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The proposed EU Corporate Sustainability Due Diligence Directive and its Impact on LDCs

A Legal Analysis

Ministry for Foreign Affairs of Finland

Publications of the Ministry for Foreign Affairs 2023:4

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Abstract

The report provides a concise critical analysis of the Proposal for a Directive on Corporate Sustainability Due Diligence by the Commission from the standpoint of the least developed countries (LDCs). The proposed sustainability due diligence obliges certain European companies and companies of third-countries generating significant turnout in the EU to conduct due diligence in identifying, preventing and ending potential or actual negative environmental and human rights impacts. The proposal includes new means for injured parties to access justice by establishing civil liability and complaints procedures for those experiencing actual and foreseen adverse impacts in relation to the operations of the companies. The report analyses the trade structures between the EU and Tanzania and the Democratic Republic of the Congo, relevant principles of international law on human rights, environmental law, labour rights, corruption and rule of law, technology transfer, and liability rules, considered important to LDCs. The Draft Directive is almost silent on developing countries and LDCs where one can see that problems of human rights conditions and environmental harms are more prominent. There is a need to bring up issues that are crucial to boost the sustainable and equitable development of those countries, most prominently the fight against corruption and development of the rule of law.

Provision

This report is commissioned as part of UniPID Development Policy Studies (UniPID DPS), funded by the Ministry for Foreign Affairs of Finland (MFA) and managed by the Finnish University Partnership for International Development (UniPID). UniPID is a network of Finnish universities established to strengthen universities' global responsibility and collaboration with partners from the Global South, in support of sustainable development. The UniPID DPS instrument strengthens knowledge-based development policy by identifying the most suitable available researchers to respond to the timely knowledge needs of the MFA and by facilitating a framework for dialogue between researchers and ministry officials. The content of this report does not reflect the official opinion of the Ministry for Foreign Affairs of Finland. The responsibility for the information and views expressed in the report lies entirely with the authors.

Keywords	Sustainability due diligence; international trade; human rights; environmental protection; Global South; technology transfer; corruption; labour standards; corporate social responsibility; civil liability; developing countries

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EU:n ehdotus direktiiviksi yritysten kestävää toimintaa koskevasta huolellisuusvelvoitteesta ja sen vaikutukset LDC-maissa
Oikeudellinen analyysi

Ulkoministeriön julkaisuja 2023:4

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Tekijä/t	Yenkong Ngangjoh-Hodu, Tarcisio Gazzini, Avidan Kent, Kristian Siikavirta & Parveen Morris		
Kieli	englanti	**Sivumäärä**	102

Tiivistelmä

Tämä raportti on tiivis kriittinen analyysi komission ehdotuksesta direktiiviksi yritysten kestävää toimintaa koskevasta huolellisuusvelvoitteesta. Anlyysi nostaa esiin vähiten kehittyneiden maiden (LDC-maiden) näkökulman. Ehdotettu kestävää toimintaa koskeva huolellisuusvelvoite velvoittaa tietyt eurooppalaiset yhtiöt ja EU-alueelta merkittävää liikevaihtoa saavat kolmansien maiden yhtiöt huolellisesti tunnistamaan, estämään ja lopettamaan sellaiset toimet, jotka saattavat aiheuttaa tai aiheuttavat negatiivisia ihmisoikeus- ja ympäristövaikutuksia. Ehdotus sisältää uusia oikeussuojakeinoja vahingonkärsijöille luomalla siviilioikeudellisia vastuita ja valitusmenettelyjä niille, jotka kärsivät yhtiöiden toiminnoista johtuvista todellisista ja ennakoitavissa olevista haittavaikutuksista. Raportissa analysoidaan EU:n ja Tansanian sekä Kongon demokraattisen tasavallan välisen kaupan rakenteita, ihmisoikeuksia koskevan kansainvälisen oikeuden periaatteita, ympäristölainsäädäntöä, työntekijöiden oikeuksia, korruptiota ja oikeusvaltiota koskevia periaatteita, teknologian siirtoa ja vastuusäännöksiä, joiden katsotaan olevan tärkeitä LDC-maille. Ehdotusluonnoksessa ei juurikaan mainita kehitysmaita ja LDC-maita, joissa ihmisoikeus- ja ympäristöongelmat ovat yleisiä. On tarpeen nostaa keskusteluun näiden maiden kestävää ja oikeudenmukaista kehitystä tukevia seikkoja, joita ovat erityisesti korruption torjunta ja oikeusvaltion periaatteiden kehittäminen.

Provision

Tämä raportti on osa ulkoministeriön rahoittamia ja UniPID-verkoston hallinnoimia kehityspoliittisia selvityksiä (UniPID Development Policy Studies). Finnish University Partnership for International Development, UniPID, on suomalaisten yliopistojen verkosto, joka edistää yliopistojen globaalivastuuta ja yhteistyötä globaalin etelän kumppanien kanssa kestävän kehityksen saralla. Kehityspoliittinen selvitysyhteistyö vahvistaa kehityspolitiikan tietoperustaisuutta. UniPID identifioi sopivia tutkijoita vastaamaan ulkoministeriön ajankohtaisiin tiedontarpeisiin ja fasilitoi puitteet tutkijoiden ja ministeriön virkahenkilöiden väliselle dialogille. Tämän raportin sisältö ei vastaa ulkoministeriön virallista kantaa. Vastuu raportissa esitetyistä tiedoista ja näkökulmista on raportin laatijoilla.

Asiasanat Kestävää toimintaa koskeva huolellisuusvelvoite; kansainvälinen kauppa; ihmisoikeudet; ympäristönsuojelu; globaali etelä; teknologian siirto; korruptio; työnormit; yritysten sosiaalinen vastuu; siviilioikeudellinen vastuu; kehitysmaat

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EU-kommissionens förslag till direktiv om företagsbesiktning avseende mänskliga rättigheter och miljö och dess inverkan på de minst utvecklade länderna
En juridisk analys

Utrikesministeriets publikationer 2023:4
Utgivare Utrikesministeriet

Författare Yenkong Ngangjoh-Hodu, Tarcisio Gazzini, Avidan Kent, Kristian Siikavirta & Parveen Morris
Språk engelska **Sidantal** 102

Referat

Rapporten tillhandahåller en kortfattad kritisk analys av kommissionens förslag till direktiv om företagsbesiktning avseende mänskliga rättigheter och miljö. Rapporten tar up de minst utvecklade ländernas (MUL) synvinkel. Den företagsbesiktning som föreslås ålägger vissa europeiska företag och företag i tredje länder som genererar ett betydande utfall i EU att genomföra en företagsbesiktning för att identifiera, förebygga och stoppa potentiell eller faktisk negativ påverkan på miljö och mänskliga rättigheter. Förslaget inkluderar nya sätt att få tillgång till rättslig prövning för skadelidande genom att etablera procedurer för civilrättsligt ansvar och klagomålsförfaranden för dem som upplever faktiska och förutsedda negativa konsekvenser som kan relateras till företagens verksamhet. Rapporten analyserar handelsstrukturerna mellan EU och Tanzania samt Demokratiska republiken Kongo, relevanta principer för internationell rätt gällande mänskliga rättigheter, miljölagstiftning, arbetsrätt, korruption och rättsstatsprincipen, tekniköverföring och ansvarsregler som anses viktiga för de minst utvecklade länderna. I utkastförslaget undviker man nästan helt att ta upp utvecklingsländer och MUL där man kan se att problem gällande mänskliga rättigheter och miljöskador är mer framträdande. Det finns ett behov av att ta upp frågor som är avgörande för att främja en hållbar och rättvis utveckling i dessa länder, framför allt kampen mot korruption och utvecklingen av rättsstatsprincipen.

Provision

Denna rapport är beställd som en del av UniPID Development Policy Studies (UniPID DPS), finansierad av Finlands Utrikesministerium (MFA), och hanterad av Finnish University Partnership for International Development (UniPID). UniPID är ett nätverk av finska universitet som etablerats för att stärka universitetens globala ansvar och samarbete med partner från det södra halvklotet, till stöd för en hållbar utveckling. UniPID DPS-verktyget stärker en kunskapsbaserad utvecklingspolicy genom att identifiera de mest lämpliga, tillgängliga forskarna för att svara på utrikesministeriets kunskapsbehov i rätt tid och att underlätta ett ramverk för en dialog mellan forskare och departementstjänstemän. Innehållet i denna rapport återspeglar inte Finlands utrikesministeriums officiella uppfattning. Ansvaret för informationen och åsikterna i rapporten ligger helt på författarna.

Nyckelord Due diligence för hållbarhet; internationell handel; mänskliga rättigheter; miljöskydd; Global South; tekniköverföring; korruption; arbetsnormer; företagens sociala ansvar; civilrättsligt ansvar; utvecklingsländer

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Contents

FOREWORD

The Ministry for Foreign Affairs has worked with responsible business conduct for over a decade. During the past years, the Ministry has closely collaborated with the Ministry of Economic Affairs and Employment, business, and civil society to elaborate, what due diligence – an ongoing process where businesses identify, prevent, mitigate, and cease adverse impacts caused by their own operations or business partners and provide remedy, when appropriate – means in different sectors, supply chains, or operating environments.

Since 2019, guided by the Programme of Prime Minister Sanna Marin's Government, the focus has been on how due diligence could be translated into legally binding obligation. The Ministry of Economic Affairs and Employment published an assessment memorandum on national due diligence obligation, where it was noted that the country of operation plays a role in how the objects of due diligence legislation – respect of human rights, environmental protection – can be met.[1] In February 2022, the European Commission published its proposal for a Directive on Corporate Sustainability Due Diligence. This would place a due diligence obligation on human rights and the environment to large companies and smaller, certain risk sector companies operating in the EU.

Both the national assessment memorandum and the draft directive include assessments on impacts to human rights, the environment, and EU companies, but very little assessment on how the directive would impact developing countries, their companies and trade. As such a legislation is quite new, we as legislators have little experience on its practical application or impacts. The unknown impacts have been a specific concern to our sustainable trade unit, as we work with both responsible business conduct and encouraging business in least developed countries (LDCs) to part take in EU value chains.

1 Piirto, Linda and Teräväinen, Sami (Ministry of Economic Affairs and Employment, Helsinki 2022): Memorandum on the due diligence obligation: Review of the national corporate social responsibility act, http://urn.fi/URN:ISBN:978-952-327-795-3. Retrieved 8 March 2023.

This is why our unit requested studies to:

1. Assess impact of the proposed legislation on the ability of particularly LDCs to participate in EU supply chains and the impact on their economies (e.g. jobs).
2. Identify key bottlenecks that prevent LDCs from participating in EU supply chains as well as measures that mitigate negative impact.
3. Propose options for Finland to support LDCs in meeting requirements of the proposed legislation.

Furthermore, we requested the studies to approach the research topic by focusing on two developing countries, preferably LDCs, relevant to Finland's development cooperation. The studies should also focus on supply chains both in primary production and in manufacturing. We have identified these as key "unknowns" on which we need to know more about in order to a) fulfil the objectives of the due diligence legislation and b) support developing countries and their companies to be a part of EU value chains in the future too.

We are fortunate to have received two excellent research proposals that examine the topic from two different perspectives. The report at hand prepared by an international research team lead by the University of Vaasa provides a rich analysis of the proposed legislation particularly from a legal perspective. It offers insights into its implications of the proposed legislation for developing countries by considering the cases of Tanzania and the Democratic Republic of Congo. The report makes recommendations to improve the proposed legislation and identifies measures to support LDCs.

The second report titled Towards inclusive European CSR legislation: Analysing the impacts of the EU corporate sustainability directive on LDC trade and prepared by an international team lead by the Hanken School of Economics focuses more on the economic and social implications of the proposed legislation on value chains in developing countries complementing the analysis of the first report. It considers particularly the textiles and garment manufacturing value chain in Ethiopia and the coffee production value chain in Tanzania.

The two reports provide independent assessments by the researcher teams of the proposed EU legislation on corporate sustainability due diligence and its implication for developing countries. We are confident that the findings of these reports will contribute significantly to discussions concerning the proposed legislation and will support in identifying measures to assist companies operating in developing countries to meet requirements of the proposed legislation. We would also like to thank both research teams for their excellent work and giving their expertise to these studies.

We are greatly indebted to the UniPID network of Finnish Universities for facilitating the two research reports starting from the call for proposals, to managing contracts and ensuring the successful publication of the reports. We would in particular like to thank Kelly Brito for her professional support throughout the process.

Commercial Counsellor Linda Piirto and Commercial Counsellor Antti Piispanen,
Sustainable Trade Department for International Trade, Ministry for Foreign Affairs

EXECUTIVE SUMMARY

The present report offers a concise critical analysis of the proposed EU corporate social responsibility Directive from the standpoint of trade between the EU and the world's least developed countries (LDCs), taking into account the cross-cutting objectives of Finnish development policy, according to which "development cooperation should not only focus on avoiding negative impacts, but also try to make a positive contribution."[2]

There is little doubt that the proposed Directive represents a positive step in the right direction. The attempt to address and prevent human rights and environmental impacts beyond the EU's jurisdiction is laudable and reflects recent trends in international law. Yet, the proposal as it stands will have consequential impacts on the already fragile trade relationship between the EU and African LDCs. Accordingly, EU-incorporated companies are 'in scope' companies and non-EU companies will also be covered by the Directive, subject to them meeting a certain threshold. The report found that companies in Tanzania and the Democratic Republic of the Congo (DRC), two case studies, will need to ensure human rights practices are engrained in their business practices, especially at the senior board level. Accordingly, companies that are 'in scope' are required to put measures in place that would ensure they are following human rights and environmental due diligence. As is the case with some existing Sanitary and Phytosanitary (SPS) and technical barriers to trade (TBTs) requirements for exports into the EU, where satisfying health and safety norms have proven particularly challenging to LDCs such as the DRC and Tanzania, the report found that human rights and environmental requirements in the proposal may likely add another barrier to export from these countries into the EU, if care is not taken in the final drafting of the proposed Directive.

More specifically, the report found that the proposed Directive will present a real challenge to the exports of key products like foodstuff, beverages and minerals from the DRC into the EU. The same applies to the export of live animals, vegetable products and base metals from Tanzania. These are all identified as high impacts areas in the proposed Directive. Overcoming these challenges will require EU Member States to reconsider

2 Guideline for the Cross-Cutting Objectives in the Finnish Development Policy and Cooperation (2021), at https://um.fi/documents/35732/0/Annex+4+-+Cross-cutting+Objectives+%281%29.pdf/e9e8a940-a382-c3d5-3c5f-dc8e7455576b?t=1596727942405.

the proposed Directive and put in place a support package for LDCs like the DRC and Tanzania which will be impacted by the proposed Directive. Three key components from the trade perspective would be crucial in helping companies in Tanzania and the DRC to overcome the difficulties posed by the proposed Directive. Firstly, targeted technical assistance to help companies in these countries meet the due diligence requirements and domestic constraint to build their capacity to export will be crucial. Secondly, it is of absolute necessity that the drafting of the final Directive is made simpler and clearer so that companies in these countries will be able to ascertain, without difficulty, the exact due diligence standard they will need to meet before they can export to the EU. Thirdly, the promotion of transparency, streamlining as well as coherence amongst EU Member States is also very important.

Indeed, the report's main conclusion is that the impact of the proposed Directive on LDCs and industries that are operating within their jurisdictions deserves further attention. As presented, the proposed text requires clarification and elaboration on elements such as technical assistance, clearer and more detailed guidelines, and better coherence with other areas. The proposed Directive could have been more ambitious, notably by addressing competing areas such as technology transfer and corruption. The proposed Directive will also benefit from more targeted adjustments, such as with respect to civil liability, post-disengagement obligations, and engagement with stakeholders.

Non-enforcement of international human rights obligations (and international environmental laws) and even weak enforcement of national law, especially in LDCs due to insufficient rule of law, makes legislation such as the proposed Directive an alluring option to manage real human rights conditions in foreign countries in an indirect way.

International law has not succeeded in creating sustainability obligations for multinational companies (MNCs), though there is still ongoing development towards more concrete responsibilities for MNCs in securing human rights in their value chains and supply management. The directive does not give guidance on how the future development in international law would be anticipated.

Over the years, the main human rights responsibilities and obligations have been on states. The proposed Directive sets MNCs in a new environment, particularly due to the mitigation and liability rules.The proposed Directive, therefore, opens up the possibility for human rights responsibility beyond the current state-centred regime. In this regard, it is important that the proposed Directive takes into account the fact that MNCs are required to observe human rights due diligence so that implementation is uniformly carried out within the EU.

The due diligence obligations and additional requirements and liabilities make it necessary for MNCs to take on a new role working with foreign trading partners, foreign administration and local communities. In this new role, European companies may need additional support and guidance from the EU and home state authorities.

The instructions on engagement with stakeholders such as local communities require certain adjustments. Notably, the instruction to consult with relevant stakeholders only "where relevant" does not represent the golden standard of public participation and engagement. The removal of the term "where relevant" is not expected to harm companies and will support them in their efforts to prevent adverse impacts, future disputes, and reputational damage.

Article 15 of the proposed Directive provides specific instructions on climate change. Companies will require further detail on the meaning of the instruction to ensure compatibility with the Paris Agreement (global) 1.5 °C target, especially in the context of operating in LDC territories and in light of the recognition of these nations' sovereignty and the principle of common but differentiated responsibilities.

The proposed Directive instructs companies to support their small and medium-sized enterprise (SME) partners in their effort to mitigate and prevent adverse impacts. As they currently stand, these instructions are too vague and SME partners are not guaranteed sufficient support. In light of the very drastic implications for SMEs failing to comply with the requirements to prevent and mitigate adverse impacts (i.e. the possible termination of the business relationship), the Directive should clarify the scope and the detail of the required assistance, and confirm that it will be adequate to ensure SMEs' ability to comply with the proposed Directive's requirements.

The proposed Directive includes instructions to end business relationships where business partners have not complied with the Directive's requirement to prevent and mitigate adverse impacts. The Council's draft allows companies, in very limited cases, to maintain these business relationships, under the condition that companies will routinely monitor the situation and reassess their decision to avoid disengagement. The requirements to monitor and reassess deserve further detail and clarification, especially in light of the severity of this exception and its consequences, i.e. allowing companies to knowingly maintain business relationships with partners that cause adverse impacts to human rights and the environment.

The due diligence obligations detailed in the proposed Directive are laudable in that they significantly enhance existing reporting only obligations enacted in California, the U.K. and Australia in the quest to tackle modern slavery.

The report has considered the proposed Directive's impact upon labour standards insofar as they impact upon businesses in LDCs. The focus on LDCs such as Tanzania and the DRC highlights the prevalence of poor labour standards and the plight of modern slavery and child labour, which are rampant alongside poor enforcement systems. The hidden nature of modern slavery due to its existence in the informal sector presents significant challenges.

If the Finnish cross-cutting objective of making positive contributions is brought to the fore, then there is an urgency for clear guidance for EU corporations on their responsibilities for engaging with local businesses and stakeholders. This is to be accompanied by sanctions, both pecuniary and those that come with a risk of reputational damage.

Alongside robust guidance and sanctions, the proposed Directive should extend the support to potential victims of egregious labour standards. The civil liability regime should place the burden of proof upon the corporation as opposed to the victim. This is to enhance the support to vulnerable LDC victims. The proposed Directive should adopt the Finnish development policy cross-cutting objectives and make a positive contribution by enhancing support for victims. This should extend to enabling victims to be represented by non-governmental organisations (NGOs). A uniform approach across the EU will avoid a fragmented and uncertain civil liability regime.

The Draft Directive is silent on two issues that are crucial for LDCs, namely the fight against corruption and transfer of technology. These issues are intimately related to the enjoyment of human rights, protection of the environment, promotion of rule of law and good governance, reduction of the technological gap and advancement of sustainable development.

The importance of fighting corruption has been emphasised in every fora, including the European Parliament (EP). Companies must refrain from engaging in corruption practices and are expected to play a significant role in fighting those practices alongside the EU and its Members, which are bound by several conventions on this subject. The inclusion of the fight against corruption in the Directive – as prospected by the EP Committee on Legal Affairs – is fully justified and will be very beneficial for LDCs, most of which occupy the bottom places in the Corruption Perceptions Index (in 2021 Tanzania and the DRC figure, respectively, at 87th and 169th place, out of 180). Such a conclusion is even more compelling for corporate responsibility in the extractive sector.

The need to include transfer of technology in the Directive is less immediate compared to the fight against corruption, but nonetheless equally important from the standpoint not only of the protection of human rights and the environment, but also of the transition

to climate resilience and low emission development, as recognised by the Finnish Development Policy. The EU and its Members are bound under Article 66 (2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to promote and encourage companies in their territories to transfer technology to LDCs. Indeed, such transfer largely depends on the willingness of companies – which normally hold technologic knowledge – to pursue such transfer in all its forms, while continuing to enjoy the legal protection of intellectual property rights. Bringing transfer of technology within the scope of the concept of corporate responsibility is admittedly a cross-cutting objective, although it already figures in a few investment treaties such as the 2019 Economic Community of West African States Common Investment Code (ECOWIC). Yet, including transfer of technology in the preamble or even in a specific provision in the Directive would at once strengthen the synergies between the EU, its Members and companies in this area, and considerably increase the Directive's added value for LDCs.

1 Introduction

The report aims at providing a concise critical analysis of the Proposal for a Directive on Corporate Sustainability Due Diligence elaborated by the Commission (hereinafter "Draft Directive")[3] from the standpoint of the world's least developed countries (LDCs). It takes into account the Explanatory Memorandum,[4] the Council's General Approach on the Draft Directive, and the provisional position on the Draft Directive expressed by the European Parliament's Legal Affairs Committee.[5]

The main challenge of the Report is that the Draft Directive is almost silent on developing countries and LDCs. Furthermore, there is no mention in the Draft Directive or any related documents of issues that are crucial to boost the sustainable and equitable development of those countries, most prominently the fight against corruption.

