NOVA SCHOOL OF LAW

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Corporate Duties Towards Climate Change: Application, Challenges, and Opportunities within Business and Human Rights Frameworks

Dissertation to obtain a Master's Degree in Law, in the specialty of International and European Law

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Statement I

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Abstract

Corporate activities are one of the main drivers of global warming. At the current moment, most of the laws or policies that exist globally to tackle climate change cannot be properly enforced and businesses still have plenty of room to decide whether or not to address their contribution to climate change. However, this landscape is changing. The evolution of business and human rights frameworks presents new avenues towards the regulation of business conduct in addressing climate change, while also considering the human rights impacts of both climate change and climate mitigation efforts. This thesis discusses the role of corporations in tackling climate change, as well the consequences of corporate inaction towards climate change and its effects on human rights. The first chapter delves into the first efforts to create the business and human field, looks at the objectives of these efforts, and brings to light new factors the evolution of the field brought to mandatory human rights due diligence laws, namely, incorporating environmental and climate aspects into their requirements. The second chapter is dedicated to presenting the most recent environmental and climate requirements that can be derived from soft-laws, hard-laws, and case-laws in Europe, as well as other initiatives that propose to create corporate duties in relation to climate change. The third chapter runs through the elements proposed for the climate transition plan of the Corporate Sustainability Due Diligence Directive and looks at each step of this law's adoption process to explore the content proposed by the different European institutions, and discusses the reach of the final version of the transition plan. The last chapter discusses the remaining challenges for addressing climate change with the use of mandatory human rights due diligence law, arguing that, paradoxically, the current initiatives of human rights due diligence laws to create transition plans, which are supposed to focus on human rights protection, are not considering the rights of humans that are affected by climate change. In the conclusion it is emphasized that corporate duties to tackle climate change should be more human-rights centered and less business-centered.

Resumo

Um dos principais impulsionadores do aquecimento global são as atividades empresariais. No presente momento, a maioria das leis ou políticas climáticas que existem globalmente não podem ser executadas adequadamente, uma vez que não são vinculantes, e as empresas ainda têm muito espaço para decidir se querem ou não abordar a sua contribuição para as alterações climáticas. No entanto, este panorama está a mudar. A evolução dos instrumentos normativos relativos às empresas

e aos direitos humanos apresenta novas vias para a regulamentação da conduta das empresas na abordagem das alterações climáticas, e tem simultaneamente em conta os impactos das alterações climáticas e dos esforços de atenuação das alterações climáticas nos direitos humanos. Esta tese discute o papel das empresas no combate às alterações climáticas, bem como as consequências da inação das empresas face às alterações climáticas e os seus efeitos nos direitos humanos. O primeiro capítulo discorre a respeito dos primeiros esforços que criaram o ramo de estudos "empresas e direitos humanos", analisa os objetivos desses esforços, e traz à tona os novos fatores que a evolução do campo trouxe para as leis obrigatórias de dever de diligência em direitos humanos, nomeadamente, a incorporação de aspectos ambientais e climáticos em seus requisitos. O segundo capítulo é dedicado a apresentar os requisitos ambientais e climáticos que já existem em soft-laws e em hard-laws, e que podem ser derivados de jurisprudências na Europa, bem como outras iniciativas que propõem a criação de deveres corporativos em relação às mudanças climáticas. O terceiro capítulo examina os elementos propostos para o plano de transição climática na Diretiva Relativa ao Dever de Diligência das Empresas em Matéria de Sustentabilidade da UE através da análise de cada etapa de seu processo de adoção, e discute o alcance da versão final deste plano de transição climática. O último capítulo discute os desafios remanescentes para lidar com mudanças climáticas através do uso de leis de dever de diligência em direitos humanos, argumentando que, ironicamente, as iniciativas atuais do uso destas leis para criar planos de transição não consideram os direitos dos seres humanos que são afetados pelas mudanças climáticas. Na conclusão, enfatiza-se que os deveres corporativos para lidar com as mudanças climáticas devem ser centrados nos direitos humanos ao invés de centrados em sua execução pelas empresas.

