRDD law in the short term, and it is poised to reshape the global regulatory environment for GVCs. More importantly, the EU CSDDD functions as a pivotal relay in the institutionalization of mHRDD, demonstrating its capacity to harmonize domestic mHRDD laws and exert influence on the global mHRDD legislative landscape through the phenomenon known as the "Brussels Effect." These findings necessitate additional and critical reflection on the EU CSDDD and the mHRDD laws "made in Europe" as a whole, given that the latter might impact the final version and future revisions of the EU CSDDD.

Thus, Section 3 proposes re-evaluating these laws, taking the TWAIL perspective—an external lens on European discourse that offers complementary insights. This perspective problematizes the Eurocentricity of the mHRDD laws in Europe that could undermine their initiative purpose and identifies the underlying causes of this problem. While the initial intent of mHRDD laws in Europe is to humanize GVCs, the section shows there is a risk of entrenching existing power imbalances between trade partners from the Global North and South. The substantial exclusion of affected stakeholders from the Global South from the legislative and implementation processes of mHRDD laws limits the protective impact of these laws; their exercise aligns primarily with the domestic political and economic interests of the legislative states. These findings underscore the need for EU legislators to earnestly consider and respond to the concerns raised from a TWAIL perspective.

Based on these progressive layered critiques, this study concludes that the EU CSDDD stands out as the most promising legislative effort for humanizing GVCs in the coming years. However, it is neither flawless nor a substitute for a BHR treaty in the long term. To fulfil its potential in addressing the governance gap, EU legislators should rectify the shortcomings of the EU CSDDD by incorporating the best practices reflected in other mHRDD laws, particularly the victim-centered approach in the Updated Draft of BHR LBI. Equally important, EU legislators should also attentively address and engage with the concerns brought forward through the TWAIL perspective.

This examination and assessment of mHRDD laws at the domestic, EU, and international levels may be limited as it does not exhaustively discuss the empirical complexities of human rights governance in GVCs and does not formulate an all-encompassing framework to evaluate every detail of mHRDD laws. It nonetheless contributes to the rapidly evolving discourse on mHRDD legislative practices across various dimensions.

First, it presents the Rana Plaza tragedy case study to reveal the empirical complexity inherent in human rights governance within GVCs and the need for BHR scholars to (more systematically) revisit the implicated reality on the ground before considering mHRDD legislation. Second, it develops Surya Deva's qualitative assessment framework, presenting an alternative for future comparative research on the burgeoning but complex mHRDD laws. Third, this study enriches scholarship on the comparative study of mHRDD legislative practices by offering a vertical and holistic comparison of the mHRDD laws prevailing at the domestic, EU, and international levels. Fourth, it contributes to burgeoning critical scholarship in the field of BHR through an in-depth twailian scrutiny of mHRDD laws made in Europe.

Business actors in GVCs and legislators worldwide are also expected to benefit from this study. Business actors may gain insights into BHR norm cascading and the evolution of mHRDD legislation. This could prove instrumental in enhancing corporate compliance and risk management concerning human rights, the environment, and sustainability. It empowers business policymakers to consciously adapt their strategies and planning to align with evolving ethical and legal standards. The work here on the empirical complexity of human rights governance within GVCs offers legislators a deeper understanding of the challenges at the intersection of global business and human rights. Furthermore, the comparative and critical evaluation of prevailing mHRDD laws offers meaningful insights for legislators to design new laws and enhance existing legal frameworks.

This study also illuminates potential avenues for future research. First and foremost, more systematic comparative research on mHRDD laws at various levels is required to gain nuanced and valuable insights for future legislation. As correctly stated by the OHCHR, a point corroborated by this study, “there is not one, single model for mandatory human rights due diligence regimes” and that “when people are discussing mandatory human rights due diligence regimes they are potentially discussing a wide range of legal and regulatory possibilities.”[915] Second, in a general sense, any study focusing on mHRDD laws, or more broadly, the institutionalization of BHR, should acknowledge the pivotal role of stakeholders, including those in the Global South. Their involvement is crucial to closing the BHR governance gap and configuring responsible business conduct. Third, this study serves as a call for more substantial empirical work assessing the effectiveness of mHRDD laws in practice. In this context, interdisciplinary research intersecting GVC and BHR is indispensable; the former can fill gaps in the latter’s attention to empirical complexity, and the latter can provide normative guidance for the former. Fourth, there is a need for heightened scrutiny of mHRDD laws, especially assessments from a non-Eurocentric standpoint and through a lens of intersectionality. Lastly, while recognizing the breakthrough and necessity of mHRDD legislation in humanizing GVCs, it is worth noting that mHRDD, and HRDD more broadly, represents only one of the paths rather than the only path. Therefore, contemplating what lies beyond the institutionalization of HRDD, as highlighted by the three distinguished editors of the *Business and Human Rights Journal*, remains an

915 OHCHR, "UN Human Rights ‘Issues Paper’ on Legislative Proposals for Mandatory Human Rights Due Diligence by Companies," (June 2020): 1, accessed 20 December 2023, https://www.ohchr.org/sites/default/files/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

important avenue for scholarly exploration.[916]

916 See Deva, Ramasastry, and Wettstein, "Beyond Human Rights Due Diligence: What Else Do We Need?" (n.313).

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