The proposed Directive is based on Articles 50 and 114 of Treaty on the Functioning of the European Union (TFEU). It has two main purposes: (a) obliging European companies satisfying the conditions indicated in Article 3 and companies of third-countries generating significant turnout in the territory of the EU to conduct due diligence in identifying, preventing and ending potential or actual environmental and human rights impacts; and (b) compelling those companies to facilitate access to remedy and justice, in particular by establishing civil liability and complaints procedures for those having legitimate concerns regarding potential or actual adverse impact in relation to the operations of the former and their subsidiaries as well as their value chain.

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3 Proposal for a Directive of the EP and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23 February 2022 COM(2022) 71 final, available at https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-1aa75ed71a1.0001.02/DOC_1&format=PDF.

4 Ibidem.

5 Proposal for a Directive of the EP and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, Doc. 15024/1/22 REV 1, Brussels, 30 November 2022, available at https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf. Draft Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD), available at https://www.europarl.europa.eu/doceo/document/JURI-PR-738450_EN.pdf

Environmental adverse impact and human rights adverse impact are defined indirectly in Article 3 (b) and (c) respectively by equating them to violations of the obligations contained in the international conventions listed in the Annex. The reference to those violations serves the very limited scope of setting a benchmark for establishing environmental and human rights impact for the purpose of the Draft Directive. From this perspective, the Draft Directive assumes that conduct by a State that would amount to a violation of the international conventions listed in the Annex causes environmental or human rights adverse impact in relation to the due diligence obligations of the companies falling within the scope of the Directive. Such a benchmark is not applied mechanically. Indeed, environmental or human rights adverse impacts may be caused by "a violation of a prohibition or right not specifically listed in that Annex which directly impairs a legal interest protected in those conventions".[6]

It follows that the international conventions listed in the Annex continue to apply exclusively to their respective Parties. A conduct inconsistent with any of those conventions that can be attributed to a State would trigger its international responsibility in accordance with the rules on State responsibility as largely codified in the International Law Commission's (ILC) Articles on State Responsibility.[7] On the contrary, companies falling within the scope of the Directive are not bound by the international conventions listed in Annex.[8] They are rather bound by the national regulations and administrative provisions Member States are obliged to adopt to implement the Directive and publish in accordance with Article 30 of the Draft Directive.[9]

With regard to the nature and spatial scope of the national regulations and administrative provisions, they can be qualified as "domestic measures with extraterritorial implications"[10] or considered as an example of "territorial extension of measures adopted by Member States."[11] The Court of Justice of the EU has admitted that acts of the EU Institutions consistent with international law may apply beyond the border of the EU "in limited and

6 Explanatory Report, para 25, p. 35.

7 See International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts (2001), UN Doc. A/56/49(Vol. I)/Corr.4.

8 This is without prejudice to the possibility of attributing the conduct of a company to a State under the rules on State responsibility.

9 As a matter of terminology, Article 30 uses in paragraph 1 "regulations and administrative provisions" and in paragraph 3 "national law".

10 Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, 9 April 2010, A/HRC/14/27, para 48.

11 See J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', 62 Am. Journ. Comp. Law (2014) 87.

clearly defined circumstances" and provided there is "a close connection with the territory of the European Union".[12] Alternatively, they can be justified under the so-called effects doctrine developed mainly by the U.S. Supreme Court, which "has repeatedly upheld [the Congress'] power to make laws applicable to persons or activities beyond our territorial boundaries where U.S. interests are affected",[13] especially when the presumption against extraterritoriality has been rebutted by a "clear, affirmative indication that it applies extraterritorially".[14]

In the case of the Directive, such clear and affirmative indication is quite manifest in its very objective to introduce corporate sustainable due diligence in the context of transnational business. It follows that the Directive is clearly meant to require Member States to enact measures applicable beyond the borders of the EU. From the standpoint of Member States, they exercise prescriptive jurisdiction with regard to companies formed in the EU identified in Article (2) (1) and Article 3 (a). The basis for the exercise of jurisdiction is the passive nationality link between the company and a Member State. The Directive equally applies to companies of third countries fulfilling one of the conditions indicated in Article 2.2 (a) and (b), both concerning the volume of turnover generated in the territory of the EU. The turnover in the territory of the EU above the indicated threshold thus provides a "territorial connection" between the third-country company and the territory of the EU.[15]

Concerning the structure of the report, Section 2 focuses on the relevance and implications of the Draft Directive for the trade relationships between the EU and its Members on one side, and LDCs on the other side. Sections 3 to 5 deal with three key areas of corporate sustainability due diligence, namely the protection of human rights, the environment and labour standards. Section 6 reflects on the fight against corruption and transfer of technology, which are important issues for LDCs but are not included in the Draft Directive. Section 7 briefly examines the remedies foreseen in the Draft Directive and in particular the complaints procedure.

12 Case C-561/20, Q v. United Airlines, Judgment, 7 April 2022, ECLI:EU:C:2022:266, paras 52, 54.

13 Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 813-814.

14 RJR Nabisco, Inc. v. European Community, 579 U.S. 2090 (2016) ... See William S. Dodge, 'The Presumption against Extraterritoriality in Two Steps', 110 Amer. Journ. Int'l Law (2016) 45.

15 Explanatory Report, para 24, p. 34.

In all those specific contexts, the report examines how the Directive could be amended or integrated to better meet the needs and priority of LDCs and ultimately contribute to boosting the sustainable development of their economies. The report's final part will elaborate a series of recommendations.

While the report's recommendations are relevant for LDCs in general, we will provide closer examination of two case-studies, namely Tanzania and the DRC. The choice of the two countries is motivated essentially by the prominent place of these countries amongst LDCs, as well as their importance for the standpoint of natural resources and rare earth. The natural resources sector is indeed at once of paramount importance for the sustainable development of LDCs and of great concern in terms of the protection of the environment and human and labour rights.

As far as methodology is concerned, the task entrusted with this team was to provide a legal analysis of the directive and its impact on LDCs and relevant stakeholders. We therefore commenced our work with the identification of key areas in which this impact is likely to manifest itself. We then relied on desk research methodology, analysing appropriate legal materials including conventions, EU law (including drafts) domestic laws and soft law guidelines, and secondary sources including academic journal articles, data from international organisations, NGOs reports and IGOs reports. Where appropriate and necessary, we provided a closer examination of two case studies – Tanzania and the DRC – although our analysis and recommendations are designed to be applicable to LDCs more broadly. The result of our legal analysis is presented as a report, accompanied with a list of concrete recommendations for policy makers.

The Report is divided into 6 Parts discussing the Draft Directive from specific perspectives and focusing, respectively, on Trade between the EU and LDCs (Part 2 – Ngangjoh-Hodu), Human rights (Part 3 – Siikavirta), Environment and climate change (Part 4 – Kent), Labour standards (Part 5 – Morris), Corruption and transfer of technology (Part 6 – Gazzini) and Liability (Part 7 – Morris).

2 Trade between the EU and LDCs

2.1 Introduction

The proposal, on face value, will likely affect only medium and large companies incorporated in third countries due to the turnover requirements highlighted below. The proposal, as it stands, will have consequential impacts on the already fragile trade relationship between the EU and African LDCs. Accordingly, EU incorporated companies are 'in scope' companies and non-EU companies will also be covered by the Directives subject to them meeting a certain threshold. In this regard, the proposed Directive will apply to non-EU companies if;

> the company generates a net turnover of more than EUR 150 million in the EU market in the financial year preceding the last financial year; or the company generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the EU internal market in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in certain high-risk sectors.[16]

This means that the proposal will only apply to fewer companies in the LDCs that meet the threshold specified in Article 2.2(a) and (b) as highlighted above. However, before discussing the implications of the proposal and the challenges currently facing companies in countries such as the DRC and Tanzania when it comes to trading with the EU, it is important to briefly identify and discuss existing the framework for trade between the EU and LDCs like the DRC and Tanzania.

2.2 Trade between the African LDCs and the EU

The legal framework governing trade relations between the EU and African countries varies based on geographical location, level of development, whether there are existing Economic Partnership Agreements (EPAs) in place or the Generalised System

16 See Article 2.2(a) and (b) of the proposed Directive. Accordingly, some of the high risk sectors identified in the proposed Directives are; textile and clothing, mining, leather and footwear, agriculture, forestry, fisheries (including aquaculture), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages, extractive industry, the manufacture of basic metal product etc. See page 64 of the revised text (15024/1/22 REV 1).

of Preferences (GSP) that applies to the exports of the African country in question. With regards to trade between the EU and African LDCs, there are two key trading regimes. The first is the Everything But Arms (EBA) initiative applicable to all LDCs around the world, including those in Africa. The second framework is the EPA, provided the LDC in question has signed and ratify an EPA with the EU or is part of a sub-regional group that has signed the agreement.[17] The third trading regime is the multilateral trading system under the World Trade Organization (WTO). However, as most African LDCs have yet to sign an EPA, their trade with the EU have been largely governed by the EBA. As always with non-reciprocal trade preferences, the EBA is voluntary and can be withdrawn at will by the EU. Therefore, over the last decades, the EU and these countries have been involved in the negotiation of a legally binding and WTO-compatible reciprocal trade arrangements in form of an EPA.

Negotiating trade agreements with third countries as a group, especially when the group operates as a custom union or common market, is a normal practice as it ensures that the applicable common external tariffs (CET) amongst the members is the same. In this regard, the CET that is essential to the functioning of the custom union is preserved. Although there have been expectations that the four sub-regions i.e., the East African Community (EAC),[18] the Southern African Development Community (SADC)[19], Central Africa[20] and the Economic Community of West African States (ECOWAS) would negotiate, sign and implement an EPA as a group, this never happened. For instance, in West Africa, Nigeria refused to sign the EPA proposed by the EU, complaining that the proposed agreement was incompatible with its trade interests and overall development objectives. Consequently, for fear of access to EU market, Côte d'Ivoire and Ghana broke ranks and are now implementing what is termed a 'stepping stone' EPA. None of the West African LDCs saw the need to sign the so-called stepping stone EPA, given that they currently export to the EU under the EBA framework.

17 The European Community in 2002 introduced the "Everything But Arms" initiative for all LDCs. This means that this non-reciprocal trade preferences do not only apply to African LDCs The initiative applies to all LDCs so long as they meet the rules of origins condition. See Regulation 416/2001 of 26 February 2001, Official Journal of the European Union No. L 60 of 1.3.2001

18 See EU EAC – EPA, available at https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/east-african-communityeac_en

19 See EU – SADC EPA at https://trade.ec.europa.eu/access-to-markets/en/content/epa-sadc-southern-african-developmentcommunity.

20 See EU – Cameroon EPA, available at https://trade.ec.europa.eu/doclib/docs/2020/october/tradoc_158984.pdf

In a similar light, with regard to the EAC EPA, Kenya and Rwanda broke ranks and signed the agreement even though the EAC is a custom Union and the other LDC members of the EAC, including Tanzania, are not willing to sign. Although the two countries were given the green light by the EAC at their summit on 28 February 2021 to implement the signed interim EPA based on the principle of variable geometry, such implementation is yet to take place.[21] The difficulty of implementation of the signed EAC – EU EPA by Kenya and Rwanda only demonstrates the challenges of engaging in fragmented trade agreements by individual members of Custom Unions with third countries.[22] The implication for the current studies is that while Kenya continues to trade with EU under the EU GSP scheme and the WTO regime, Tanzania and other LDCs members of the EAC trade with the EU under the EBA. The same can be said about the DRC, where Cameroon broke ranks and signed the Central Africa EPA with the EU, while the DRC and other Central African countries refused to sign. These countries are either trading with the EU under the EBA, the EU GSP or the WTO regimes. This is particularly true with the DRC, which has continued to trade with the EU under the EBA.

Nonetheless, the nature of the EBA preferences do not lend themselves to exports of value-added goods to the EU. EBA preferences are structured in such a way that the beneficiaries could only largely benefit from them if they rely on primary products as their key exports to the EU. The simple reason behind this as will be discussed below is because of the SPS requirements as well as the technical requirements by EU for value added goods from these countries into the EU markets. In most cases, the SPS and technical requirements lack clarity and are too cumbersome for companies in LDCs to be able to comply with.

21 See European Commission, Overview of Economic Partnership Agreements, available at https://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf

22 For EAC – EU EPA to enter into force, the remaining four EAC members i.e., Burundi, Uganda, South Sudan and Tanzania will need to ratify the agreement. See https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/east-african-community-eac_en#:~:text=The%20East%20African%20Community%20(Burundi,and%20Kenya%20has%20ratified%20it.

Figure 1. EU Trade with the DRC

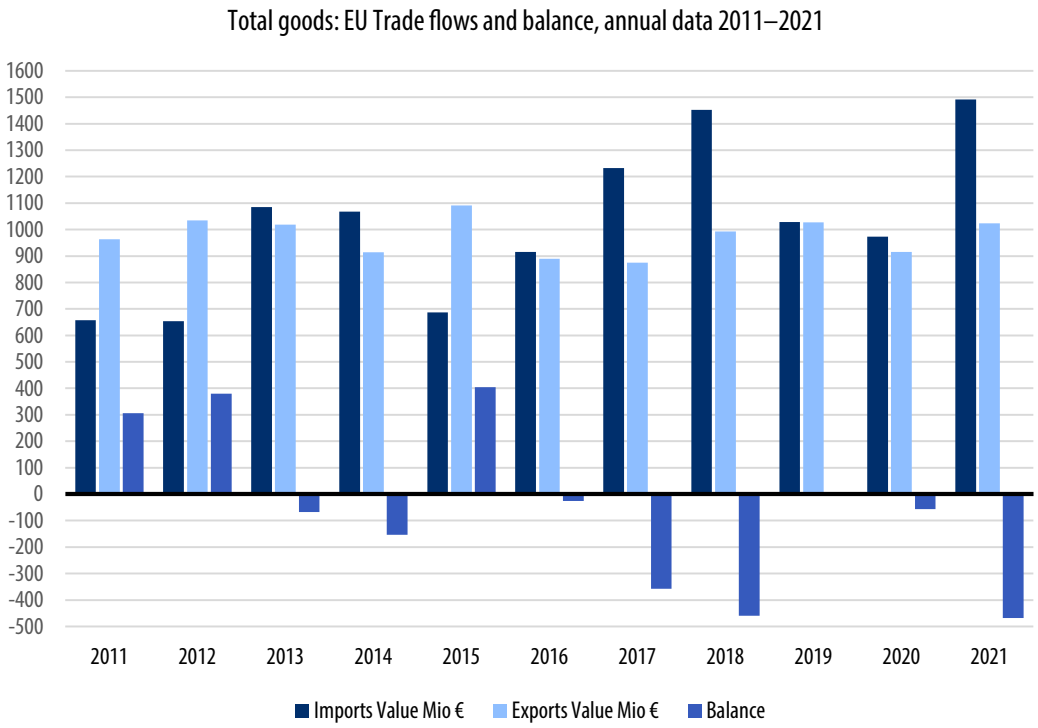

Table 1. EU Trade with the DRC

Total goods: EU Trade flows and balance				Source Eurostat Comext - Statistical Regime 4				
Period	**Imports**			**Exports**			**Balance**	**Total Trade**
	Value Mio €	**% Growth**	**% Extra-EU**	**Value Mio €**	**% Growth**	**% Extra-EU**		
2011	657		0	963		0,1	306	1621
2012	654	-0,5	0	1035	7,4	0,1	380	1689
2013	1085	65,9	0,1	1019	-1,5	0,1	-67	2104
2014	1068	-1,6	0,1	914	10,3	0,1	-154	1981
2015	687	-35,7	0	1091	19,4	0,1	404	1778
2016	915	33,3	0,1	890	-18,5	0	-26	1805
2017	1232	34,6	0,1	875	-1,6	0	-357	2108
2018	1452	17,8	0,1	993	13,4	0	-459	2444
2019	1028	-29,2	0,1	1027	3,4	0	-1	2055
2020	973	-5,4	0,1	915	-10,9	0	-57	1888
2021	1492	53,4	0,1	1024	11,9	0	-468	2516

% Growth: relative variation between current and previous period
% Extra-EU imports/exports as % of all EU partners i.e. excluding trade between EU Member States

Table 2. European Union, Trade with DRC, Source Eurostat Comext – Statistical regime 4

HS Sections	Imports				Exports			
	Value Mio €	% Total	% Extra-EU	% Growth	Value Mio €	% Total	% Extra-EU	% Growth
I Live animals; animal products	0,0	0,0	0,0	282,0	169,0	16,5	0,4	40,9
II Vegetable products	16,0	1,1	0,0	9,6	43,0	4,2	0,1	-13,5
III Animal or vegetable fats and oils	0,0	0,0	0,0	28,3	2,0	0,2	0,0	9,8
IV Foodstuffs, beverages, tobacco	28,0	1,9	0,1	-2,9	137,0	13,3	0,1	14,4
V Mineral products	126,0	8,4	0,0	-24,7	25,0	2,4	0,0	-44,7
VI Products of the chemical or allied industries	0,0	0,0	0,0	-13,2	160,0	15,6	0,0	-14,0
VII Plastics, rubber and articles thereof	0,0	0,0	0,0	41,6	22,0	2,2	0,0	15,0
VIII Raw hides and skins, and saddlery	0,0	0,0	0,0	336,2	1,0	0,2	0,0	49,1
IX Wood, charcoal and cork and articles thereof	13,0	0,9	0,1	29,4	1,0	0,2	0,0	64,4
X Pulp of wood, paper and paperboard	0,0	0,0	0,0	41,5	48,0	4,7	0,1	18,1
XI Textiles and textile articles	0,0	0,0	0,0	37,2	28,0	2,7	0,0	13,0
XII Footwear, hats and other headgear	0,0	0,0	0,0	-88,4	2,0	0,3	0,0	45,5
XIII Articles of stone, glass and ceramics	0,0	0,0	0,0	266,4	8,0	0,8	0,0	54,1
XIV Pearls, precious metals and articles thereof	54,0	3,6	0,1	-15,6	0,0	0,0	0,0	-13,8
XV Base metals and articles thereof	891,0	59,7	0,6	74,6	25,0	2,4	0,0	-1,0
XVI Machinery and appliances	1,0	0,1	0,0	87,6	192,0	18,8	0,0	8,5
XVII Transport equipment	0,0	0,0	0,0	-51,2	112,0	11,0	0,0	95,7
XVIII Optical and photographic instruments, etc.	1,0	0,0	0,0	132,4	24,0	2,3	0,0	-8,0

HS Sections	Imports				Exports			
XIX Arms and ammunition								
XX Miscellaneous manufactured articles	0,0	0,0	0,0	304,1	10,0	1,0	0,0	21,2
XXI Works of art and antiques	0,0	0,0	0,0	67,1	0,0	9,0	0,0	-64,0
XXII Not classified	361,0	24,2	2,2	105,4	15,0	1,4	0,1	121,0
AMA / NAMA Product Groups								
Total	1492,0	100,0	0,1	53,4	1024,0	100,0	0,0	11,9
Agricultural products (WTO AoA)	44,0	3,0	0,0	1,4	349,0	34,1	0,0	20,3
Fishery products	0,0	0,0	0,0	252,4	3,0	0,3	0,0	80,1
Industrial products	1447,0	97,0	0,1	55,9	671,0	65,6	0,0	7,7

% Growth: relative variation between current and previous period
% Total: Share in Total: Total defined as all products
% Extra-EU: imports/exports as % of all EU partners i.e. excluding trade between EU Member States

As shown in Figure 1 above, the imports from the DRC into the EU have rather fluctuated between 2011 and 2021. Despite this fluctuation, one can see a somewhat upward trend in imports from the DRC into the EU in this time period. Yet, most of the imports are in the extractive sector as can be seen in Table 2. Beyond this sector, there has also been noticeable export of forestry products into the EU, as well as foodstuffs, beverages and tobacco.

Although the trade balance seems to be in favour of the DRC, the figure is not entirely accurate. The DRC almost fully relies on arms and ammunition imports from the EU, and these figures have not been recorded. Consequently, if the new EU proposal is to impact trade between the EU and the DRC, this will likely be in the extractive sector as well as the forestry and agricultural sectors.