Abbreviation List

BHRE – Business, Human Rights and the Environment

BHR - Business and Human Rights

BIICL - British Institute of International and Comparative Law

BP - British Petroleum

CSR – Corporate Social Responsibility

CSDDD - Corporate Sustainability Due Diligence Directive

CSRD - Corporate Sustainability Reporting Directive

CO2 - Carbon Dioxide

EU - European Union

GHG - Greenhouse Gas

GP - Guiding Principle

HRDD – Human Rights Due Diligence

IPCC - Intergovernmental Panel on Climate Change

MHRDD – Mandatory Human Rights Due Diligence

MNEs - Multinational Enterprises

MS - Member States

NCPs - National Contact Points

NCPA - Norwegian Consumer Authority

OECD - Organisation for Economic Cooperation and Development

RDS - Royal Dutch Shell

SDG - Sustainable Development Goals

SFDR - Sustainable Finance Disclosure Regulation

UN – United Nations

UNGPs - United Nations' Guiding Principles on Business and Human Rights

UK - United Kingdom

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Introduction

According to John Ruggie, the author of the United Nations' Guiding Principles on Business and Human Rights (UNGPs), adapting the human rights regime to provide more effective protection to individuals and communities against corporate-related human rights abuses is one of the core governance challenges of our time.[1] Ending corporate impunity and holding corporations accountable for their serious human rights violations, environmental degradation, or contribution to the climate crisis have been the object of long-lasting discussion and have recently evolved into an independent area of study: the Business and Human Rights (BHR) field[2].

Since the 90s, BHR scholars have gained significant space in the international agenda aiming to establish real obligations for companies to respect human rights throughout their activities, and to hold corporations accountable and legally responsible when infringing human rights.[3] The first achievements of the field, however, were mostly focused on human rights without encompassing environmental and climate adverse impacts resulting from business operations, or the adverse human rights impacts that business strategies to mitigate their environmental and climate impacts can have.

As the BHR field evolved, studies pointing out the increasing interconnection between corporate greenhouse gases emissions, the adverse impacts of climate mitigation efforts, and their resulting effects on human rights felt by people began to be considered as part of the BHR studies. For instance, in 2018 the former UN Special Rapporteur on the Environment, Professor John Knox, published a framework detailing the inherent interlinkages between human rights and the environment[4] which influenced the UN General Assembly to recognise the right to a clean, healthy and sustainable environment as a human right. This recognition was based on the assertion that environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy human rights.[5]

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[1]RUGGIE, John Gerard. Just Business, New York : W. W. Norton & Company, First Edition. 2013. Pg. 201.
[2]BERNAZ, Nadia, '*Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap'*. 2016. London: Routledge. 'Introduction'.
[3]Ibid.
[4]UNITED NATIONS, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/37/59 (24 January 2018).* 2018. Available at:https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/A_HRC_37_59_EN.pdf
[5]UNITED NATIONS, *General Assembly: The human right to a clean, healthy and sustainable environment.* 2022. Available at: https://digitallibrary.un.org/record/3982508?ln=en.

Amid different efforts to control the rise of the world's temperature and mitigate its effects on people, which are yet described as insufficient[6], BHR binding frameworks were noticed to be a possible instrument to give corporations climate obligations, as climate change is intrinsically connected with the enjoyment of human rights.[7] At present, the prospects of limiting global warming to 1.5°C above pre-industrial levels are described by the Climate Action Tracker as not sufficient, and in one its latest findings it was reported that there remains a "substantial gap between what governments have promised to do and the total level of actions they have undertaken to date" [8], highlighting that the current policies in place around the world are projected to result in about 2.7°C warming above pre-industrial levels in the next few years, when the safe level would be limiting global warming to 1.5ºC.