Figure 2. EU Trade with Tanzania

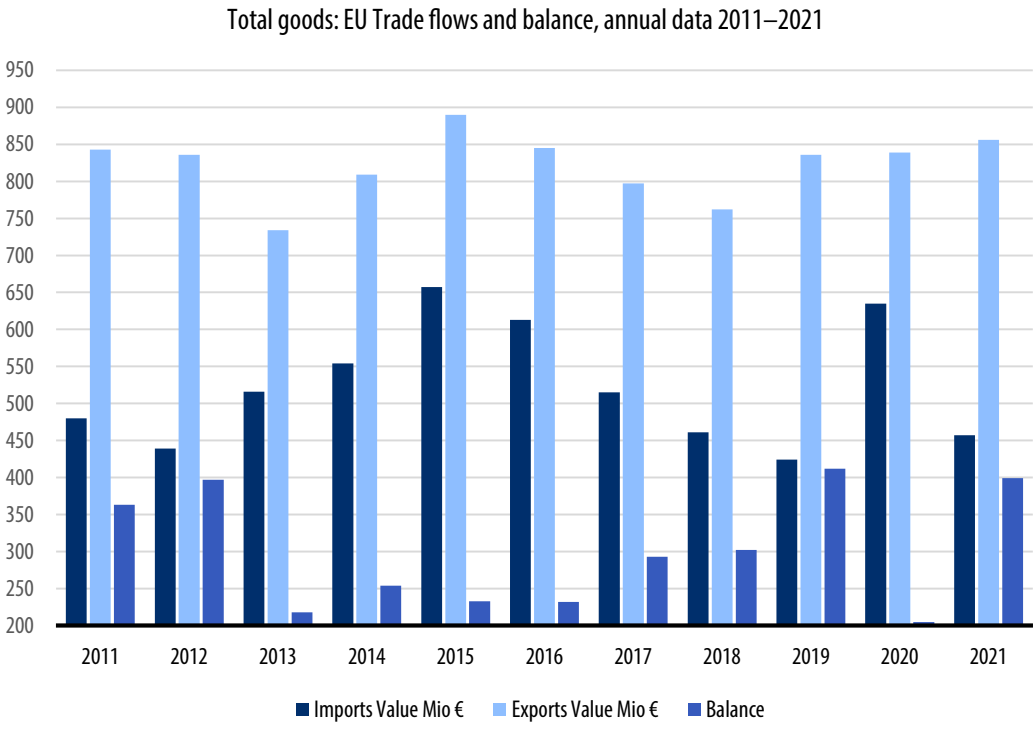

Table 3. EU Trade with Tanzania Total goods: EU Trade flows and balance, Source: Eurostat Comext – Statistical regime 4

Period	Imports			Exports			Balance	Total Trade
	Value Mio €	% Growth	% Extra-EU	Value Mio €	% Growth	% Extra-EU		
2011	480,0		0,0	843,0		0,1	363,0	1323,0
2012	439,0	-8,6	0,0	836,0	-0,8	0,0	397,0	1275,0
2013	516,0	17,7	0,0	734,0	-12,2	0,0	218,0	1251,0
2014	554,0	7,4	0,0	809,0	10,1	0,0	254,0	1363,0
2015	657,0	18,6	0,0	890,0	10,1	0,0	233,0	1547,0
2016	613,0	-6,7	0,0	845,0	-5,0	0,0	232,0	1458,0
2017	515,0	-17,7	0,0	797,0	-5,7	0,0	293,0	1302,0
2018	461,0	-8,7	0,0	762,0	-4,4	0,0	302,0	1223,0
2019	424,0	-8,1	0,0	836,0	9,7	0,0	412,0	1260,0
2020	635,0	49,9	0,0	839,0	0,4	0,0	205,0	1474,0
2021	457,0	-28,0	0,0	856,0	2,0	0,0	399,0	1314,0

% Growth: relative variation between current and previous period
% Extra-EU imports/exports as % of all EU partners i.e. excluding trade between EU Member States

Table 4. EU Trade with Tanzania, Source Eurostat Comext - Statistical regime 4

HS Sections	Imports				Exports			
	Value Mio €	% Total	% Extra-EU	% Growth	Value Mio €	% Total	% Extra-EU	% Growth
I Live animals; animal products	67,0	14,7	0,2	31,9	8,0	0,9	0,0	8,2
II Vegetable products	146,0	32,0	0,3	22,1	21,0	2,4	0,1	-63,7
III Animal or vegetable fats and oils	1,0	0,1	0,0	-54,1	5,0	0,6	0,1	46,7
IV Foodstuffs, beverages, tobacco	71,0	15,5	0,1	-39,8	47,0	5,4	0,1	30,1
V Mineral products	40,0	8,7	0,0	-85,8	16,0	1,9	0,0	11,9
VI Products of the chemical or allied industries	1,0	0,2	0,0	409,7	141,0	16,5	0,0	-7,0
VII Plastics, rubber and articles thereof	0,0	0,1	0,0	325,6	26,0	3,0	0,0	-7,5
VIII Raw hides and skins, and saddlery	0,0	0,0	0,0	-76,9	0,0	0,0	0,0	139,4
IX Wood, charcoal and cork and articles thereof	1,0	0,2	0,0	-11,8	1,0	0,1	0,0	1,1
X Pulp of wood, paper and paperboard	0,0	0,0	0,0	8,2	25,0	2,9	0,0	53,7
XI Textiles and textile articles	7,0	1,5	0,0	9,5	10,0	1,1	0,1	-3,5
XII Footwear, hats and other headgear	1,0	0,1	0,0	45,7	0,0	0,1	0,0	69,9
XIII Articles of stone, glass and ceramics	1,0	0,2	0,0	-3,3	12,0	1,3	0,0	45,1
XIV Pearls, precious metals and articles thereof	21,0	4,5	0,0	-32,4	0,0	0,0	0,0	-65,9
XV Base metals and articles thereof	95,0	20,8	0,1	495,9	42,0	4,9	0,0	-36,4
XVI Machinery and appliances	2,0	0,5	0,0	22,0	249,0	29,0	0,0	-17,5
XVII Transport equipment	1,0	0,1	0,0	76,8	74,0	8,7	0,0	29,2
XVIII Optical and photographic instruments, etc.	1,0	0,2	0,0	-5,1	26,0	3,0	0,0	-36,1

HS Sections	Imports				Exports			
XIX Arms and ammunition					0,0	0,0	0,0	-34,5
XX Miscellaneous manufactured articles	1,0	0,1	0,0	61,7	10,0	1,2	0,0	3,7
XXI Works of art and antiques	1,0	0,1	0,0	19,6	0,0	0,0	0,0	-81,1
XXII Not classified	1,0	0,3	0,0	-64,9	144,0	16,8	0,0	380,7
AMA / NAMA Product Groups								
Total	457,0	100,0	0,0	-28,0	856,0	100,0	0,0	2,0
Agricultural products (WTO AoA)	217,0	47,5	0,0	-8,4	81,0	9,4	0,0	-23,3
Fishery products	71,0	15,5	0,0	26,5	0,0	0,0	0,0	182,4
Industrial products	169,0	36,9	0,0	-50,5	775,0	90,6	0,0	5,6

% Growth: relative variation between current and previous period
% Total: Share in Total: Total defined as all products
% Extra-EU: imports/exports as % of all EU partners i.e. excluding trade between EU Member States

As regarding EU – Tanzania trade, Figure 2 shows that Tanzania has witnessed a negative balance of trade against the EU for the last ten years. While there has been fluctuation in imports and exports between Tanzania and the EU, there is a noticeable positive balance of trade in favour of the EU between 2011 and 2021. Regarding specific areas of trade, the bulk of Tanzania's exports to the EU have been vegetable products and precious metals. There have also been modest exports of live animals and animal products to the EU. Essentially, even without statistics on arms and ammunitions that Tanzania is likely a net importer from the EU, Tanzania is a net importer from the EU. Table 4 shows that most of Tanzania's imports from the EU are machinery and chemical products. Therefore, if the new EU proposed Directive is to affect EU trade with Tanzania, it would likely involve products such as machinery, chemicals, precious minerals as well as vegetables and vegetable products.

2.3 Challenges Facing EU – DRC and Tanzania Trade

As is the case with most LDCs and developing countries, the DRC and Tanzania consider international trade as a critical path to economic growth, poverty alleviation and prosperity.[23] This is not a surprise, though, as the link between international trade and development is no longer a point of contestation. Recent examples from emerging economies like China, India, and South Korea as well as advanced developing countries like Botswana, Tunisia and Mauritius show that with the right conditions, international exchange of goods and services can foster economic growth and contribute to poverty alleviation, gender equality and environmental sustainability.[24] This approach to development and prosperity is also consistent with United Nations 2030 Sustainable Development Goals (SDGs)[25] as well as African Union Agenda 2063.[26] Yet, the extensive policies and measures undertaken by LDCs and in particular, Tanzania and the DRC, have not led to increase in trade volume and positive balance of trade vis-à-vis the European Union. In fact, international trade has not generated the quality and form of growth necessary to reverse rising poverty levels and low prosperity. The persistent underdevelopment, lower volume of trade and reliance on a few baskets of exports mainly, in the agricultural and extractive sectors, demonstrate that despite largely tariff-free and duty-free market access to the EU under the EBA, there are still significant non-tariff barriers (NTB) that prevent them from engaging into value added goods exports to the EU.[27]

In recent years, there have been improvements in exports earnings for the DRC and Tanzania, as shown on Tables 2 and 4 above. These improvements have been largely due to favourable movements in prices of commodities such as diamonds, gold, copper, and

23 See International Trade Centre, United Republic of Tanzania: Invisible Barriers to Trade Business Perspectives, (April 2022).

24 See Jeffrey A. Frankel & David Romer, 'Does Trade Cause Growth?', in John J. Kirton (ed.), Global Trade (Routledge, 2009); Mukhisa Kituyi, International Trade and Development Nexus, Great Insight Magazine, ECDPM (November 2013), Michael Trebilcock, 'Between Theories of Trade and Development: The Future of the World Trading System', 16 Journ. World Investment & Trade (2015) …; Thomas Wiedmann & Manfred Lenzen, 'Environmental and Social Footprints of International Trade', 11 Nature Geoscience (2018) 314; Zi Hui Yin & Chang Choi, The effect of trade on the gender gap in labour markets: the moderating role of information and communication technologies, Economic Research-Ekonomska Istraživanja, (2022), pp. 1-20.

25 See UNSDG targets 17.10, 17.11, and 17.12

26 See Agenda 2063: The Africa We Want, African Union. Available at https://au.int/en/agenda2063/overview

27 Of course, it is also true that lack of competitive business environment and concrete government policy to promote industrialisation are also to be blamed.

coffee. Yet, exports of these countries continue to be dominated by primary products. The key challenge for these countries is structural. In most of the countries that have transitioned into emerging economies through export-led growth, export promotion has played a critical role in their long-term growth strategy.[28] Manufacturing-led export, which is pivotal in long-term growth, can only happen when there is support for a virtuous cycle of investment, innovation and a transparent and focused poverty reduction strategy. All these ingredients are missing in the trade policy approach of the DRC and Tanzania. At best, where there is a growth strategy,[29] implementation is woefully missing.[30] Although insufficient infrastructure is a key contributory factor to lack of manufacturing-led growth in the DRC and Tanzania, political will, which has been largely lacking, is pivotal to any export-led growth.

However, external factors have also been an issue. Over the years, Tanzania and the DRC have found it challenging to comply with SPS as well as products standards for their exports to the EU market. While the EU, as a WTO member, is obliged to act in accordance with WTO obligations on SPS, the SPS Agreement under the WTO also allows Members to set their own SPS standards. To this end, WTO Members are generally expected to set standards that are not higher than international ones or than standards necessary to achieve a legitimate objective.[31] In other words, restrictions on the basis of SPS shall only

28 It is true that in some instances export-led growth will better be achieved through increase public infrastructure financing as well as expanded import of capital equipment. See for instance, Tyler Biggs, Assessing Export Supply Constraints: Methodology, Data, Measurement, in Africaportal (2007), Paul Collier, The Political Barriers to Development in Africa (Oxford Research Encyclopedias, 2019).

29 See Tanzania Country Strategy 2019-2022, available at https://www.lrct.go.tz/uploads/documents/sw-1665650968-LRCT%20STRATEGIC%20PLAN.pdf.

30 See Christian Estmann et al, Merchandise export diversification strategy for Tanzania - promoting inclusive growth, economic complexity and structural change, Development Economics Research Group Working paper Series, 02-2020, University of Copenhagen (2020).

31 See Annex B.11(b), to the WTO SPS Agreement.

be "to the extent necessary to protect human, animal or plant life or health, based on scientific principles and not maintained without sufficient scientific evidence".[32] The EU standard has been seen as more restrictive.[33]

In the case of Tanzania, the requirement to comply with SPS standards has impeded the market access of fish and other agricultural products such as maize, beans, and coffee to the EU. Exports of these products to the EU require exporters to put in place additional measures to improve hygiene and safety in the supply chain.[34] Moreover, there are issues of concern related to policies and strategies for investing in the upgrading of landing sites. The same challenges hold true for the DRC as EU strict SPS and standards requirements have made it very difficult to export animals and animal products as well as foodstuff and other agricultural products to the EU. Moreso, the strict EU SPS requirements has also been a hinderance to manufacturing-led export from Tanzania and the DRC into the EU. The existence of strict SPS requirements means that the export of semi-processed and processed products into the EU has been very challenging.

2.4 Potential Impacts on EU - LDC Trade

Pursuant to Article 2 of the proposed Directive, companies established according to the laws of third countries will be expected to comply with significant obligations in the Directive. Such compliance will be expected if they generate a net turnover of more than 40 million but not more than EUR 150 million in the EU in the financial year preceding

32 See WTO SPS Agreement Article 2.2. The only exception to this obligation is where relevant scientific evidence is not sufficient. In such a situation, a WTO member may provisionally adopt SPS measure which may be more restrictive based on the available evidence. Such measure would need to be reviewed within a very reasonable timeframe and the member concerned is obliged to seek clarity on the scientific evidence available before continuing the measure. See SPS Agreement Article 5.7.

33 The Cotonou Agreement Article 48 requires African, Caribbean and Pacific (ACP) countries and the EU to recognise the right of each party to adopt or to enforce SPS measures necessary to protect human, animal, or plant life or health, subject to the requirement that these measures do not constitute a means of arbitrary discrimination or a disguised restriction to trade, generally. The EU and most ACP countries have agreed to apply the same standard in the context of the EPA and also act consistent with the SPS Agreement under the WTO.

34 See EU Commission Regulation (EC), No. 1881/2006 of 19 December 2006 setting Maximum levels for certain contaminant in foodstuffs (OJL 364, 20.12.2006, p.5) as well as Eric Pichon, Economic Partnership Agreement with the East African Community, Briefing, International Agreements in Progress, European Parliament, (May 2022). Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729445/EPRS_BRI(2022)729445_EN.pdf.

the last one provided that at least EUR 20 million was generated in any of the following sectors; agriculture, forestry, fisheries (including aquaculture), the manufacture of food products and beverages, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages.[35] It is also important to note that the threshold requirements may change by the time the proposed Directive is finalised as the EP Legal Affairs Committee seems to be suggesting a much more lower threshold in term of the number of employees.

As seen on Tables 2 and 4 above, most of these sectors are precisely sectors of significant export interests to the DRC and Tanzania. This means that SMEs and large multinationals based in these countries are likely to be impacted by the new proposal if the threshold specified in Article 2 of the proposal is met. However, assuming that very few companies from LDCs, Tanzania[36] and the DRC in particular, meet the EUR 40 or EUR 20 million turnover requirements under the proposed Directive, there will still be potential impacts on companies from these countries that are part of a value chain with a company that are 'in scope'. Additionally, if the threshold is lowered as currently suggested by the EP Legal Affairs Committee, the impact will likely be felt by smaller companies that are part of a value chain with 'in scope' companies. By implication, instead of the supposedly, well-intentioned objectives of the proposed Directive to safeguard human rights and prevent harmful environmental practices, the proposed Directive may well become a disguised restriction on international trade.

As is the case with existing non-tariff measures (NTMs) to trade, such as TBTs and SPS measures which have contributed to reduced market access for LDCs into the EU, the environmental requirements, if designed in a discriminatory and protective manner, are likely to be counterproductive to the ambition of the DRC and Tanzania to double their exports by 2030.[37] On the other hand, the requirements could also increase international trade if they are designed and applied in a manner that would guarantee the environmental and human rights credentials of imported goods. In other words, such an approach can build trust and confidence in a particular product and eventually, demand for the goods.

35 The following sectors are also included; the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear. See Article 2.2(b).

36 An example of such company is the MeTL Group in Tanzania, which has an annual revenue of roughly USD 9 Billion. See https://www.metl.net/en/who-we-are/about-us

37 See Istanbul Plan of Action, Fourth United Nations Conference on the Least Developed Countries, United Nations, (09-13 May 2011), A/CONF.219/3/Rev.1

However, with goods from Tanzania and other LDCs historically, facing restrictive NTBs of about 75 per cent, it is more likely than not that requirements to demonstrate environmental and human rights credentials of export to the EU will further stifle international trade.[38] Generally, companies in Tanzania and the DRC will need to ensure human rights practices are ingrained in their business practices, especially at the senior board level. Accordingly, companies that are 'in scope' are required to put measures in place that would ensure that they are following human rights and environmental due diligence.

Integrating due diligence and identifying actual or potential adverse human rights and environmental impacts by companies in these countries, as required by the proposed Directive, may not in themselves be a problem. The key issue for businesses intending to export to the EU is likely to be proving that they have those conditions in place even if there is a public communication as required by the proposed Directive. As is the case with existing SPS and TBT requirements for exports into the EU, where satisfying health and safety norms have proven particularly challenging to LDCs like the DRC and Tanzania, the human rights and environmental requirements in the proposal will add another layer of barrier to export.[39]

In view of the above, it is fair to conclude that the proposed Directive will present a real challenge to the exports of key products like foodstuff, beverages and minerals from the DRC into the EU. The same applies to the export of live animals, vegetable products and base metals from Tanzania. These are all identified as high impacts areas in the proposed Directives. Overcoming these challenges will require EU Member States to reconsider the proposed directives and put in place a support package for LDCs such as the DRC and Tanzania, which will be impacted by the proposed Directive. Three key components would be crucial in helping companies in Tanzania and the DRC to overcome the difficulties posed by the proposed Directive. Firstly, targeted technical assistance to help companies in these countries meet the due diligence requirements and domestic constraint to build their capacity to export will be crucial. Secondly, it is of absolute necessity that the drafting of the final Directive is made simpler and clearer so that companies in these countries will be able to ascertain, without difficulty, the exact due diligence standard they will need to meet before they can export to the EU. Thirdly, the promotion of transparency, streamlining as well as coherence amongst EU Member States is also very important.

38 See UNCTAD, If you Care about Least Developed Countries, Care about Non-Tariff Measures, A technical note by UNCTAD Secretariat, at https://unctad.org/system/files/official-document/ditc2015misc4_en.pdf

39 See Abel Paul et al, 'Comparative Advantage of Tanzanian Coffee Sector under "Everything but Arms" Export Trading Regime', 13 Journal of Economics and Sustainable Development (2022) …. Related to this, see for instance, Benjamin William Mkapa, Why the EPA is not Beneficial to Tanzania, South Centre, Bulletin No. 1 (November, 2016).

3 International Human Rights and the Rule of Law

3.1 Introduction

The directive aims to complement vague international rules on business responsibility. This section clarifies some human rights developments and discussions in international law and brings up the problems faced by LDCs. The analysis highlights some key issues by way of bettering the directive proposal.

The aim of this study is to analyse the implications of the proposed directive on corporate sustainability due diligence. Without a general understanding of human rights in differing social and juridical cultures, it is not simple to offer robust answers to these questions. General analysis of human rights is not the goal of this study, but instead we focus on legal rules and international trade with emphasis on human rights (and environmental) issues.

One view of the human rights and trade nexus is that in theory, namely in economic theory, trade liberalisation raises living standards measured in Gross National Product (GNP) in aggregate. More open trading countries experience higher rates of economic growth. This is illustrated for example by Sykes.[40] His analysis from existing sources suggests that wealthier states have superior human rights conditions. That effect is seen also in the Rule of Law Index produced by the World Justice Project[41] and I Human Freedom Index[42].

Sykes underlines there is no basis for supposing, either in theory or in practice, that a more open trading system does systematic damage to human rights.[43] The question is how to best address the tensions that arise between open trade and human rights. Economic theory admits that open trade may cause undesired effects in the form of negative externalities (pollution and natural resources overuse) and uneven distribution of income.

40 Alan O. Sykes, International Trade and Human Rights: An Economic Perspective, 2003 (John M. Olin Program in Law and Economics), p. 3.

41 World Justice Project, https://worldjusticeproject.org.

42 The Human Freedom Index, https://worldpopulationreview.com/country-rankings/freedom-index-by-country

43 Sykes, note 40, p. 9.

Howse illustrates well the complex relation between (liberal) trade and human rights and imminent problems like conflict diamonds and sex tourism (and trafficking).[44] A balanced analysis of benefits and costs is perhaps needed to explain and illustrate difficulties.[45] In general, the protection of human rights requires legislation and access to justice in addition to working national income distribution mechanisms to control the undesired effects of open trade.[46]

In general, there is conformity in thinking that international trade creates an incentive for state leaders to protect domestic human rights. Repression and arbitrary law enforcement undermine the business marketplace by creating uncertainty.[47] Despite that, we can see that human rights are not on the same level in trading countries, even when the states are bound by identical international rules and conventions protecting human rights.[48]

It is not within the remit of this study to analyse the reasons for observed differences, but it would be useful to reflect on why and to what extent human rights conditions differ on a global scale. Only then can one begin to consider the appropriate tools for implementing human rights. The proposed Directive fails to incorporate observed differences, trends, causes, or analysis of the legal, administrative or social measures to approach the problem.

One way to confront the anomaly of differing human rights conditions is to assess the real and implied costs and benefits of human rights. This is currently missing in the human rights paradigm. This discussion does not undermine the importance and value of human rights and human rights obligations, but creates an opportunity to analyse why some states fail to uphold human rights to a similar extent to others (as for example in EU). Analysis may give reasons for targeted policy measures.

Human rights costs and benefits may be pecuniary, social, and political. The political cost of securing human rights may be high for authoritarian states where leaders are destined to stay in power through undemocratic means.[49] Enforcement of human rights requires

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44 Robert Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' 13 Eur. Journ. Int'l Law (2002), 651–659, p. 651–652.

45 Sykes 2003, note 40, p. 10–11.

46 Sigrun Skogly, 'Global human rights obligations', in Mark Gibney et al. (eds.), The Routledge Handbook on Extraterritorial Human Rights Obligations (2022), p. 25, p. 31.

47 Olga Chytz. 'Dangerous liaisons: An endogenous model of international trade and human rights', 53 Journal of Peace Research (2016) 409 and literature there.

48 See for example Rule of Law Index . 2021 by The World Justice Project, p. 10. Obtainable from https://worldjusticeproject.org/sites/default/files/documents/Index-2021.pdf.

49 Chytz, note 47.

an effective and credible legal system with sanctions. For this reason, there is a need for a credible public power and well-functioning tax system.[50] Accountability and rule of law may emerge as a risk for authoritative regimes and autocrats. Domestic industry, political and business elites may use intermediary states to take advantage of the benefits of international trade without observance of human rights. The benefits of human rights generally accrue to the public and society as a whole, and it is not clear how this affects political leaders and social conditions in authoritarian states. Competitive and healthy markets benefit from human rights and vice a versa, but in states where markets are not competitive (perhaps even monopolised or state-owned), the picture may differ.

3.2 LDCs and the Rule of Law: Tanzania and the DRC

In order to reap the benefits of international trade, a country needs solid rule of law conditions. In this respect, LDCs are under-performing. Tanzania is included in international indexes comparing rule of law and human rights conditions and development. The Rule of Law Index lists Tanzania at 100th place globally, and theDRC at 137th place.[51] In this case, it is interesting to investigate how these two countries are seen in the areas of adherence to rule of law, fundamental rights, absence of corruption, regulatory enforcement, and civil and criminal justice. These aspects of social development affect the risks confronted by firms engaged in business and trade in foreign countries. Figures 1 and 2 show the scores given to Tanzania and the DRC in 2021 respectively.[52] Given the low ranking for both countries globally and regionally, one may see these countries as more problematic when it comes to the relationship between trade, human rights and the environment.

50 See discussion in Sykes, note 40.

51 World Justice Project, Rule of Law Index 2021, p. 10–11.

52 The scores range from 0 to 1, where 1 signifies the highest possible score and 0 signifies the lowest possible score.

Figure 3. Tanzania 2021, Rule of Law Index 2021, p. 161.

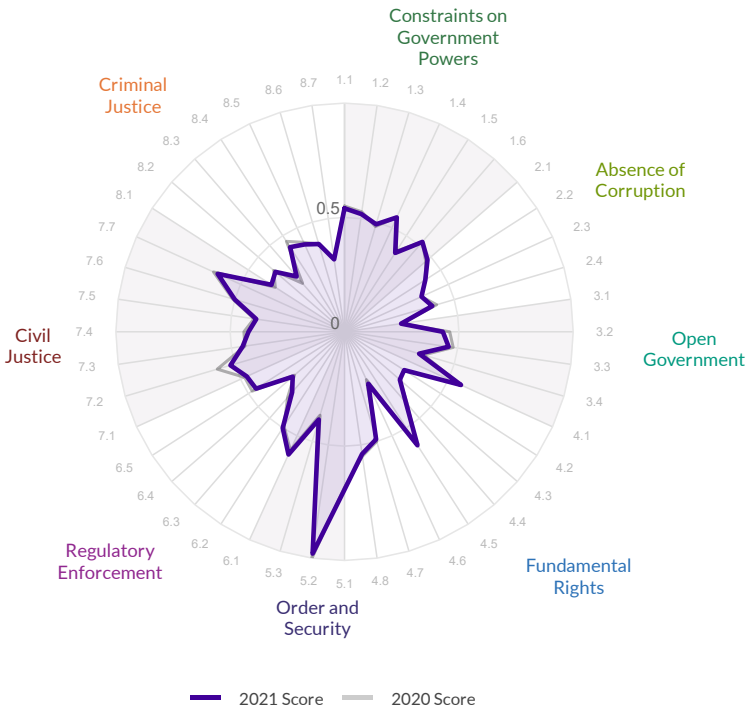
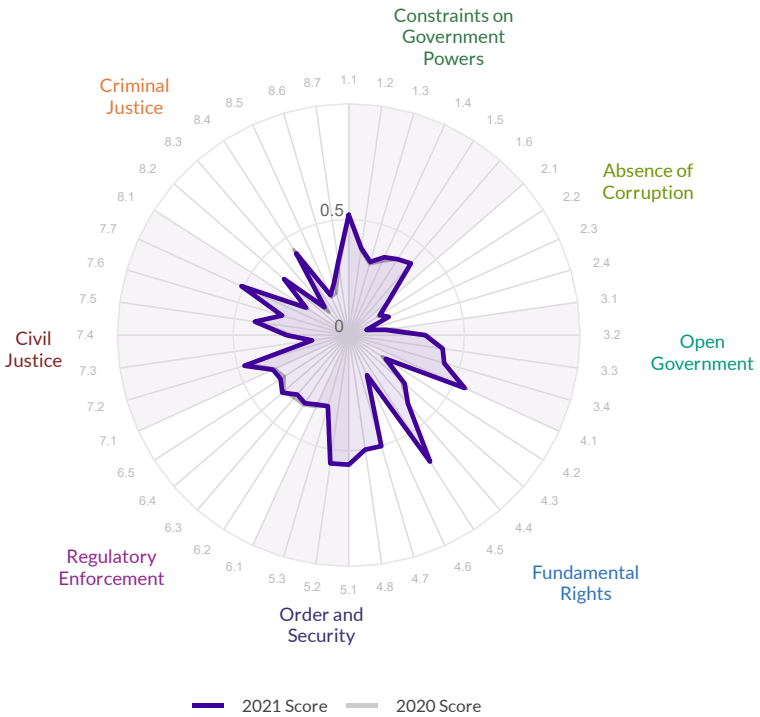


Figure 4. DRC 2021, Rule of Law Index 2021, p. 66.



Trade agreements between the EU and LDCs are discussed in the trade section of this report. In this instance, it is fitting to note that those agreements include human rights conditionality and even sanctions in limited occasions. Furthermore, they acknowledge that a political environment guaranteeing peace, security and stability, respect for human rights, democratic principles and the rule of law, and good governance is part of a long-term development strategy.[53] The responsibility for establishing such an environment rests primarily with the countries concerned.

3.3 Market Exit from LDCs

The academic response to the proposed Directive chiefly focuses on the anticipated effects on domestic corporate law.[54] Though, some points may be relevant to trade with LDCs suffering from rule of law problems. There is the threat that companies may have an incentive to exit markets where adverse environmental or human rights impacts may occur and the company does not believe it can fully control or oversee the problems.

The nature and scope of human rights violations and negative impacts is potentially wide. This creates additional problems for MNCs and may make exit from LDCs an obvious business decision if the market or supply are available elsewhere. Negative human rights impacts include, but are not limited to:

- Damage to public health through pollution, environmental accidents and health and safety failures
- Use of forced labour or child labour, or underpayment of workers
- Provision of unsafe or unhealthy working conditions
- Forced or involuntary displacement of communities, including indigenous communities
- Use of excessive force by security guards protecting assets
- Discrimination against employees, for example by race, gender or sexuality
- Depletion or contamination of water sources that local communities depend upon.[55]

53 2000/483/EC: Partnership agreement between the members of the ACP of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000. OJ L 317, 15.12.2000, p. 3–353, amended.

54 Nordic & European Company Law, LSN Research Paper Series No. 22-01, Response to the Proposal for a Directive on Corporate Sustainability, Due Diligence by Nordic and Baltic Company Law Scholars.

55 KPMG 2016. Addressing human rights in business. Executive perspectives. December 2016.

In preparation of the Directive proposal, the Commission reacted to market exit issues addressed by the Regulatory Scrutiny Board noticing the anticipated indirect and negative impacts of the directive on trade with LDCs.[56] The Commission replied that although new obligations are imposed on EU companies, the value chain and the fact that human rights violations occur mostly outside the EU means the proposed Directive has a strong external dimension and will inevitably affect companies and stakeholders in third countries. It could affect the economies of third countries more broadly.[57] The Commission noted that this requires coherence with EU trade and development policies and measures to mitigate potential negative impacts on EU partner countries, adding that it is currently difficult to assess the possible negative impacts of due diligence implementation on companies in third countries. The proposal contains safeguards with a view to mitigating such feasible negative impacts.

The Commission presumed there is a certain risk that suppliers in LDCs will prefer to sell to other regions where due diligence rules are not in place or less stringent.[58] However, for lowering that risk, there are some safeguards in the proposal requiring EU companies to engage locally and contribute to the costs of new production processes, infrastructures, and share burden with SMEs.

Paragraph 36 of the preamble of the proposal states that

> companies should prioritize engagement with business relationships in the value chain, instead of terminating the business relationship, as a last resort action after attempting at preventing and mitigating adverse potential impacts without success.

This is detailed in Article 7 (Preventing potential adverse impacts) paragraphs 5–6 and in Article 8 (Bringing actual adverse impacts to an end) paragraphs 6–7 of the proposal. The idea is similar to the due diligence guidance of the Organisation for Economic Co-operation and Development (OECD). Exiting business relationships or markets is the last option. These principles concern existing business relationships and do not confront

56 European Commission, SWD(2022) 39 final, Commission Staff Working Document. Follow-up to the second opinion of the Regulatory Scrutiny Board Accompanying the document Proposal for a Directive of European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 23.2.2022.

57 European Commission, note 56 p. 20–21.

58 European Commisson, note 56, p. 22.

the anomaly of companies perceiving business relationships or markets as too risky to enter or invest in the first place. In general, political risks and human rights conditions affect investment decisions[59].

Academic responses underline that it would be better for companies to do all they can to resolve issues, instead of leaving markets and letting the abuse continue out of sight or left to competitors from jurisdictions unrestrained by these considerations.

3.4 Analysing Current Regulation

Human rights are currently a well-developed area in international law and various indexes have been identified ranking states according to their human rights and freedom conditions.[60]. From the perspective of the proposed Directive, it must be noted that the proposal refers to the most universal UN declarations and international agreements and conventions, not to European, regional, or national human right laws.

The traditional principle in international law is that states are sovereign legal subjects and a state lawfully acts within its jurisdiction in its own territory. Action in another country requires permission as violation of another country's sovereignty is not permitted. This means that although human rights are universal, a state's human rights obligations extend only within its own territorial borders.[61] In addition, these human rights treaties often make reference to a state's 'territory' or to its exercise of 'jurisdiction' as a way of limiting

59 See for example Jiang, Martek (2021) and Blanton, Blanton 2006. For foreign direct investment (FDI), human rights conditions creates a dilemma because repression may create a stable, compliant, and relatively inexpensive host for FDI, while contending argument is that the protection of human rights reduces risk and contributes towards economic efficiency and effectiveness. Jiang, Weiling & Igor Martek, 'Political risk analysis of foreign direct investment into the energy sector of developing countries', … Journal of Cleaner Production (2021) 1. Blanton, Shannon Lindsey & Robert G. Blanton, 'Human Rights and Foreign Direct Investment A Two-Stage Analysis', 45 Business & Society (2016) 464.

60 For example, The Rule of Law Index, Freedom House, and UN Universal Human Rights Index. Nevertheless, human rights have a history with ideological and political conflicts. Antonio Cassese, International Law, 2nd ed. (OUP, 2005), p. 377–391, especially p. 380.

61 Mark Gibney, 'The historical development of extraterritorial obligations', Gibney et al., 13, p. 14; Ibrahim Kanalan, 'Extraterritorial State Obligations Beyond the Concept of Jurisdiction', 19 German Law Journal (2018) 43, p. 44.

the nature and scope of state obligations.[62] This principle means that the host state is responsible for protecting its citizens from negative human rights impacts stemming from trade with foreign MNCs[63].

However, U.N. treaty bodies have interpreted international human rights law more broadly. For example, the Committee on Economic, Social, and Cultural Rights has affirmed that the Convention has extraterritorial application.[64] Human rights lawyers have developed initiatives to create new ways to resolve negative human rights impacts[65] and renew the traditional interpretation of international law.[66]

Augenstein summarises international discussion on business-related obligations home state regulation into two questions. Firstly, if it is mandatory under international law for states to prevent business-related negative human rights impacts beyond their territory. Secondly, if states should use domestic law to regulate the extraterritorial human rights impacts of business enterprises.[67] Augenstein concludes that the increasing use of domestic regulation with extraterritorial effect goes hand-in-hand with the incremental recognition of international extraterritorial obligations to prevent and redress business-related negative human rights impacts.[68]

Current international human rights law does not, in general, permit the extension of the duties international law imposes on private parties. As Altwicker (2018) outlines, state-centred human rights law needs a 'paradigm shift' if international law is to impose direct

62 Monika Heupel, 'How do States Perceive Extraterritorial Human Rights Obligations? Insights from the Universal Periodic Review', 40 Human Rights Quarterly (2018) 521, p. 526–527.

63 Antal Berkes, 'Extraterritorial Responsibility of the Home States for MNCs Violations of Human Rights', in Yannick Radi (ed), Research Handbook on Human Rights and Investment (Routledge, 2018) 304.

64 Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties', 12 Chinese Journ. Int'l Law (2013) 639.

65 Maastricht principles (ETO) and Hague rules on business and human rights arbitration. Sigrun Skogly, 'Global human rights obligations' in Gamze Erdem Türkelli, Markus Krajewski and Wouter Vandenholep (eds.), The Routledge Handbook on Extraterritorial Human Rights Obligations (Routledge, 2022) 25, p. 26.

66 Tilmann Altwicker, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts', 29 European Journal of International Law (2018) 581.

67 Daniel Augenstein, 'Home-state regulation of corporations' in Gibney et al., note 61, 284, p. 284.

68 Idem, p. 295.

duties upon private actors concerning human rights.[69] The reason for this conclusion is that no international human rights instrument provides for a direct horizontal effect aiming to bind private parties.

Some court cases demonstrate the difficulties of imposing liability upon MNCs for negative human rights impacts in third countries. In 2013, the Versailles Court of Appeal dismissed the case against Veolia and Alstom raised by Association France-Palestine Solidarité "AFPS" and Organisation de Liberation de la Palestine "OLP"[70], stating that international law does not create direct legal obligations upon private companies because companies are not subjects of international law nor legal persons in international law. The case was raised against two French companies in contract with Israeli authorities for the construction of a tramway partially in unlawfully occupied territory and serving illegal settlements.

A similar example of a national court dismissing the extraterritorial corporate obligation is the U.S. Supreme Court decision in Jesner v. Arab Bank.[71] The case concerned a question of whether it was possible to plead a case under the Alien Tort Act (ATA) when one has suffered negative human rights impacts by private corporations affiliated in the US. In the dismissing the claim, the court noted that Courts must exercise "great caution" before recognising new forms of liability under the ATA. The primary conclusion was that foreign corporations may not be defendants in suits brought under the ATA which is strictly jurisdictional and does not provide or define a cause of action for international law violations.

In general, one problem in enforcing human rights obligations is the lack of legal remedies for injured parties, though there has been nitiatives to develop new working remedies.[72] The Hague Rules on Business and Human Rights Arbitration, launched on 12 December 2019, serve to provide a concrete framework for arbitrating business and human rights (BHR) disputes.[73] The Preamble of the Hague Rules states that arbitration under the Rules

69 Altwicker, note 66, p. 598.

70 Alston & Veolia v. AFPS & OLP, Cour d'Appel de Versailles, 3ème chambre, 22.3.2013, R.G. N° 11/05331.

71 Jesner v. Arab Bank, PLC, 584 U.S. (2018).

72 See for example Kayla Winarsky Green and Timothy McKenzie, February 4, 2020. 'Culturally Appropriate and Rights-Compatible: The Esprit De Corps Of the United Nations Guiding Principles on Business and Human Rights & the Hague Rules on Business and Human Rights Arbitration'

73 The Hague Rules are based on the Arbitration Rules of the United Nations Commission on International Trade Law (with new article 1, paragraph 4, as adopted in 2013) (the "UNCITRAL Rules"), with some modifications.

is not meant as a general substitute for State-based judicial or non-judicial mechanisms. In addition, the Human Right Council Resolution (A/HRC/RES/26/9) established an open-ended intergovernmental working group (OEIGWG)[74] under the mandate of elaborating the first-ever international treaty on this matter.

The proposed directive is an example of "home state" regulation (though European regulation), familiar in the discussion concerning the scope of international trade law, in which the home state imposes regulatory (due diligence) requirements that apply throughout the corporate group and the global value chain on corporate actors within its territorial jurisdiction.

The text of the proposed Directive does not give detailed guidance on the nature of risks that companies are exposed to in their value chains which can adversely impact human rights and the environment. Companies are expected to identify those in their due diligence procedure.

The wide scope of feasible violations in trading countries and diversity of relevant international agreements and conventions have demanding effects on due diligence. Risks may be avoided via companies' own actions. If a trading country has deficient rule of law, it creates a risk for corruptive practices and adverse human rights and environmental effects but it still may not deny the healthy value chain.

The logic of international human rights regulation has long been that agreements oblige states and that an individual has the opportunity to enforce one's rights in the state culpable of negligence. Human rights referred to in the Draft Directive are internationally recognised and are globally binding. As violations and negative impacts are seemingly common, one needs understanding on their reasons for developing effective regulation. If negative human rights impacts are due to lack of information, the problem can be confronted. Instead, if there are cultural, economic, political or social reasons for human rights problems, they may be more challenging to overcome and unintended effects may appear[75].

74 Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc

75 See for example discussion in Johanna Elbel, Setphan 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), p. 1–11. In the DRC, the national laws are difficult to implement and formalisation of small miners' work may lead to their displacement or division of terrain to "controlled islands" where rules are followed.

The value of the proposed Directive is found from the fact that, as Augenstein noted, the desire to impose international human rights obligations on corporations is found from the limited capacity of some states to regulate harmful activities caused by transnational companies in their jurisdiction. Inadequate ability may be a result of competition for access to markets or investment.[76]

However, a KPMG paper on corporations and human rights issues notes that there is significant potential for companies to have positive impacts on human rights, for example by contributing to local community development.[77] There is historical evidence from Finland that companies may take a useful role in the development of the community they operate in. During the time of Finnish industrialisation (late 19th century), companies developed local schools, church buildings, cultural life, and infrastructure.[78] The real but controversial role of industrial factories in their surrounding community was based on business-related power structures and compensating social services for workers. It could be a viable idea to determine how companies today can take a more positive and constructive role in their communities.

3.5 Conclusions

Non-enforcement of international human rights obligations (and international environmental laws) and even weak enforcement of national law due to insufficient rule of law makes the legislation such as the proposed Directive an alluring option to manage real human rights conditions in foreign countries in an indirect way.

In the international law forum, ongoing development towards more concrete responsibilities for MNCs in securing human rights in their value chains and supply management has emerged. The directive does not give guidance to how future development in international law would be anticipated.

International human rights law and policy has long relied on discussions, negotiations and reporting between countries. The main responsibilities and obligations have been carried by states. New regulation will open up a new operational environment to all parties.

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76 Augenstein, Daniel, 'Towards a New Legal Consensus on Business and Human Rights: A 10th Anniversary Essay' 40 Netherlands Quarterly of Human Rights' (2022) 35, p. 54.

77 KPMG, 'Addressing human rights in business. Excecutive perspectives', December 2016.

78 For example, Mirja Mäntylä, 'Suurtilanomistajat muokkaamassa ja kontrolloimassa työväen asumista kartanoyhteisössä ja esikaupungeissa' 2020, Koivuniemi, Jussi 'Tehtaan pillin tahdissa. Nokian tehdasyhdyskunnan sosiaalinen järjestys 1870–1939', Helsinki. 2000

Proposed regulation sets MNCs in a new environment, particularly due to the mitigation and liability rules. The Directive should take this into account and ensure that the new obligations are implemented uniformly within the EU.

The due diligence obligations and additional requirements and liabilities make it necessary for MNCs to take a new role working with foreign trading partners, foreign administration and local communities. In this new role, European companies may need additional support and guidance from the EU and home state authorities.

4 Environment and Climate Change

4.1 Introduction

The proposed Directive aspires to provide 'comprehensive mitigation processes for adverse human rights and environmental impacts in their value chains'. The choice of due diligence obligations as the legal tool for achieving this goal reflects key environmental legal principles, notably preventive action, precaution, 'no harm' and more. The proposed Directive is expected to assist businesses by harmonising the legal framework in Europe, as well as for reasons of civil liability. The latter is becoming ever more important as domestic and international courts are increasingly attributing liability for damages created not only by human rights violations but also for adverse environmental impacts. An obligation to conduct due diligence will help businesses to deliver more sustainable operations, but also to identify (and avoid) future financial, reputational and legal risks.

Like many Global South countries, the economies of the two selected case-studies – Tanzania and the DRC – rely on environmentally sensitive sectors, notably mining,[79] agriculture and manufacturing.[80] Much of the activity in these sectors is undertaken by MNCs (not unlike those that will be covered by the proposed Directive), or their value chains partners. Most of the foreign companies that are currently operating in these two states are from China. The impact of the proposed Directive will nevertheless be clear if EU industries will enter these markets in greater numbers. Furthermore, the lessons discussed below are also applicable for other Global South countries, in which EU companies are operating in greater numbers.

The proposed Directive represents a positive step vis-à-vis the efforts to improve environmental protection. There are, nevertheless, several issues that should be flagged and addressed. Some of the issues discussed below are also relevant for this report's human rights section (e.g. public participation, post-disengagement responsibilities), and for the purpose of avoiding repetition are discussed in this chapter alone.

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79 Mining-related exports represent more than 95 percent of DRC's goods exports. See IMF, Country Report No 22/210 https://www.imf.org/en/Publications/CR/Issues/2022/07/05/Democratic-Republic-of-the-Congo-Staff-Report-for-the-2022-Article-IV-Consultation-Second-520400

80 See Tanzaniainvest, 'Tanzania Economy' https://www.tanzaniainvest.com/economy#:~:text=Tanzania%20Key%20Economic%20Sectors&text=Notable%20sectors%20of%20the%20Tanzanian,construction%2C%20agriculture%2C%20and%20manufacturing.

4.2 Public Engagement and Participation

The importance of public participation is enshrined in key international documents such as the Rio Declaration,[81] as well as in regional treaties.[82] The reliance on public participation is also widespread in future-facing risk-identifying legal mechanisms, notably impact assessment studies. A statement made by a group of NGOs criticises the proposed Directive for not granting sufficient importance to public engagement and participation in the prescribed due diligence process.[83] These organisations claim that engagement with stakeholders is necessary, as it will inform the due diligence process and ensure a better identification of local risks.[84]

The proposed Directive does establish certain mechanisms that facilitate engagement with the wider public. To begin with, Article 6(4) instructs that '[c]ompanies shall, where relevant, also carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts.' A roughly similar instruction is found in Article 8(3)(b) of the proposed Directive.[85] This instruction has been criticised as lacking in ambition, with authors pointing out that consultations are required only 'where relevant' and not as a default option.[86] On the face of it, such language leaves the decision of whether to consult with local communities at the hands of a company.[87]

Also of relevance, Article 9 establishes a complaint mechanism that allows members of the public to directly engage with a company not only when actual damage has materialised, but also, importantly, when future damage is expected. The existence of such a mechanism is important from the perspective of public engagement and access to remedy: it creates a direct route to engagement with the company and requires the company to actively interact with the public. However, a complaint mechanism cannot

81 Principle 10, Rio Declaration.

82 See for example the Aarhus Convention and the Escazú Convention.

83 Civil Society Statement on the proposed EU Corporate Sustainability Due Diligence Directive (May 2022) https://corporatejustice.org/wp-content/uploads/2022/05/CSO_statement_CSDDD_EN.pdf

84 Civil Society Statement, Ibidem.

85 Article 8(3)(b) of the proposed Directive instructs: 'Where relevant, the corrective action plan shall be developed in consultation with stakeholders'. A proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (2022).

86 Christopher Patz, 'The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment', 7 Business and Human Rights Journal (2022) 291.

87 Patz, Ibidem.

replace an early, preventive, consultative process at the time which the due diligence process is conducted. Furthermore, such a complaint mechanism misses important components that are accepted as covered by the principle of public participation, notably access to information.[88]

Similarly, Article 7(2)(a) instructs that once a potential harm has been identified, an action plan shall be prepared for the purpose of preventing it from occurring. This Article instructs that this preventive action plan 'shall be developed in consultation with potentially affected stakeholders', ensuring mandatory public participation at this stage. This instruction is important as it ensures a mandatory process that incorporates the views of those most affected by potential environmental risks. Yet, as with Article 9, this mechanism cannot be regarded as filling the gap created by Article 6(4) vis-à-vis public participation in the early stage of risk identification.

The lack of strong instruction on public participation in the due diligence process is problematic from the context of LDCs. Citizens of LDCs are well-positioned to contribute to a meaningful due diligence process: they are well-informed about potential environmental impacts in their own lands, and are much more likely to be affected by these harms. LDCs are also less likely to offer alternative institutions or legal routes that mandate effective public participation (see by comparison the routes available

88 As described in Principle 10 of the Rio Declaration, and implemented in treaties such as the Aarhus Convention and the Escazú Convention.

to European citizens, notably via the Aarhus Convention and the EU EIA Directive).[89] Finally, a meaningful public participation process is also sensible from a company's own commercial perspective: it will assist companies in the identification of potential disputes with local communities, and will allow them to avoid future legal and reputational risks.

Finally, the benefits of keeping the words 'where relevant' in the text are marginal and even questionable. If planned properly, the process of public consultation does not impose significant costs or time constraints. It is also hard to think of a case in which it is not relevant to ask local communities for their views and perspectives regarding the industrial operation of MNCs and their business partners, in their lands. For all of the above, removing the words 'where relevant' from the text of Article 6(4) of the proposed Directive's text seems desirable.

89 It is important to nevertheless stress that many of these routes are in fact available in LDCs and a further case-by-case examination will provide more accurate insights. For example, where effective environmental impact assessment legislation exists, it could be that relevant groups did have the opportunity to inform decision makers and provide their input as part of this process, at the project authorisation phase. In Tanzania, the Environment Management Act (2004) includes a detailed instruction regarding public participation in the preparation of environmental impact assessments (Environment Management Act (2004), Article 17). Also in the DRC, the relevant legislation is instructing the preparation of environmental and social impact assessments (Article 21, Loi No 11/009) and requiring that this process will incorporate effective public participation (See instruction in title 5, Decree 14/019). Funders as well may require the preparation of environmental impact assessment studies for international projects in the Global South (See for example the International Finance Corporation's Performance Standards on Environmental and Social Sustainability, performance standard 1; The Adaptation Fund Environmental and Social Policy, para 30; The U.S. International Development Finance Corporation, Environmental and Social Policy Procedure, and more) making these instructions even more widespread. At the same time, it should be noted that a significant number of states are yet to adopt suitable regulation. According to some, 'Only eight African countries had established legal requirements for SEA or adopted SEA guidelines over the past two decades'. See in Ghislain Mwamba Tshibangu, 'An Analysis of Strategic Environmental Assessment Legislation and Regulations in African Countries' 20 Journal of Environmental Assessment Policy and Management. (2018)… With respect to the mining sector, which is of relevance to both the DRC and Tanzania, it was stated: 'Unfortunately, some developing countries have been much slower in accepting community consultation and engagement principles, and even where this practice has become enshrined in national laws, proper implementation is often problematic.' Suzi Malan, 'How to advance sustainable mining' (2021) IISD Brief 26, 7. Relying on the provision of adequate public participation through this process alone, therefore, could be overreaching.

4.3 The Environmental Scope of the Directive

Article 6 requires that the due diligence process will cover 'adverse environmental impacts', where Article 3 defines this term as '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'.[90] The Annex itself provides a surprisingly short list of environmental conventions (especially when compared with the much longer human rights list included in the Directive). It includes references to specific parts from only seven conventions:

- The Convention on Biological Diversity (CBD)
- The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- The Minamata Convention on Mercury
- The Persistent Organic Pollutant (POPs) Convention
- The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
- The Vienna Convention for the Protection of the Ozone Layer
- The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

Whilst this list is important, it is also very far from being comprehensive, especially as the field of environmental law is extremely prolific – according to one database, it includes no less than 1300 multilateral treaties[91] - and many important elements have been left uncovered. The most important omission in this list is climate change, a topic that is regulated separately under Article 15 of the proposed Directive.

A comparative examination of other due diligence regulations reveals mixed results. The French Corporate Duty of Vigilance Law presents a wider model: it does not include a list of treaties and the definition of 'environmental impact' is not limited in any specific way. On the other hand, the German Supply Chain Act includes a list that is almost identical to the EU's proposed Directive, and most likely is the model on which the Directive's environmental scope is based. However, the German list is even more limited than that of the proposed Directive, and does not include important references to biodiversity treaties such as CITES or CBD.

90 See also para 25 to the proposed Directive's preamble, note 85.

91 See IEA Database, University of Oregon, https://iea.uoregon.edu/ .

Importantly, a significant addition that expands the environmental scope of the proposed Directive is found in Part I of the Annex, in which human rights violations are listed. Paragraph 18 of Part I includes a reference to:

> Violation of the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources, that
>
> (a) impairs the natural bases for the preservation and production of food or
>
> (b) denies a person access to safe and clean drinking water or
>
> (c) makes it difficult for a person to access sanitary facilities or destroys them or
>
> (d) harms the health, safety, the normal use of property or land or the normal conduct of economic activity of a person or
>
> (e) affects ecological integrity, such as deforestation

Similarly, the above-mentioned Annex list, this paragraph is also based on the German Supply Chain Act. Here, the proposed Directive also expands on the German version by adding the words 'any measurable environmental degradation' to this provision's chapeau (the German Act is limited to a specific list of harms), and by adding item (e), which very widely addresses harms to 'ecological integrity'. These additions are significant and could in theory cover almost any environmental damage, not unlike the entirely unrestricted French version.

From an environmental perspective, this expansion is useful, especially as it is accompanied by the civil liability mechanism available under the proposed Directive. On the other hand, from the perspective of business, this very wide text could be regarded as too vague, businesses would doubtlessly appreciate more specific instructions on what kind of environmental harms they should address in their due diligence processes, as is the case in other comparable EU legislation.[92]

The Council's later draft both extends and cuts the environmental scope of the proposed Directive. On the one hand, the Council's draft significantly limits the environmental scope of the all-inclusive environmental Paragraph 18 of the Annex's human rights list.

92 For example, see the specific list of environmental factors in the EU Environmental Impact Assessment Directive.

Most importantly, the Council's draft entirely removes the open-natured Paragraph 18(e), and limits the text of Paragraph 18's chapeau. This change signifies a shift from the open French model, back to the German closed-list approach, and is unlikely to be welcomed by environmental groups and victims of environmental harms. On the other hand, perhaps to sweeten the pill, the Council's draft expands the list of treaties included in the original proposal, and adds important references to the Convention Concerning the Protection of the World Cultural and Natural Heritage, the Ramsar Convention, the International Convention for the Prevention of Pollution from Ships (MARPOL), and the United Nations Convention on the Law of the Sea (UNCLOS).

The environmental scope of the proposed Directive is of relevance for the selected case studies. As explained above, the Directive's climate change instructions are less likely to affect Global South nations, notably due to their limited scope and ambition. The DRC and Tanzania are Parties to six of the seven conventions that are mentioned in the proposed Directive's Annex (the exception being the Minamata Convention). As stated above, the all-inclusive environmental item on the Annex's human rights list is providing even wider environmental coverage. The most relevant question in this context is which version will be adopted, the 'closed list' version presented by the Council, or the less restrictive version that appears in the Directive's proposal and can, in theory, address almost every type of environmental harm

4.4 Article 15: Climate Change and the 1.5 °C Target

The proposed Directive addresses climate change under a unique heading - Article 15 - and subjects this environmental harm to a separate set of rules. To begin with, Article 15 covers only the companies that are referred to in Article 2(1)(a) and 2(2)(a).[93] This coverage means that business partners and supply chains are exempted from the scope of this Article, which in turn reduces the relevance of Article 15 for most LDCs.

Furthermore, the proposed Directive's instructions on civil liability also do not address Article 15 obligations. On the face of it, this omission reduces a company's exposure to climate litigation based on the instructions of this Directive. However, one should note

93 Article 2(1)(a) refers to companies with more than 500 employees and turnover of more than EUR 150 million, and Article 2(2)(a) refers to third country companies with turnover of more than EUR 150 million.

that climate change could be interpreted as included under the very wide Paragraph 18 of the Annex's Part I (human rights), as discussed above.[94] Whether this paragraph's inclusive language will survive the Council's intention to restrict it or not remains to be seen.

The limited scope of the instructions on climate change is understandable, given the extra-jurisdictional nature of the proposed Directive (see more on this at the introduction to this report) and the sensitive nature of international climate change law and politics. Notably, the imposition of climate-related limitations by the EU on industries operating in the Global South may contradict with the nature of the Paris Agreement and key principles enshrined by the United Nations Framework Convention on Climate Change (UNFCCC), such as sovereignty and common but differentiated responsibilities. It could also be understood as hypocritical, given that the EU's own emissions far exceeds those of most LDCs.

The obligations imposed under Article 15 are indeed far weaker than those imposed under the proposed Directive's main obligations. These include instructions to prepare plans that will ensure compatibility with the Paris Agreement's 1.5 °C target, including the setting of emission reductions objectives (where climate change has been identified as a 'principal risk').

The instruction that an individual company's plans ensure compatibility with the global Paris Agreement's 1.5 °C target is extremely vague, and to a certain extent also inaccurate.[95] For example, it is not clear whether a company will be able to satisfy this obligation by simply complying with their host states' domestic laws: the Paris Agreement mitigation goals are based on the Nationally Determined Contribution (NDC) mechanism, which is in turn based on each state's self-determined targets and goals. Where a state's domestic laws are aligned with its NDCs, it is therefore hard to claim that the operation of its subjects is not 'in line with the Paris Agreement', even in the case of highly polluting industries. This is not to argue that the obligation to make plans is empty or insignificant: these plans can include, for example, targeted elements that could be actively promoted by individual companies (for example, transfer of technology, as discussed below in this

94 Greenhouse gas emissions can certainly fall under the definition of 'harmful emissions' that affect 'ecological integrity'.

95 The Paris Agreement's target is to hold 'the increase in the global average temperature to well below 2 °C above preindustrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels' (see Article 2 of the Paris Agreement). The instruction, as confirmed recently in the COP 27 Sharm el-Sheikh Implementation Plan, is therefore only to pursue efforts to achieve the 1.5 °C target. This nuance is adding an additional layer of vagueness as for what is it that companies are asked to do in practice, and what the obligation to 'pursue efforts' means in the context of individual actors.

report). The drafters of the proposed directive will do well to provide more clarification regarding this requirement, and, importantly, focus on the positive role that MNCs can play with respect to climate change.

4.5 Obligation to Mitigate Environmental Damages

Article 8 of the proposed Directive instructs that companies must take 'appropriate measures' to bring any identified adverse effect to an end. Paragraph 39 of the Directive's preamble explains in this respect that '[t]hey should neutralise the adverse impact or minimise its extent […]' and that their action must be 'be proportionate to the significance and scale of the adverse impact and to the contribution of the company's conduct to the adverse impact.'[96]

The proposed Directive goes even further to instruct that Member States will have to 'lay down rules governing the civil liability of companies for damages arising due to its [their] failure to comply with the due diligence process' as well as 'for damages if they failed to comply with the obligations to prevent and mitigate potential adverse impacts or to bring actual impacts to an end and minimise their extent […]'. Importantly, Paragraph 56 of the proposed Directive's preamble includes, under the cover of this mechanism, not only damage identified in due diligence, but also damage that 'should have been' identified. This text opens a very wide window for claimants' reliance on the proposed Directive's liability rules for almost any type of environmental damage. After all, it is hard to think of entirely unexpected significant environmental damage, such that could not have been predicted or prevented when relying on meaningful due diligence. Such is the nature of hindsight analyses. This arrangement will de facto impose a very high standard of care and operation on regulated companies and their business partners, in the EU and abroad.

While desirable from an environmental point of view, the extra-jurisdictional nature of this legislation may be regarded as imposing a heavy burden on European companies (who will have to monitor value-chain partners' compliance abroad) and, to a certain extent, also an infringement of other states' sovereignty (which is the case with any extra-jurisdictional legislation).

The EU Council has noticed these issues. In its own later draft, the Council decided to remove the words 'should have been identified' from the text, and further limited the attached civil liability mechanism by adding the condition 'that the company intentionally

96 A proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (2022), para 39.

or negligently failed to prevent and mitigate potential adverse impacts or to bring actual impacts to an end and minimise their extent and as a result of such a failure a damage was caused to the natural or legal person.'[97] At first glance, the addition of the intent and negligence condition could cause difficulties for prospective claimants, especially where defendants could demonstrate the imposition of contractual assurances and the appointment of independent third party verification bodies. On the other hand, it could be argued that it is difficult to think of an adverse environmental (or human rights) impact that did not involve at least negligence. The impact of these amendments, therefore, may be less problematic than they appear to be. Much is then depending on the manner in which courts will address the intent and negligence condition.

4.6 Assistance for LDC-Based Companies

The proposed Directive instructs that once the due diligence process has identified risks, companies are obliged to mitigate and prevent these risks. Where risks are created by supply chain partners, EU companies are asked to ensure the mitigation and prevention of risks by obtaining 'contractual assurances from a direct partner'. Importantly, companies are further asked to support their SMEs partners' efforts to implement mitigation and prevention:

> companies should also make investments which aim to prevent adverse impacts, provide targeted and proportionate support for an SME with which they have an established business relationship such as financing, for example, through direct financing, low-interest loans, guarantees of continued sourcing, and assistance in securing financing, to help implement the code of conduct or prevention action plan, or technical guidance such as in the form of training, management systems upgrading, and collaborate with other companies.[98]

This instruction is important in the case of LDC-based partners as it implies some assistance with their efforts to adopt greener operation and production methods. However, the actual meaning of the term 'proportionate support' remains vague, where the scope of other terms that are used as examples (e.g. low-interest loans, guarantees of continued sourcing, or assistance in securing financing) is equally vague. In other words, the scope of the obligation to support LDC-based business partners is not clear, and it

97 Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937- General Approach', 15024/1/22 REV 1 (2022), para 56.

98 A proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (2022), para 34.

could be that these will be left to their own devices when it comes to the implementation of these measures. The authors of the Council's later draft have somewhat acknowledged this problem and moved the list of examples from the preamble to the Articles 7 and 8 of the proposed Directive. Their acknowledgement, however, does not clarify what general instructions such as 'direct financing' 'assistance in securing financing' and 'guidance' will mean in practical terms.

This last point is problematic, considering the severe consequences that LDC-based business partners will have to endure in the case of failure to prevent or mitigate environmental harms. Where LDC-based business partners are unable to ensure environmental mitigation and prevention, EU companies are asked to suspend and even terminate their business relationships with them. Threatening such severe outcomes on the one hand, while offering only a vague promise of support on the other, does not seem fair, and neither is it productive when ensuring compliance with the Directive's high environmental standards. The drafters of the Directive would do well to offer more clarification on what kind of support business partners are expected to receive, especially in the Global South.

4.6.1 Reliance on Contractual Assurances

As stated above, EU companies are asked to ensure the mitigation and prevention of risks by obtaining 'contractual assurances from a direct partner'. Gabrielle Holly et al have commented that reliance on contractual assurances may lead to 'checkbox compliance' that, once completed, will essentially transfer all responsibilities to a company's business partner.[99] This is relevant from the perspective of this study; if these contractual assurances are regarded as sufficient for the purpose of preventing legal liability, victims of environmental harms may not be able to rely on the envisioned civil liability regime and secure sufficient access to remedies and justice.

However, this understanding could be challenged. To begin with, where contractual obligations to respect human rights and environmental standards are in place, and where an EU company has hired 'suitable industry initiatives or independent third-party verification' to ensure compliance, it could indeed be argued that reasonable steps have been taken, enough distance has been created, and the EU company should no longer

99 Gabrielle Holly et al, Legislating for impact: Analysis of the proposed EU corporate sustainability due diligence directive (2022) at https://www.humanrights.dk/publications/legislating-impact-analysis-proposed-eu-corporate-sustainability-due-diligence.

be regarded as responsible. The alternative of demanding full knowledge and monitoring of all supply chain business partner operations seems very demanding in an ever more globalised business environment.

The reader should also note that the distance created by 'contractual assurances' could be significantly reduced once a complaint has been made through the Directive's complaint procedure (Article 9), an act that establishes an immediate obligation to investigate, and, where justified, also to prevent, and mitigate the harm.[100]

Furthermore, Article 7 addresses not only prevention, but also mitigation. Contractual assurances are regarded as a 'prevention' measure. But, where prevention 'is not possible', there is a separate and independent obligation to mitigate.[101] In other words, even where contractual assurances (i.e. prevention) are correctly and legally in place, where these are not respected or deemed inadequate and a certain damage has been created, the situation should be regarded as 'prevention is not possible' and the obligation to mitigate arises. The liability vis-à-vis the lack of sufficient mitigation activities is therefore maintained, and an EU company cannot simply wash its hands of an environmental damage once the 'box ticking' has been completed.

4.6.2 Responsibility Following Disengagement

The proposed Directive instructs that where adverse impacts are not remedied by a regulated company's supply chain partners, then the regulated company should sever their business relations with these partners, either temporarily or permanently. In a statement posted by a number of NGOs, the signatories point to the lack of clarity regarding the post-disengagement responsibilities of a regulated company. These NGOs

100 Article 9 states that 'where the complaint is well-founded, the adverse impact that is the subject matter of the complaint is deemed to be identified within the meaning of Article 6.' Article 8 adds that 'Member States shall ensure that companies take appropriate measures to bring actual adverse impacts that have been, or should have been, identified pursuant to Article 6 to an end'.

101 Article 7 explicitly separates between the obligations to prevent and mitigate: 'Member States shall ensure that companies take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts […].' This Article also instructs that 'Companies shall be required to take the following actions, where relevant:' offering the option of sub-section (b) (seek contractual assurances) or, alternatively, sub-section (e) (mitigate). In other words, separating these two routes of action, to be applied 'where relevant' under different, independent scenarios.

demand 'responsible disengagement by clarifying that companies remain responsible for un-remediated impacts as well as addressing new and additional impacts arising from the disengagement.'[102]

These claims are undoubtedly important and deserve more attention. At the same time, the civil liability mechanism vis-à-vis failure to comply with the proposed obligations to prevent and mitigate damage (Article 22 of the proposed Directive) applies independently, and any environmental harm left behind could be covered via this route. The civil liability option is far from perfect on its own,[103] but it does add an additional level of responsibility towards damage created, even following disengagement.

The Council's draft softens the obligation to sever ties where adverse impacts are not remedied. In a nutshell, the new draft adds exceptions to this obligation, allowing companies to maintain ties where (1) termination would result in a more severe outcome than the maintenance of business relations, and (2) the business partner is providing an essential product, raw material, or a service, that cannot be sourced elsewhere, and 'termination would cause substantial prejudice to the company'.[104] This revised text is understandable from an economic and commercial point of view. However, it is potentially problematic from an environmental point of view: option 1 is understandable in cases where sufficient evidence has been produced, but it could also be an opening for an exploitative, overly wide self-interpretation of hypothetical future outcomes that may (or may not) materialise in the case of termination. Option 2 is equally problematic as it potentially frustrates the Directive's objective in those cases where the sourcing of rare materials is available only via limited suppliers. For example, cobalt mining has been criticised by organisations such as Amnesty International as involving child labour and exploitation,[105] and by others for causing environmental harms.[106] Most of the global mining of cobalt is done in the DRC, allowing companies to ignore these violations by arguing that there are no viable alternatives.

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102 Civil Society Statement, note 83.

103 See for example comments regarding the burden of proof in the introduction to this report.

104 Article 7(7)(b) of the Council's draft, note 97.

105 Amnesty International, 'Is my phone powered by child labour?' https://www.amnesty.org/en/latest/campaigns/2016/06/drc-cobalt-child-labour/#:~:text=Given%20that%20more%20than%20half,our%20phones%20contain%20child%20labour.

106 Shahjadi Hisan Farjana et al. 'Life cycle assessment of cobalt extraction process' 18 Journal Sustainable Mining (2019)150; Abbi Buxton, 'Mining cobalt better' (2021), at https://www.iied.org/mining-cobalt-better.

The Council's draft is mindful of these difficulties and requires companies in these situations to 'monitor the potential adverse impact, periodically reassess its decision not to terminate the business relationship and seek alternative business relationships.'[107] This monitoring and reassessment requirement is important and adds more balance to this text, albeit it is somewhat vague. It should, at the very least, define the term 'periodically' and explain whether the obligation is only to 'report', i.e. entirely based on self-assessment, or whether the supervisory authority will investigate, question, and even overrule a company's decision to maintain business relations.

4.7 Conclusions

As stated in the introduction to this chapter, the adoption of the proposed directive is a positive step for the protection of the environment. It will force MNCs to identify risks to the environment in advance. It will further prompt them to take preventive steps and mitigate damage where necessary. The above analysis suggests that, with respect to environmental protection, the drafts presented by Commission and the Council are by and large well balanced. This proposed legislation is expected to be beneficial for communities in LDCs. Importantly, it stresses the clear responsibility and liability of MNCs towards the environmental harms that they create in the Global South. It also grants LDCs communities important tools, whether in the preventive stage (e.g. public participation in and active contribution to the due diligence process) or at the post-injury stage (e.g. civil liability and grievance mechanisms).

At the same time, and as clarified in the report itself, these proposals require some refinement and clarification. Importantly, potential barriers to public engagement and participation should be removed. This is crucial for any society, but especially for LDCs where alternative public engagement routes are not always available. It will further be useful to provide more clarity vis-à-vis the instructions on climate change, including targeted and detailed guidelines on implementation. Affected LDC-based companies will have to be better supported, and the obligation to provide such support should be clear and effective.

107 Council of the European Union, General Approach' note 97, Article 7(7).

5 Labour Rights and Standards

5.1 Introduction

This part of the report will address the Directive's obligations for business insofar as they impact upon labour standards with a particular focus on modern slavery. It will then hone in on two particular African states, Tanzania and the DRC. By doing so, the report seeks to analyse the impact of the Directive in light of the specific challenges faced by these nations, and business in these regions, by virtue of their LDC status.

As mentioned in the introduction to this report, the early motivation for adopting sustainability due diligence legal instruments, and the urgency of raising labour standards across borders more specifically, has been heightened by disasters such as the collapse of Rana Plaza in Dhaka, Bangladesh. The 2013 disaster saw the collapse of a building housing several garment factories. This resulted in the loss of 1132 workers' lives and injured in excess of 2500.[108] Five months preceding this tragedy, a factory fire on the outskirts of Dhaka caused the loss of 112 workers' lives. The factories were supplying major international brands such as Primark and Matalan.[109] The aftermath of the disasters unearthed the hazardous working conditions to which workers were exposed. The failure to oversee safe working practices proved to be fatal, and thus the overseas practices of major international brands was placed firmly in the spotlight with a renewed sense of urgency. Other high-profile incidents spotlighting egregious labour conditions are the plight of workers exposed to slavery conditions in Thai fishing boats. The victims were chiefly migrants from surrounding states such as Burma and Malaysia. After being trafficked from their home states, the migrants were sold to boat owners and were forced to endure both physical and mental abuse. The fish products caught on the slave boats were supplied to American pet food brands.[110]

The reporting of the tragedies and the lack of enforceable labour standards has ignited a global debate and has thus seen the inclusion of the goal of advancing social standards in the UN 2030 agenda. Specifically, the quest to 'balance social, economic

108 See https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm.

109 See https://www.theguardian.com/world/2013/jun/23/rana-plaza-factory-disaster-bangladesh-primark.

110 K. Fischman, 'Adrift in the Sea: The Impact of the Business Supply Chain Transparency on Trafficking and Slavery Act of 2015 on Forced Labor in the Thai Fishing Industry', 24 Indiana Journal of Global Legal Studies (2017) 227.

and environmental sustainability'.[111] Target goal 8.7 of the SDGs seeks to eradicate forced labour, modern slavery and human trafficking, and by 2025 aims to end 'child labour in all its forms'.[112]

Whilst the report specifically targets modern slavery and forced labour, there is academic debate surrounding the definition of modern slavery and forced labour. A camp of scholars favour the first international definition of slavery drafted by the League of Nations, as set out in the 1926 Slavery Convention:

'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.[113] The League favoured a narrow definition of slavery and made slavery conditional upon ownership, in reflection of the purchase and ownership of slaves in the trans-Atlantic slave trade. As slave ownership is no longer legal, scholars favouring the 1926 definition assert that the question is one of control, as ownership is synonymous with control.[114] Thus, as long as there is control and possession, the 1926 definition will be satisfied.

The 1930 International Labour Organization (ILO) definition of forced labour[115] defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[116]
The definition surfaced at the time owing to the narrow 1926 definition. The wider interpretation was favoured by the UN Working Group on Contemporary Forms of Slavery, which advocated widening the definition of slavery by including forced labour practices such as serfdom, exploitation of migrant workers, trafficking, forced marriage and child labour.

111 See https://www.undp.org/sustainable-development-goals?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=EAIaIQobChMI4ovynPXu-gIV0u3tCh16HA5OEAAYBCAAEgJhVfD_BwE.

112 See https://www.unodc.org/roseap/en/sustainable-development-goals.html.

113 See https://www.ohchr.org/en/instruments-mechanisms/instruments/slavery-convention.

114 J. Allain, 'The Definition of Slavery in International Law', 52 Howard Law Journal (2009) 239.

115 The 1930 Convention on Forced Labour.

116 Article 2.

Putting aside the debate over the definition, the Annex to the Directive incorporates reference to "all forms of slavery and slave-trade, including practices akin to slavery, serfdom or other forms of domination or oppression in the workplace, such as extreme economic or sexual exploitation".[117]

The upshot of this is that slavery in the narrow sense is put aside for the purposes of the Directive. The duty of due diligence extends to practices akin to slavery, such as exploitative working practices. This is to be lauded, given disasters such as Rana Plaza (detailed above) did not, on the face of it, constitute slavery. However, the building collapse is evident of exploitative and unsafe working conditions. Although this aspect of the report delves into the particular problem of modern slavery across the African region owing to the high prevalence of the practice, and in Tanzania and the DRC in particular, the Directive intends to capture exploitative working conditions as well as modern slavery for both adult and child victims. The distinction is drawn for the purposes of this report to allow for a more in-depth understanding of modern slavery by consideration of its definition.

5.2 Challenges for African Business

There are challenges facing African corporations. Research highlights the particular challenges faced by MNCs in developing nations. It describes Corporate Social Responsibility (CSR) as Euro-centric and western-style CSR[118] which adversely impacts the competitive edge of developing state MNCs owing to their later immersion into CSR practices. With reference to China, the researchers highlight the shift from the defensiveness of Chinese corporations over CSR practices pioneered by corporations from economically advanced nations to embracing CSR practices. This is motivated by the recognition that adherence and compliance open up access to lucrative markets and instils them with a competitive edge over non-compliant and other competing businesses.

The imbalance of power, however, can promote the practice of engaging in deception. The scholars highlight awareness of such practices of those from advanced economies. This is problematic given the findings from a World Bank survey[119], which found in excess of 80% of the 107 MNCs that were surveyed were concerned with the CSR practices of

117 See https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf at 119.

118 Gugler, P., Shi, J., 'Corporate Social Responsibility for Developing Country Multinational Corporations: Lost War in Pertaining Global Competitiveness?', 87 Journal of Business Ethics (2009) 3.

119 Ibid, 8.

their business suppliers prior to engaging in business relations. The said research is based on MNCs in developing economies. This is less relevant for the current report, given the expectation that a very small number of MNCs, if any, will be caught by the due diligence obligations targeted at third country corporations. However, the findings are nevertheless relevant when viewed from the lens of the businesses supplying or subcontracting to European corporation supply chains. Any contractual obligation upon such businesses reflecting European due diligence obligations will entail power imbalances which may lead to potentially deceptive practices which could be overlooked by the focal company. This predicament extends to intermediaries acting in between the focal company and the supplier company. The above-mentioned study calls for solutions to achieve levelling up for developing state corporations in CSR campaigns, which is justified given their later succession to the CSR agenda.

It could well be that the solution to this lies in the already raised notion of support for SMEs. The obligations in the Directive do not directly impact the SME community. However, it is expected that SMEs will be indirectly impacted by the 'cascading effect' and spill over of MNC due diligence obligations. How potent the cascading effect will be is dependent on the policing and enforcement aspects of the Draft Directive. If corporations are subject to penalties and reputational damage, then this will impact SMEs. The question then remains, whether MNCs will expect SMEs to meet higher standards as a direct result of their due diligence obligations. The support should be extended and targeted to suppliers in developing regions in light of their limited to negligible exposure to CSR practices.

The above analysis lays out the potential impediments for African corporations which will impact due diligence efforts of corporations under the Directive. It is crucial for these aspects to be considered in detail, owing to the particular problem of modern slavery and forced labour in the continent. The region reportedly has the highest rate of prevalence of modern slavery and forced labour, with 7.6 people living in modern slavery for every thousand people.[120] In 2016, the region had the world's highest number of child labourers.[121]

120 Global Slavery Index, 2016.

121 African Union, Draft Ten Year Action Plan on Eradication of Child Labour, Forced Labour, Human Trafficking and Modern Slavery in Africa (2020-2030).

5.2.1 Tanzania

Tanzania is ranked as a low-middle income economy by the World Bank and thus holds LDC status.[122] Its principal industries are agricultural exports, specifically exports of gold, fruit, nuts, vegetables, coffee, tea, mate and spices.[123] Tanzania carries a trafficking risk in its agricultural and mining industries, and children in particular are at risk of forced labour in farms, mines and quarries, and in the informal sector.[124] This immediately impacts the supply chains of EU corporations given the high risk of forced labour.

Tanzania's labour laws are by no means non-existent. The nation recognises freedom of association by collective bargaining and strike action. Both mainland Tanzania and Zanzibar govern minimum wage, working time and health and safety and discrimination is prohibited. Tanzania's labour laws prohibit forced labour and the nation has ratified the ILO conventions on forced labour and child labour. Tanzania's child labour laws prohibit child work under the age of fourteen, whilst the minimum working age in Zanzibar is fifteen. Children aged fourteen to eighteen are not permitted to engage in hazardous work or work that impacts upon the child's schooling, thus a child's working day is limited to six hours. However, the risk of forced labour is particularly rampant for children, as well as women, refugees and migrants. According to ILO figures, there are 4.2 million children in forced labour in Tanzania. This is due to a failed and next to non-existent enforcement system.[125] Particular sectors impacted by child labour are identified by the U.S. Department of Labor as cloves, coffee, gold, nile perch (fish), sisal, tanzanite (gems) tea and tobacco.[126] Most problematically, the majority of the workforce are employed in the informal sector. This presents significant challenges to monitoring with or without the political will to monitor.

122 See https://www.worldbank.org/en/country/tanzania/overview#1.

123 See https://verite.org/wp-content/uploads/2022/04/Verite-TraffickingRisk-in-Sub-Saharan-Africa_Tanzania-2022.pdf.

124 See https://www.state.gov/wp-content/uploads/2021/07/TIP_Report_Final_20210701.pdf.

125 See Verite report, supra. The poor enforcement system is discussed at pages 7 and 8.

126 See https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf at 28.

5.2.2 The Democratic Republic of the Congo

The DRC is a low-income nation and is ranked by the World Bank as one of the five poorest nations in the world. Alongside Tanzania, it too holds LDC status. The country has significant natural resources including minerals, hydropower potential, arable land, and immense biodiversity.[127] The nation's largest industry is mining, with its recent economic growth supported by its exports of copper and cobalt.[128]

The DRC's labour laws permit freedom of association, and labour laws govern working time, minimum wage, discrimination and health and safety.[129] The state has ratified international conventions on forced labour and the ILO's convention on child labour[130] but ratification comes at the expense of enforcement. In a 2021 report, the U.S. Department of Labor found child labour to be rampant, particularly in the mining sector. The report found modest progress in tackling the worst forms of child labour, as the government apportioned forty percent of the state budget to education at primary level. Further, three inspections were conducted in the mining industry. However, overall the efforts at tackling child labour are feeble and inadequate and with insufficient resources given the size of the nation's workforce. The state's legal framework is also a cause for concern, given that it mandates a minimum age for compulsory education of twelve years, thus failing to meet international standards.[131]

The enforcement aspects of labour standards, whether for forced labour, child labour or overseeing conditions of employment, is lacking with significant under-resourcing in monitoring.[132] The upshot of this is the enduring exploitative working conditions with the rampant use of forced labour and child labour.

127 See https://verite.org/wp-content/uploads/2022/08/DRC-2022-FINAL-2.pdf at 1.

128 Ibid.

129 Ibid, 8-9.

130 Forced Labour Convention 1930 (No. 29), Abolition of Forced Labour Convention 1957 (No. 105), Worst Forms of Child Labour Convention 1999 (No. 182).

131 U.S. Department of Labor, Child Labor and Forced Labor Reports available at https://www.dol.gov/agencies/ilab/resources/reports/child-labor/congo-democratic-republic-drc.

132 Ibid.

5.2.3 The African Union Action Plan

The African Union has devised a ten-year plan to eradicate forced labour between 2020 and 2030.[133] The Plan's target population covers women and men who are subject to or at risk of forced labour, and children who are either in or at risk of child labour. It acknowledges that the responsibility to tackle forced labour rests primarily with governments. They raise the importance of awareness-raising campaigns for individuals to understand and recognise modern slavery and child labour, and the costs attached to it. They aim to raise such campaigns at public gatherings such as cultural and sporting events. The Plan further recognises the importance of calling for decent work in the informal economy in conjunction with employers, business and other stakeholders. However, it recognises the important role to be played by the private sector and stakeholders in instilling accountability in each other. The Plan aims to supports its member states in capacity building and to establish a continental multi-stakeholder platform to address child labour and forced labour in the supply chains of MNCs. The Plan seeks to bring business, organisations and individuals onto the platform where stakeholders can work together and support one another. This aspect of the Plan, targeted at aiming for multi-stakeholder engagement at a continental level and then at a national level, is a forum where EU corporations could seek to raise awareness of the challenges they may face. This could expand awareness of local conditions that may not otherwise have emerged in a due diligence process.

5.3 Challenges for Business

There are challenges facing corporations under the duty to exercise due diligence under the Directive. The focus of the Directive, as set out above, is to raise standards across borders. It specifically targets human rights and the environmental. The potential challenges creating a barrier to raising these standards are multifold.

Firstly, it is likely that focal corporations are far removed from the reach of suppliers which employ slave labour. There could be multiple layers of suppliers in the supply chain network, with workers appearing several layers down the chain. Under the terms of the Draft Directive, an EU corporation would not have been compelled to exercise due diligence for any business, supplier, subcontractor or company with which it does not

133 'Draft Ten Year Action Plan on Eradication Of Child Labour, Forced Labour, Human Trafficking And Modern Slavery In Africa (2020-2030): Agenda 2063-SDG Target 8.7' December 2019, African Union, Addis Ababa, Ethiopia. 2021 was dedicated as the International Year for the Elimination of Child Labour in Africa.

have an 'established relationship'. Although the term's removal has been proposed[134], if removed, the possibility or likelihood of corporations going above and beyond their direct relationships seems remote. The French law incorporates the concept of 'established relationship'. Whilst the term is limiting and the removal of it is to be lauded, the absence of guidance may result in the possibility of uncertainty and confusion regarding how far a corporation should go. It is also likely that corporations will deliberately seek to set up their supply chain networks so that they are far removed through several intermediaries from the business that engages or employs the workers.

Further challenges lie in the cultural differences between the developed and developing nations and their stance towards forced labour and child labour. For instance, an ILO report highlights the zero-tolerance 'Euro-centric' approach to child labour, which is denounced as damaging for children. Yet, it may not be perceived as such in the local African context. In the latter, it may be seen as a necessity, and part of the social norm and culture in preparation for adulthood. The report draws a distinction, however, between the latter which can be described as child work and harmful child labour.[135] Distinguishing between the two in practice would require cultural sensitivities of the local context and perceptions, which may go beyond the mandate of corporations subject to due diligence duties.

Other challenges facing corporations are the costs of engaging in due diligence. Engaging in multi-stakeholder efforts, such as those set out in the African Union Action Plan, comes with constraints on a corporation's time and resources. In the absence of realistic sanctions in particular, the incentive for corporations to engage in meaningful due diligence must be considered. Sanctions are a strategy that will go some way in compelling corporations to observe their due diligence obligations proactively and genuinely, and avoiding the risk of a box-ticking approach, namely through the adoption of both monetary sanctions and naming and shaming for failure to comply. The Directive leaves the penalties to be set by national law but suggests pecuniary penalties, with decisions of penalties published

134 See the amendments proposed by the Permanent Representatives Committee at https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf (Accessed 7th February 2023). See para. 4 which details the amendments due to be voted on in late March 2023.

135 International Labour Organisation, 'Communication Strategies on Child Labour: From awareness raising to action' (September 2021), ILO.

and available for public inspection for three years.[136] A central forum for holding such decisions should be available for public inspection. Thus, incentivising corporations to avoid falling foul of their obligations with the added risk of adverse reputational impacts.

Further, the guidance accompanying the Directive should advise corporations to engage in multi-stakeholder collaboration in order to develop insight into the challenges facing local businesses. Corporations should be encouraged to support such businesses through capacity building. Through this support, these businesses can have a material impact on raising local standards by developing an understanding of the real costs of modern slavery.

5.4 Conclusions

Due diligence obligations are an improvement to reporting only obligations. Challenges are nevertheless present. The report has laid out the analysis based on the request to consider impact upon LDC business. It is with this in mind that this analysis has been completed.

Aside from supporting business, support is needed for individuals that are adversely affected by corporations in the form of egregious labour conditions.[137] This can materialise through the creation of a civil liability regime in which the burden of proof is placed upon the corporation.[138] By doing so, the victim is eased of some of the hardship of litigation, and the corporation can raise their due diligence efforts in defending any such claims. Currently, the updated Directive leaves the burden of proof to be decided by national law.[139] Likewise, the Directive leaves it to national law to decide whether a civil society organisation can bring a claim on behalf of the victim. Not only will this create uncertainty, but will also lead to fragmentation over the civil liability regime. States that preclude civil society organisations from pleading claims on behalf of victims will be denying access to justice for LDC victims who are very much in need of NGO support in civil liability claims. The aims of the Directive insofar as they relate to targeting human rights and the environment must also incorporate a victim-centred regime in order to empower individuals adversely affected by corporate actions or non-actions.

136 Council of the European Union, 2022/0051, 30 November 2022, para. 54, leaves the penalties to be set by national law but suggests pecuniary penalties with decisions of penalties published and available for public inspection for three years.

137 This would extend to environmental harm or any harm impacting human rights.

138 For an enhanced discussion on civil liability regimes, see chapter 7.

139 Council of the European Union, 2022/0051, 30 November 2022, para. 58

6 Corruption and Transfer of Technology

6.1 Introduction

This part of the report focuses on two issues that are not mentioned in the Draft Directive, but are nonetheless crucial for LDCs, namely the fight against corruption and transfer of technology from the standpoint of corporate sustainability due diligence. Both issues can significantly contribute to good governance, reduction of the technological gap and sustainable development.

The negative impact of corruption practices on the enjoyment of human rights and the protection of the environment is quite evident, as stressed by the OECD, according to whom "[b]ribery and corruption are damaging to democratic institutions and the governance of corporations. They discourage investment and distort international competitive conditions".[140] Accordingly, the inclusion of the fight against corruption in the Directive is fully justified.

The relevance of transfer of technology for the purpose of the protection of human rights and the environment is less immediate, but nonetheless its inclusion in the Directive must be carefully considered. Indeed, transfer of technology may not only minimise the negative impact of climate change and boost sustainable develoment, but also and perhaps more importantly improve enjoyment of and compliance with human rights through a better use of resources, the diversification of economy, good governance and administration of justice.

140 OECD, Guidelines for Multinational Enterprises, 2011, para 74. Amongst many investment arbitral awards condemning corruption, see in particular: World Duty Free Company v Republic of Kenya, ICSID Case No. Arb/00/7, Award, 4 October 2006, para 157 ("bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy"); Republic of Croatia v. MOL Hungarian Oil and Gas Company Plc, PCA CASE No. 2014-15, Final Award, 23 December 2016, para 95 ("corruption is a cancer that eats into the body politic").

6.2 Corruption

The Draft Directive and its Explanatory memorandum are silent on corruption and corruption practices. The decision to exclude corruption from the scope of the Draft Directive follows the view taken in the report commissioned by the European Commission. According to the Report,

> [t]he framework on which this study is based […] frame due diligence in terms of human rights and environmental harms, which are currently unregulated by corruption regulation. As such, corruption due diligence falls outside of the focus of this study for the purposes of "human rights and environmental" due diligence.[141]

The Explanatory memorandum does not offer any explanation for excluding corruption from the scope of the Draft Directive. In so doing, it neglects the position of the EP, which stressed that fighting corruption and protecting human rights are intertwined tasks. According to the EP, "corruption and lack of transparency greatly undermine human rights" and "corruption can lead to cases of systematic violation of human rights in the business context".[142]

The decision to leave corruption outside the reach of the Draft Directive is questionable not only as a matter of principle, but also for the serious implications that corruption practices may have, especially in LDCs. It is indeed reassuring the draft report on the proposed directive elaborated by the EP Committee on Legal Affairs recommends the inclusion of a specific provision on the fight against bribery and corruption.[143] Less convincing is the inclusion in the list of "good governance and anti-corruption conventions" (Annex II), of instruments other than conventions in the sense of the Vienna Convention on the Law of Treaties (VCLT).[144]

The question whether corruption should be included in the Draft Directive must be analysed from three perspectives: (a) legal commitments of the EU and its Member States; (b) the relationship between the protection of human rights and the environment, on one hand, and the fight against corruption on the other hand; and (c) the inclusion of corruption in a legally binding instrument on corporate sustainability due diligence.

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141 Study on due diligence requirements through the supply chain. Final Report (L. Smit et al), 20 January 2020, p. 190.

142 Corporate due diligence and corporate accountability European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, EP, P9 TA(2021)0073 (2020/2129(INL).

143 Introduction, note 5.

144 Idem, Amendment 259.

6.2.1 Legal Commitments of the EU and its Member States

The EU and its Member States are parties to several legal instruments on the fight against corruption, including, most prominently, the 2003 UN Convention against Corruption (UNCAC).[145] The Convention applies equally to the public and the private sector. With regard to the latter, Article 12 (1) provides that

> Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

The following paragraph provides a non-comprehensive list of measures to prevent and sanction corruption practices. Those measures include:

> (b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities […];
>
> (c) Promoting transparency among private entities […];
>
> (d) Preventing the misuse of procedures regulating private entities […];
>
> (f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

Furthermore, Article 26 (1) imposes upon the parties the obligation to adopt the measures necessary to establish the liability of legal persons for participation in the corruption practices falling within the scope of the Convention. The EU Member States are also parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[146] Article 2 contains the very same obligation imposed in Article 26 (1) UNCAC.

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145 31 October 2003, entered into force on 14 December 2005. Ratified by all EU Members and approved by the EU on 15 September 2005, entered into force on 12 November 2008.

146 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, entered into force on 15 February 1999, ratified by all EU Members.

As clearly emphasised by the EP,

> the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN Convention against Corruption oblige Member States to implement effective practices aimed at the prevention of corruption; [and] provisions of the UN Convention against Corruption should form part of due diligence obligations in legislation.[147]

6.2.2 Relationship Between the Protection of Human Rights and the Environment and Fight Against Corruption

The intimate relationship which exists between, on the one hand, the protection of human rights and the environment, and, on the other hand, the fight against corruption in the private sector has been recognised in numerous official documents and reports. To start with, such a relationship has frequently and systematically been emphasised by various organs, bodies and agencies of the UN on the basis of a shared holistic and integrated approach to responsible business conduct.[148] Suffice it to mention the Human Rights Council, according to which,

> [c]orruption risks in the operations of a business, relating to supply chains, partnerships or operation in States with prevalent corruption, mean that not only is there a risk of bribery occurring, either through a company or its agents or business partners, there is also a heightened risk of human rights abuses.[149]

Likewise, the OECD has stressed the importance of "the efforts of the international community to promote responsible business conduct globally in order to strengthen and harmonise the implementation of standards for human rights, labour, the environment, and anti-corruption and to support a level playing field for business that takes into account their impacts on society and the environment".[150]

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147 Parliament resolution of 10 March 2021, note 142, lett. (t).

148 A/HRC/44/43, para 50 (referring to the OECD instruments and the UN Global Compact).

149 Human Rights Council, Connecting the business and human rights and the anticorruption agendas. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 17 June 2020, A/HRC/44/43, para 47.

150 OECD, Recommendation of the Council of the OECD on the OECD Due Diligence Guidance for Responsible Business Conduct, 30 May 2018.

Within the EU, the EP has unambiguously taken the position that

> [c]orruption […] has a direct impact on the human rights and environmental impacts of business activities: if left unchecked, it can significantly weaken the protection of local communities against such impacts, and undermine the efforts to strengthen respect for human rights and environmental rights in global supply chains.[151]

In an official document circulated at the UN, the EP stressed that "[f]ighting corruption is a fundamental precondition for upholding the rule of law, peace and security, achieving sustainable development and respect for human rights and fundamental freedoms".[152] In a recent recommendation it also acknowledged "the linkage between corruption and human rights and that corruption is an enormous obstacle to the enjoyment of all human rights". On the basis of this assumption, it adopted "a human rights-based approach in the fight against corruption, with victims of corruption placed at its core, and place the fight against corruption at the front and centre of all EU efforts and policies promoting human rights, democracy and the rule of law around the world".[153]

The recommendation upholds, without hesitation, the view that fighting corruption is part and parcel of the policies and measures intended for the protection of human rights broadly intended. Such integrated approach requires an adequate level of coordination and, equally important, must characterise the action of the EU not only within its territory but globally.

151 The Prevention of Corruption as Part of Mandatory Due Diligence in EU Legislation, Prepared by Olivier De Schutter at the request of Transparency International EU and Global Witness, April 2021, p. 4.

152 Conference room paper submitted by the European Union: EU contribution to the outcome document of the Special Session of the UN General Assembly on corruption, 17 December 2019, CAC/COSP/2019/CRP.6, p. 2.

153 European Parliament recommendation of 17 February 2022 to the Council and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy concerning corruption and human rights (2021/2066(INI)).

6.2.3 Inclusion of Corruption in a Legally Binding Instrument on Corporate Sustainability Due Diligence

If it is accepted that the fight against corruption is closed linked to the protection and enjoyment of human rights, as it clearly emerges from the practice of States and International Organisations, it is appropriate to consider whether corruption should be included in the Directive on corporate sustainability due diligence.

According to the International Chamber of Commerce, "[f]ighting corruption […] is at the core of corporate responsibility and good corporate governance".[154] A detailed study concerning due diligence in EU legislation concluded that "a duty to adopt preventive measures against corruption, should be part of the due diligence obligations imposed on companies operating in the EU".[155]

Four main reasons militate in favour of the above position. In the first place, the link between on one side, the protection of human right – but also of the environment – and, on the other side, the fight against corruption is well rooted in international practice and strongly commands a systematic approach. From this perspective, the inclusion in the Directive would enhance the effectiveness of due diligence, although the obligations imposed on MNCs with regard to the fight against corruption would relate to a different dynamic compared with those concerning the protection of human rights and the environment. The second category of obligations are intended to identify, prevent, mitigate and remedy the actual and potential adverse impact of corruption practices on the enjoyment of human rights and protection of the environment. The first category of obligations, on the contrary, would respond to a different logic, namely preventing and repressing corruption practice that may have detrimental effects on the proper functioning of the market and the sustainable development of the economy and, indirectly on the enjoyment of human rights, and especially political, economic and social rights.

The second reason relates to compliance by the EU and its Members or the UNCAC and when applicable the other legal instruments. Most of the obligations imposed in conventions against corruption are typical obligations of means. Their compliance in the private sector would be facilitated and more effective by virtue of the inclusion in the scope of the corporate due diligence of the measures to prevent and suppress corruption practices. The EP itself, in a resolution specifically dealing with corruption and human rights in third countries, has acknowledged the need for "a partnership approach between

154 International Chamber of Commerce, Rules on Combating Corruption, 2011 Edition, Preface.

155 De Schutter, note 151, p. 23.

the public and private sector".[156] It may be expected that MNCs may ensure a significant contribution towards the full compliance of the EU and its Member States international obligations.

The third reason relates to remedies. The UNCAC is silent on remedies available to victims of corruption practices involving MNCs. It is undisputed that "[e]ffective enforcement of the due diligence duty is key to achieving the objectives of the initiative."[157] In this regard, the Proposed Directive will provide for a combination of sanctions and civil liability. Including the fight against corruption within the scope of the Directive would at once deter and prevent those practices, ensure remedy to victims, and enhance compliance by the EU and its Member States with their international obligations.

The fourth reason is a matter of coherence. Directive 2014/95/EU, in particular, imposes on certain large undertakings and groups the obligation to include in their non-financial and consolidation statements the "undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters".[158] Moreover, trade agreements concluded by the EU contain provisions on corruption. Article 14 of the Association Agreement with Ukraine, for instance reads:

> In their cooperation on justice, freedom and security, the Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation will, in particular, aim at strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption. Respect for human rights and fundamental freedoms will guide all cooperation on justice, freedom and security.[159]

156 EP Resolution of 13 September 2017 on corruption and human right in third countries (2017/2028(INI)), para 3.

157 Explanatory memorandum, p. 16.

158 Directive 2014/95/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 22 October 2014, L 330/1 15.11.2014 esp. Art. 19 (a) and 29 (a).

159 Association Agreement between the European Union and its Member States and Ukraine, Article 14 (The rule of law and respect for human rights and fundamental freedoms).

On the top of the four reasons sketched above, it is important to stress the importance of including fighting against corruption within the scope of the Directive due to the devasting effects of corruption practices in the extractive sector, which has been identified in the Draft Directive as a particularly sensitive sector from the standpoint of corporate responsibility. Corruption is particularly serious in the extractive sector, which is often the driving force of the economy of LDCs.[160] With regard to gaps and discrepancies in corporate due diligence procedures in this sector, the OECD has noted that

> General risk factors on the company's side include the lack of effective anti-corruption compliance and due diligence procedures applicable to employees, subsidiaries, business partners and intermediaries along the extractive value chain. In particular, due diligence systems may fall short of guaranteeing strict control over employees in compliance-sensitive positions, business partners, intermediaries and third parties, and of adequate oversight of the parent company over the subsidiary's operations and robust internal financial controls related to anti-corruption compliance and internal audit processes.[161]

6.2.4 Corruption and LDCs: Tanzania and the Democratic Republic of the Congo

Tanzania and the DRC figure, respectively, at the 87th and 169th place (out of 180) in the Corruption Perceptions Index 2021.

Figure 5. Corruption Preceptions in Tanzania and the DRC

160 OECD, Corruption in the Extractive Value Chain: Typology of Risk, Mitigation Measures and Incentives, 2016

161 OECD, Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives, 2016, 17.

The twelve years of implementing Extractive Industries Transparency Initiative (EITI) standards in Tanzania (2009-2021) have brought important benefits to the country. The disclosure of extractive industries payments and revenues through EITI has helped to improve revenue collection and accountability of such public resources.[162]

In the DRC, the problem of corruption is particularly acute, especially in the mining sectors, where joint-venture contracts concluded with state-owned enterprises (SOEs) often involve corruption practices. According to a recent report,

> The opaque conditions under which joint venture agreements are negotiated undermines the strict licencing procedures in the 2002 Mining Code. Analysis has shown that the deals made by Congolese SOEs between 2010 and 2012 have cost the country over US$1 billion. On average, the state sold assets at a sixth of their commercial market value, enabling the overseas buyers to make massive windfall gains.[163]

It is argued that including the fight against corruption in the Directive on corporate sustainability due diligence would contribute to increase the transparency concerning the negotiation, terms and conclusion of contracts, especially in countries like the DRC where corruption has proved rather hard to eradicate. Reducing corruption will have a multitude of beneficial effects, most prominently on the business environment, marked competitiveness, optimisation of resource and ultimately rule of law, enjoyment of human rights, democratic governance, and protection of the environment.

6.3 Transfer of Technology

Since the attempt to establish a New International Economic Order (NIEO), transfer of technology has been one of the key claims put forward by developing countries and LDCs in particular. It is considered as indispensable to reduce the "technological gap", enhance competitiveness, facilitate the diversification of economy, reduce economic vulnerability,

162 Extractive Industries Transparency Initiative | EITI, Tanzania Report 2021-22, July 2021, p. 2.

163 Transparency International (Lisa Caripis), Combatting corruption in mining approvals: assessing the risks in 18 resource-rich countries (2017), footnotes omitted.

and ultimately boost sustainable development.[164] The impelling need to enhance transfer of technology to LDCs is particularly evident in the public health sector, as demonstrated by the recent COVID-19 pandemic.[165]

The importance of including transfer of technology in the discourse and instruments related to sustainability standards, corporate social responsibility has been explicitly recognised by the United Nations Conference on Trade and Development (UNCTAD). According to its latest report on LDCs, transfer of technology may be pursued through a number of channels, including "encouraging the adoption of concrete voluntary measures of technology transfer in the context of sustainability standards, corporate social responsibility (CSR), and responsible business conduct".[166] Another confirmation of the importance of the role played by companies, specifically foreign investors, in enhancing transfer of technology with a view to boost the sustainable development of the host state can be found in investment treaties concluded by African organisations.[167]

For developing countries, and even more for LDCs, which have little or no research capacity, the question is how to access these technologies and use them to achieve sustainable development.[168] The pivotal role of transfer of technology is magnified in countries dependent on commodities. Yet, those countries often struggle to receive and absorb technology and consequently to improve their participation in global value chain. As recently pointed out by UNCTAD,

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164 See UNCTAD, Draft International Code of Conduct on the Transfer of Technology, 5 June 1985, UN Doc. TD/CODE TOT/47; EU, Reflection Paper on TT to DC and LDCs, 14 February 2003, WT/WGTTT/W/5, paras 4 and 5.

165 See, for instance, Ellen T. Hoen, 'Protecting Public Health through Technology Transfer: The Unfulfilled Promise of the TRIPS Agreement', 24 Health and Human Rights Journal (2022) 211.

166 UNCTAD, LDCs Report 2021. The LDCs in the Post-COVID World: Learning from 50 Years of Experience, Geneva, 2021, p. 134.

167 See, in particular, Common Market for Eastern and Southern Africa (COMESA), concluded on 5 November 1993, entered into force on 8 December 1994, Article 100, at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2422/download; Treaty Establishing the East African Community (EAC), concluded on 30 November 1999 and entered into force on 7 July 2000, Article 80, at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2487/download; ECOWAS Common Investment Code (ECOWIC), Chapter 13, concluded on 22 December 2018, at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6441/download. See also Draft Pan-African Investment Code, adopted on 31 December 2016, at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african investment_code_december_2016_en.pdf.

168 EU, Reflection Paper on TT to DC and LDCs, 14 February 2003, WT/WGTTT/W/5, para 4.

> Current practices with respect to technology transfer are, however, not conducive to a large-scale transfer of technology to developing countries. Limited financial resources to acquire technologies and the rules governing the protection of intellectual property would drastically limit the access to technology of commodity dependent developing countries.[169]

6.3.1 Legal Commitments of the EU and its Member States

Article 66 (2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is the key legal commitment concerning transfer of technology. It reads:

> Developed country Members shall provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base.

In the Annex to the TRIPS Agreement, Members specifically recognised "the desirability of promoting the transfer of technology and capacity building in the pharmaceutical sector in order to overcome the problem faced by Members with insufficient or no manufacturing capacities in the pharmaceutical sector".[170] Transfer of technology can integrate and complete in a long-term perspective the compulsory licensing concerning Article 31 TRIPS, which is designed to allowed eligible Members – and especially LDCs – to use the subject matter of a patent without the consent of the holder of the related rights in order to tackle emergency situations.[171]

The EU and its Members are parties to the TRIPS Agreement and have recently declared that they

169 UNCTAD, Escaping from the Commodity Dependence Trap through Technology and Innovation (Geneva 2021), p. 120.

170 Annex to the TRIPS Agreement, WT/L/641, 8 December 2005, p. 4.

171 See, most recently, WTO Ministerial Decision of 17 July 2022, WT/MIN(22)/W15/Rev.2. As pointed out by Hoen, note 165, 213, "[t]he COVID-19 pandemic and the inability of developing-country manufacturers to obtain IP, know-how, and technology needed to produce COVID-19 vaccines through voluntary measures illustrates the need for a more forceful implementation of the measures the TRIPS Agreement offers to rebalance IP and human rights".

> take their commitment under Article 66.2 of TRIPS Agreement very seriously. The EU and its member States provided proof year after year of having promptly and attentively reacted to natural, social, health, climate, food and economic changes by implementing projects specifically tailored to the current needs of LDCs and their regional organisations.[172]

Obviously, the legal obligations stemming from Article 66 (2) of the TRIPS Agreement are completely different from those concerning the fight against corruption. Under Article 66 (2), Members are bound to promote the transfer of technology through incentives to MNCs. However, incentives may generate tension with WTO disciplines on subsidies and EU on State aid.

Compliance with Article 66 (2) TRIPS involves a manage-à-trois between developed Members, LDCs and MNCs. As a matter of treaty law, the holders of the obligations under Article 66 (2) and the related rights are, respectively the developed countries and the LDCs. Yet, as pointed out by the EU itself

> It is clear that the private - and particularly the commercial - sector is nowadays the main source of technologies and, in this context, technology transfer is often one component of a more complex project, rather than a stand alone activity.[173]

From this perspective, the Directive may provide a bridge between the three subjects for the effective implementation of Article 66 (2) TRIPS and ultimately a valuable transfer of technology. The crux of the matter, therefore, is how to promote transfer of technology while duly respecting the legal protection of intellectual property rights. The departing point is that MNCs are not obliged to transfer technology. The EU has indeed reiterated that "the private sector [cannot be forced] to transfer its technologies. Incentives can therefore only take the form of encouragement, promotion and facilitation of projects which are part of a global and comprehensive approach to development".[174]

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172 TRIPS Council, Minutes of Meeting, 28 June 2022, IP/C/M/104/Add.1, para 182. On the measures adopted by the EU and its Members, idem, paras 183-195. See also EU; Technical Cooperation Activities and Assistance for LDCs, IP/C/W/568, 20 February 2012.

173 EU, Reflection Paper on TT to DC and LDCs, 14 February 2003, WT/WGTTT/W/5, para 54. Likewise, according to the OECD, Guidelines for Multinational Enterprises 2011 Edition, p. 55, "Multinational enterprises are the main conduit of technology transfer across borders".

174 EU, Intervention at the TRIPs Council Regular Session, 27-28 February 2018.

6.3.2 Transfer of Technology, Human Rights and the Environment

The relationship between, on the one hand, transfer of technology, and, on the other hand the protection of human rights and the environment is certainly less evident and immediate compared with the relationship between the fight against corruption and the protection of human rights and the environment. Yet, the direct and indirect positive impact transfer of technology may have on the enjoyment of human rights and the protection of the environment is widely recognised.[175] Some authors have even referred to the emergence a right to technology, which "should become a centrepiece of the global human rights regime".[176]

Transfer of technology is essential for the protection of both human rights and the environment from different and intimately related angles. To start with, transfer of technology is required for any global policy intended to combat climate change and minimise environmental degradation and its negative impact of the enjoyment of human rights. Moreover, by boosting sustainable development and technological advance in several industries (including infrastructure, telecommunication, manufacturing and the extractive sector), transfer of technology contributes to economic stability and better utilisation of resources as well as indirectly to the enjoyment of human rights and social rights in particular. Transfer of technology may also improve the performance of public institutions and governance and lead to a more efficient administration of justice, with evident benefit for the compliance with human rights standards. In the long-term, finally, transfer of technology may have a significant impact on education, training and more generally in the development of management and technological skills. As recognised by the EU itself,

> The acquisition by LDCs of a sound and viable technological base does not indeed depend solely on the provision of technology or equipment, but also on acquisition of know-how, management and production skills, improved access to knowledge sources as well as on adaptation to local economic conditions.[177]

175 See, in particular, S. Humphreys, 'Perspective: Technology Transfer and Human Rights: Joining Up the Dots', 9 Sustainable Development Law & Policy (2009) 2; International Council on Human Rights Policy, Beyond Technology Transfer: Protecting Human Rights in a Climate-Constrained World (Geneva, 2011); D. Shabalala, 'Climate Change, Human Rights, and Technology Transfer Normative Challenges and Technical Opportunities', in M.K. Land, J.D. Aronson (eds.), New Technologies for Human Rights Law and Practice (CUP, 2018) 46.

176 H. Sun, 'Reinvigorating the Human Right to Technology', 41 Michigan Journ. Int'l Law (2020) 279, 325.

177 EU, Intervention at the TRIPs Council Regular Session, 27-28 February 2018.

6.3.3 Inclusion of Transfer of Technology in the Directive

Admittedly, including transfer of technology in the Directive would be quite innovative. Nonetheless, it may be more than a provocation as it would greatly enhance the added value of the Directive from the standpoint of LDCs. The basic assumption is that transfer of technology occurs essentially through MNCs. Importantly, transfer of technology has been included in the cross-cutting objectives of the Finnish Development Policy.[178] Furthermore, the Finnish Development Policy also stressed that "development cooperation should not only focus on avoiding negative impacts, but also try to make a positive contribution".[179]

After all, according to the OECD, MNCs should contribute to the development of local and national innovative capacity, adopt practices that permit the transfer and rapid diffusion of technologies and know-how, perform science and technology development work in host countries to address local market needs, as well as employ host country personnel in an science and technology capacity and encourage their training.[180] Furthermore, licenses should be granted and transferring technology occur on reasonable terms and conditions and in a manner that contributes to the long-term sustainable development prospects of the host country.[181]

It is argued that the Directive would be much more meaningful for LDCs if it promotes transfer of technology. The question is twofold. One the one hand, the Directive should reiterate the obligation of Member States to provide the economy of LDCs incentive intended to promote and encourage transfer of technology as required under Article 66 (2) TRIPS. On the other hand, MNCs should be incited to consider appropriate policies for the transfer of technology and the granting of licences on reasonable terms and conditions.

The Directive may address the question of transfer of technology in two ways. One option would be to insert a provision specifically requiring Member States to create the conditions for the voluntary transfer of technology including through incentives to MNCs. Obviously, the drafting should be modelled after Article 66 (2) TRIPS and reiterate the voluntary character of transfer of technology.

178 Executive Summary, note 1.

179 Guideline for the Cross-Cutting Objectives in the Finnish Development Policy and Cooperation (2021), at https://um.fi/publications/-/asset_publisher/TVOLgBmLyZvu/content/kehityspolitiikan-l-c3-a4pileikkaavien-tavoitteiden-ohjeistus/35732.

180 Ibidem.

181 Ibidem.

A more conservative option would be to include the promotion of transfer of technology amongst the objectives of the Directive indicated in the preambular paragraphs. Even in this form, the reference to transfer of technology would emphasise its importance for LDCs and stimulate the adoption of policies meant to reduce their technological gap.

6.4 Conclusions

The connection between human rights and the fight against corruption has long been acknowledged within the UN and beyond. Corruption can have devastating and long-lasting impacts on the environment and the enjoyment of human rights.[182] The inclusion of the fight against corruption in the Directive would be in line with other legal and non-legal instruments. More importantly, it would send a strong signal and tackle a problem that often hampers the sustainable development of LDCs and the optimal use of resources, including natural resources, has detrimental effects on competitiveness and ultimately affects the enjoyment of human rights.

Despite the evident differences compared with the fight against corruption, the encouragement of transfer of technology should equally find its way into the Directive, either in the preamble or in a specific provision. While remaining voluntary and respectful of the legal protection of intellectual property rights, such inclusion may be expected to be a step in the right direction for the reduction of the enormous technological gap that still divides developed countries and LDCs, as well as to offer the latter real opportunities to play a more significant role in international trade.[183]

182 Human Rights Council, note 149, para 8 (footnote omitted).

183 L. Kelly et al., Technology Transfer. A New Agenda for LDCs Negotiators (IIED, EIF, November 2021).

7 Liability Regime

7.1 Due Diligence Duty

The duty in the Directive is one of due diligence and encompasses a number of steps, most prominently identifying existing and potential adverse impacts as well as preventing and ending them. Corporations are able to consult with workers and other stakeholders to aid their efforts.[184] Where they cannot be prevented, there is a duty to mitigate potential impacts that should have been identified. If the adverse impacts that have or should have been identified cannot be ended, the corporation is obliged to minimise the impact. Failing this, the corporation can seek to suspend or terminate a business relationship.[185]

Corporations are obliged to operate a complaints procedure accessible by all stakeholders and engage in transparency by publishing the matters related to the due diligence duty. This is achieved by way of an annual statement published on the corporation's website.

For EU corporations, the scope of the Directive is limited to large organisations with 500+ employees and a net worldwide turnover of EUR 150 million. According to the Commission's estimate, this is expected to impact around 9,400 companies.[186] Following a period of two years, the duty will be extended to corporations with 250+ employees and a net worldwide turnover of EUR 40 million in high impact sectors. High impact sectors are expected to include the garment, agriculture and mineral industries.[187] Thus the directive is of particular concern to industries operating in African regions, where the leading industries of agriculture and mining will inevitably feature in the supply chains of EU corporations.

184 See critical discussion on the obligation to consult and its limits in part 4.2 of this report.

185 The reader should note that in its negotiations position, the EU Council provides exceptions to the instructions on suspension or termination of business relationships. See in Article 7(7) of the Council's General Approach, note 5.

186 See See https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

187 Ibidem.

The impact on third-country corporations will materialise by their reaching a threshold of a EUR 40 million turnover for business generated in the EU. Within the African continent this is expected to apply to a very limited number of LDC-based corporations.[188] The African businesses in European value chains will be impacted by the Directive in light of the due diligence duty imposed upon EU corporations. This captures the suppliers and subcontractors, and those businesses and corporations to which the focal European company outsources, be this directly or via intermediaries.

The discussion will now turn to existing legislation introducing due diligence duties upon corporations and which is intended to impact social standards on a cross-border basis. By doing so, it will feed into the analysis on potential challenges that can be expected from the Directive. For comparative analysis, and in light of their similarity, the discussion will now turn to the French Duty of Vigilance.[189] It is worth recalling that the French regulation was one of the models on which the Draft Directive was based.

7.1.1 French Corporate Duty of Vigilance Law

The French initiative was three and a half years in the making and arose from the Rana Plaza disaster.[190] The goal of advancing human rights and labour standards and conditions across borders surfaced after the perils of hazardous working conditions hit global headlines. The garments being manufactured in the Rana Plaza factories were destined for multinational brands. Thus, the MNC link to unscrupulous practices through their business connections in global supply chains has raised much discourse. Specifically, the commercial practices of global brands have been subject to much criticism. The quest for a low-cost supply of labour has implicated corporations with the tragedies.[191]

188 See the Trade section of the report for further detail.

189 The reader should be aware that there are many other relevant examples that, for reasons of space and scope, we did not cover. These include the German Supply Chain Act (which, as reviewed below, inspired parts of this proposed Directive), the Dutch Child Labor Due Diligence Act, and more.

190 C. Bright, 'Creating a Legislative Playing Field in Business and Human Rights at the European Level: is the French Duty of Vigilance Law the Way Forward?', EUI Working Papers, Max Weber Programme (2020).

191 See G. LeBaron, 'The Role of Supply Chains in the Global Business Of Forced Labour', 57 Journal of Supply Chain Management (2021) 29.

The French law is seen as an ambitious[192] approach to regulating corporate behaviour. It is ambitious in that it extends the duties of corporate vigilance from previous reporting-only obligations, such as those introduced by California in 2012[193] and the U.K. in 2015.[194] Critics deem disclosure-based obligations to be weak given their lack of sanctions.[195]

The Duty of Vigilance attracted opposition from business. In the end, the final form of the regulation was a watered-down version of the original proposal. The thinning down of the proposals appeared in two significant forms. Firstly, the original proposal was unlimited in scope. Secondly, the burden of proof in civil liability lawsuits where there was a breach of the due diligence obligations, was initially placed upon corporations but later switched to the claimant.[196] This will be considered in more detail below.

The final form of the French due diligence duty imposes an obligation upon corporations to act responsibly and in accordance with a reasonable standard of care when taking corporate actions that could foreseeably harm human rights or the environment.[197] It establishes a tripartite legal duty encompassing the obligation to set up, report on and execute[198] a vigilance plan. This must show

> 'the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls… as well as from the… subcontractors or suppliers with whom it maintains an established commercial relationship'.[199]

192 S. Cossart, S., Chaplier, J., Beau De Lomenie, T., 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All', … Business and Human Rights Journal (2017) 317, p. 318.

193 California Transparency in Supply Chain Act of 2010.

194 Modern Slavery Act 2015. Australia followed with its Modern Slavery Act in 2018.

195 Critics such as Mantouvalou, Le Baron, Bright, Cossart et al.

196 Schilling-Vacaflor, A., 'Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?', 22 Human Rights Review (2021) 109.

197 Cossart, note 192, 318.

198 Bright, note 190.

199 French Corporate Duty of Vigilance Law (English Translation) available at https://respect.international/french-corporate-duty-of-vigilance-law-english-translation/ (Accessed 20th October 2022).

Further, it introduces corporate accountability through the channel of civil litigation lawsuits, by discarding the corporate veil for the corporation's overseas activities.

Following enactment, opposers of the French initiative sought rejection based on constitutional grounds which saw the removal of a fine of up to EUR 30 million. This was removed by the French Constitutional Court on the grounds that it breached constitutional provisions. The imposition of a fine can still arise in circumstances where a company breaches an injunction compelling them to comply with their due diligence obligations and would be administered by the Court. Nevertheless, the sanctions are drastically weakened. The French law imposes the requirement to take injunction proceedings, a legal process that comes with inevitable time and expense impediments. It then requires policing efforts for breach of any successful injunction. Cossart et al lament the removal of the fine. Nevertheless, they identify the climate following the Council's decision as representing a potential political shift[200] and highlight the future scope to reintroduce sanctions with watertight drafting in light of the judicial analysis.

Turning to compliance, in the period following the first set of published plans, companies were reportedly making ground with identifying at-risk suppliers. This was achieved by review of current policies or through implementation of new procedures.[201] Problematically, the lack of will for monitoring purposes has been highlighted. Specifically, scholars observe a lack of state will and a lack of resources for monitoring corporations' due diligence obligations.[202] NGOs have assumed this role in the absence of state action by compiling an online list[203], but the list is by no means exhaustive. Lack of state action for monitoring purposes offers corporations a 'get out of jail free card' despite the significantly scaled up obligations in the French law, when compared to the weaker reporting obligations enacted in California, the U.K. and Australia. A robust monitoring mechanism is essential. Failing this, there is a risk of corporations adopting a box-ticking approach which fails to substantively comply with the spirit of the legislation.

200 Cossart, et al., note 192, 321.

201 Bright, note 190.

202 Schilling-Vacaflor, note 196.

203 See https://vigilance-plan.org/search/?i=14.

7.2 Enforcement and Civil Liability

According to Article 17, compliance with the Directive's instruction is entrusted with the Member States Supervisory Authorities. Article 18 grants Supervisory Authorities with powers to impose a number of sanctions, notably ordering the cessation of infringements, remedial action, penalties, and more.[204]

Importantly, the duty of due diligence is also accompanied by the inception of a civil liability regime.[205] This enables victims to seek access to justice for harm suffered by the actions or inactions of the corporation[206] and allows victims to claim damages in the event of a successful claim.

The pioneering regime instils corporate accountability for harms arising from their overseas actions by lifting the corporate veil.[207] Aside from demonstrating locus standi[208] the victim must prove fault, damage and causation to link the two.[209] Thus, the victim bears the responsibility for discharging the burden of proof.

The burden of proof was originally allotted to the corporation, a move that was later discarded. The amendment has oppressive ramifications for victims, and the regime fails to create genuine access to justice for all. Placing the burden of proof on the victim comes with inevitable obstacles, so much so that they present insurmountable barriers for the most vulnerable, such as meeting the legal ingredients of fault, damage and causation.

In legal terms, the victim is compelled to prove that fault arises owing to the action or inactions of the corporation. Proving fault requires legal insight in the form of legal counsel and representation in court. The acquisition and presentation of evidence to support pleaded claims in the form of documentary and witness evidence makes legal representation compelling. Cost is thus an inevitable obstacle to addressing the burden of proof, creating barriers for victims. Research recognises the importance of NGOs in

204 See Article 18(5) of the proposed Directive.

205 See further discussion about the civil liability mechanism in the chapter covering environmental protection, including the differing approaches taken by the Commission and the Council.

206 See Articles 1240 and 1241 of the French Civil Code. A translated version is available at http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf (Accessed 11th November 2022). Article L. 225-102-5 was introduced by the French Duty of Vigilance to the French Commercial Code to provide for a corporation's civil liability.

207 See Cossart et al, note 192.

208 Legal standing to bring the claim.

209 Bright, note 190.

assisting victims accessing justice.[210] However, challenges for NGO support are inevitable due to limitations in their funding and resources. The victim's discharge of the burden of proof remains an undeniable obstacle. As such, the otherwise laudable civil liability regime has attracted criticism and represents a missed opportunity.[211]

With this analysis in mind, it is fitting to highlight some of the case-law that has surfaced to date which deals with extra-judicial violations of human rights, the destruction of the environment, and the exploitation of workers in developing nations. These cases are all relatively recent; they reflect an emerging trend in international litigation and civil liability vis-à-vis adverse harms, not unlike those addressed by the Directive.

7.2.1 Case-law

A lawsuit filed against a Canadian company by workers at a mine in Eritrea pleads claims for forced labour and slavery.[212] The mine was owned by a Canadian corporation based in British Columbia. To date, the claim has succeeded on jurisdictional grounds. The claims[213] have been pleaded on the grounds that the parent corporation violated customary international law by contravening a peremptory norm. Dissenting opinions raised objections on the grounds that there is no jurisdiction as international human rights law is inapplicable between individuals and corporations. As it stands, the Canadian judiciary accepted that the case could proceed as customary international law was part of Canadian law. As the claim pleads breaches of customary international law, the trial will determine if such breaches occurred.

A further class action lawsuit involving forced labour claims had been raised in the U.S. courts by eight former child slaves from Mali[214] against Nestlé and other multinational chocolate brands. The victims pleaded slave labour in Côte d'Ivoire's cocoa plantations in the supply chains of the defendant chocolate brands. They claimed that the defendant corporations systemically profited from the use of child labour and profited from the low cost permissible from it, compared to the use of adult labour and with the use of protective equipment. The child labourers were trafficked to Côte d'Ivoire and forced

210 Ibid.

211 See Bright, note 190, and https://www.business-humanrights.org/en/blog/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives/.

212 Nevsun Resources Ltd. v. Araya (2020), Supreme Court of Canada, … 5.

213 Which include claims for degrading treatment and crimes against humanity.

214 Coubaly et al v Cargill Inc et al, U.S. District Court, District of Columbia, No. 21-00396. The plaintiffs were supported by International Rights Advocates.

to work for little or no pay in hazardous working conditions and without protective equipment. The claims were pleaded under the U.S.'s Trafficking Victims Protection Reauthorization Act of 2017. The lawsuit was dismissed on the grounds that the victims could not trace a connection between the defendant companies and the plantations in which the victims worked. A similar lawsuit against Nestlé pleaded on behalf of six former child slaves for aiding and abetting the systematic use of child labour was pleaded in the U.S. courts under the 1789 Alien Tort Statute.[215] The claim was dismissed on the grounds that it failed to prove jurisdiction.

In a claim against a U.K.-domiciled company Vedanta and its foreign Zambian based subsidiary for environmental damage occurring overseas, the English Supreme Court accepted jurisdiction on the grounds that the victims would have difficulties accessing justice in Zambia.[216] Research predicts[217] the longer-term impact likely raises difficulties over jurisdiction for future claims against parent companies, despite the victory in this particular claim. It is predicted that corporations will take a more cautious approach to future disclosure to circumvent the lifting of the corporate veil. This case is highlighted to offer insight into potential obstacles arising where the lifting of the corporate veil is not a given. Removing this impediment by reflecting the French civil liability regime could go some way to confronting the jurisdictional obstacle.

The French regime, despite removal of the corporate veil, has proved to be anomalous to date. A claim against Total for breach of its due diligence duties in Uganda has been pleaded by six NGOs.[218] In a hearing on jurisdiction, the Court of Appeal of Versailles remanded the claim to the French Commercial Court. This has attracted criticism by the NGOs as failing to adhere to the spirit of the due diligence law. The expertise of the Commercial Court is claimed to be ill-suited for a claim impacting on issues related to social and environmental standards.[219] In light of the political ambitions surrounding the law, which was prompted by the aftermath of the Rana Plaza disaster[220] remanding the claim to a Commercial Court is questionable.

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215 Nestle USA Inc v Doe et al, (2021) U.S. Supreme Court, 19-416.

216 Vedanta Resources PLC and another v Lungowe and others, (2019), UKSC 20.

217 C. Bradshaw, 'Corporate Liability for Toxic Torts Abroad: Vedanta v Longowe in the Supreme Court', 32 Journal of Environmental Law (2020) 139.

218 Notre Affaire à Tous and Others v. Total (2019), Versailles Court of Appeal.

219 See https://www.business-humanrights.org/en/latest-news/french-court-of-appeal-remands-case-against-total-over-alleged-failure-to-respect-duty-of-vigilance-law-in-uganda-to-commercial-court/.

220 Bright, note 190.

The above claims outline some of the obstacles inherent in bringing legal actions for harm suffered within the supply chain. Had Nestlé been under a due diligence obligation as set out in the French law and in the Draft Directive, the claim may have had stronger prospects of success. Some of the claims are ongoing and outcomes remain to be seen. But for the present analysis, the report seeks to highlight the nature of the claims surfacing from LDCs, and to outline the necessity to create a fair and accessible civil liability regime. Under the French regime, a corporation can raise its due diligence efforts in defence to a claim. Placing the burden of proof upon corporations will permit them to defend their positions based on compliance with their due diligence obligations. In turn, this may raise standards and increase accessibility by placing the costs burden upon those with the broadest shoulders. The burden of proof is central to accessibility for LDC victims. Placing the burden of proof on corporations will go some way towards addressing this barrier.

7.3 Interim Conclusion

There is no question that the proposed Directive represents a meaningful step for the protection of human rights and the environment and the EU's ambition to act on this front is laudable. As reflected in this report, the Directive will directly and indirectly regulate industries in LDC jurisdictions. This cross-jurisdictional element is likely to affect LDCs and their communities in a number of ways, and the lack of attention given to these interactions in current policy debates is regrettable. This report is intended to fill this gap through its focus on several key areas, namely trade, human rights, environmental protection, labour standards, technology transfer and corruption.

8 Conclusion and Policy Recommendations

This report offers a critical legal review of the impact that the proposed Directive is expected to have on LDCs and industries operating (whether directly or indirectly) in their jurisdictions. Before providing policy recommendations, it is important to make a few concluding observations.

First, despite this report's critical tone, the authors believe that the proposed Directive is a positive step in the right direction. For far too long, MNCs have operated without sufficient regard for human rights and environmental harms; a reality that this proposed Directive is aspiring to directly address. The proposed Directive represents progress also by accepting and addressing the international dimension of human rights and environmental harms, and their potential impact on communities beyond the EU. The preventive approach reflected in due diligence regulation is another important, positive element that follows the logic and guidance of the most progressive standards in this area. The accompanying civil liability and grievance mechanisms are also vital, reflecting attention to sensitive elements such as access to justice and remedy in transnational contexts. By addressing all these elements, the proposed Directive is aiming for the 'golden standard' of MNC sustainability regulation. The EU should be commended for this effort.

At the same time, the authors of this report believe that not enough attention has been given to the context of LDCs. EU decision-makers have clearly resolved to adopt an extra-territorial sustainability regulation, with the hope of also protecting vulnerable far-away communities and addressing their concerns. It is only fitting that sufficient attention, clarity, and instructions will be dedicated to the context of LDCs, and the manner in which this Directive will affect these countries.

This report analysed the impact that the proposed Directive could have on international trade, human rights, environmental protection, and labour rights standards, in the context of LDCs. It further identified corruption and technology transfer as two elements that are missing from the current legal framework. Special attention was also given to the proposed Directive's liability regime. The report's key recommendations are summarised below.

As discussed in this report, export trade is central to many LDCs' development agendas. This means not just export of primary products. The export of value-added goods is key to the realisation of this ambition. Therefore, for the proposed Directive to not act as an impediment to the exports of these countries and thereby stifling their sustainable development agendas, the below policy recommendations are put forward to the EU and its Member States to consider.

1. **Targeted technical assistance:** Targeted technical assistance delivered by MNCs and governments that will help companies in the DRC and Tanzania (and LDCs in general) meet the due diligence requirements and domestic constraint to build their capacity to export will be crucial. The terms of the assistance companies will have to provide for their LDC-based partners (where these are covered by the Directive) will have to be clarified. Given the drastic potential outcome (an obligation to sever ties), these companies deserve a concrete promise of assistance, and the Directive will have to provide more details on what such will entail.
2. **Simplification of the Directive:** It is of absolute necessity that the drafting of the final Directive is made simpler and clearer. Detailed and targeted guidelines should be provided so that companies in these countries will be able to ascertain, without difficulty, the exact due diligence standard they will need to meet before they can export to the EU.
3. **Transparency:** The promotion of transparency, streamlining as well as coherence amongst EU Member States is also very important. The EU must also make sure that the proposal does not impede regional integration in the sub regions where the DRC and Tanzania belong especially in the context of the African Continental Free Trade Area Agreement (AfCFTA).
4. **Developing international trade rules:** In the international law forum, ongoing development towards more concrete and binding responsibilities to MNC in securing human rights has emerged. It is important that the EU encourages this in international trade negotiations and aims to include these obligations into international rules.
5. **Coherent implementation:** Proposed regulation sets MNCs in a new position, especially due to mitigation and liability rules. The directive should take this into account, guaranteeing that these new obligations are regulated coherently inside EU. This is ensured with more concrete rules.
6. **Supporting companies in their new role:** New due diligence obligations and liabilities make it necessary for MNCs to take a new role working in LDCs with trading partners, public administration and local communities. In this new role, European companies may need additional support and guidance from EU and Member State authorities.

7. **Public participation and engagement:** The Directive's instructions regarding public participation and engagement with stakeholders ensure certain guarantees that the public will be consulted. It is nevertheless recommended that the term 'where relevant' will be removed from the proposed Articles 6(4) and 8(3)(b). The addition of this term has very little clear benefit, and companies wishing to avoid engagement with stakeholders may abuse this open textual reference.
8. **Climate Change:** The instructions of Article 15 (climate change) should be better explained. More specifically, the nature of the requested plans and their objective will have to be clarified.
9. **Obligation to monitor adverse impacts:** The Council's draft includes an obligation to monitor adverse impacts where these were not mitigated, and periodically reassess the decision to maintain ties with partners (Article 7(7)). This obligation requires more specific instructions, including concerning the definition of the term 'periodically' as well as on the authority to challenge the company's decision to maintain ties.
10. **Engage in multi-stakeholder collaboration:** The Guidance accompanying the Directive to advise corporations to engage in multi-stakeholder collaboration in order to develop insight into the challenges facing local businesses. Corporations should be encouraged to support such businesses through capacity building.
11. **Six-year penalties administered to corporations:** A central forum such as an online register incorporating details of penalties administered to corporations, available for public inspection for six years rather than the current limited timescale of three years. Thus, incentivising corporations to avoid falling foul of their obligations with the added risk of adverse reputational impacts.
12. **Civil liability regime:** A civil liability regime in which the burden of proof is placed upon the corporation. The victim will be eased of some of the hardship of litigation, and the corporation can raise their due diligence efforts in their defence. For the same reasons, enable NGOs to represent victims in civil liability claims.
13. **Corruption:** The Directive should include the obligation to prevent and suppress corruption practices. The inclusion of the fight against corruption in the Directive would be in line with the legal and non-legal instruments on corruption of the EU and its Member States. More importantly, it would contribute to tackle a problem that often hampers the sustainable development of LDCs and the optimal use of resources, including natural resources, have detrimental effects on competitiveness and ultimately affect the enjoyment of human rights. The relevant conventions on the fight against corruption should be included in the Annex.

14. **Transfer of technology:** The inclusion in the Directive of a provision (or more modestly a reference in the preamble) to technological transfer would serve several purposes. It will contribute to the export of value-added goods from LDCs, promote their modernisation and industrialisation, render them less vulnerable and resilient (including the public health sector), and ultimately improve the enjoyment of human rights and the protection of the environment.

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