Climate impacts have been receiving a broad consensus from scientific studies not only to be an environmental issue, but also a complex and multifaceted national security threat[9] that can provoke together with hazards in the ecosphere, changes in the anthroposphere and in socio-economic drivers.[10] The Intergovernmental Panel on Climate Change (IPCC) raised attention to the fact that climate impacts are already affecting states' infrastructure, networks, services, finances, capabilities and resources, and at the same time individuals' living standards, such as health, food and water security, and increasing the risk of physical and social vulnerability.[11]

As previously mentioned, one of the major drivers of such climate impacts is identified to be corporate activities. The IPCC has tracked that emissions from the fossil fuel industry are the dominant cause of global warming and that only in the year of 2018 it represented 89% of global CO2 emissions[12]. New evidence also shows that around 70% of carbon dioxide

[6]UN, Environment Programme. *Emissions Gap Report. 'Broken Record, Temperatures hit new highs, yet world fails to cut emissions (again)'.* 2023. Available at: https://www.unep.org/resources/emissions-gap-report-2023 or https://unepccc.org/emissions-gap-reports/

[7]MACCHI, Chiara, *In Lise Smit and Ivano Alogna (Eds): Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report,* 2021, Available at: https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf

[8]CLIMATE ACTION TRACKER. *Report: Addressing Global Warming.* 2024. on: https://climateactiontracker.org/global/temperatures/

[9]NEVITT, Mark. *On Environmental Law, Climate Change, & National Security Law* . Faculty Scholarship at Penn Carey Law, Pennsylvania Law School.2020. Faculty Scholarship at Penn Carey Law, Pennsylvania Law School. P. 323. Available at: https://scholarship.law.upenn.edu/faculty_scholarship/2101

[10]IPCC, Intergovernmental Panel on Climate Change. *C* Report. Full Report. 2022. pp. 143-148. Available at: https://www.ipcc.ch/report/ar6/wg2/ ; https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf

[11] Ibid. Pg. 144.

[12]CLIENTEARTH, *ClientEarth Communication. Fossil Fuels and Climate Change: The Facts.* 2022. Available at: https://www.clientearth.org/latest/news/fossil-fuels-and-climate-change-the-facts/

emissions come from only 100 companies worldwide[13]. Still, corporations are not yet legally responsible for their harmful contribution to global warming.

The Business and Human Rights field has advanced significantly since the endorsement of the UNGPs in 2011, and the latest mandatory human rights due diligence laws adopted impose environmental and climate change-related obligations on companies. The most recent progress comes from the recently approved European Corporate Sustainability Due Diligence Directive (CSDDD) which includes a provision explicitly requiring corporations to combat climate change by adopting a transition plan for climate. Yet, all of these BHR frameworks are still very new and there is still much to do in order to clarify the standards corporations have to carry on environmental and climate due diligence, as well as the consequences of a failure to fulfil the environmental duties, climate adaptation and mitigation obligations.

In light of that, the objective of this research is to examine how business and human rights frameworks address corporate duties towards climate change and how they are applied in different jurisdictions. The research seeks to explore these instruments to reflect on how to ensure corporate accountability for climate inaction and redress for climate-affected victims with the use of BHR norms.

To do so, this thesis will explore the European initiatives of mandatory human rights due diligence laws to understand how they are being used in this regard. It will, therefore, divide this research into four main chapters. The first chapter will be dedicated to understanding the construction of the concept of corporate accountability through the business and human rights perspective and the evolution of this concept to incorporate environmental and climate aspects. The second chapter will present the environmental and climate requirements that can be derived from soft-law, hard-law and case-law within Europe, shortly introducing other efforts coming from different domains. The third chapter will analyse in depth the process of adoption of the European proposal for a Corporate Sustainability Due Diligence Directive in order to explore the key elements proposed for the climate transition plan, and discuss the reach of the final version of the article. Finally, the fourth chapter will look back at all the previous chapters and discuss the remaining challenges for addressing climate change with the use of mandatory human rights due diligence law. At the end, a conclusion will be drawn.

[13]NRDC. *Natural Resources Defense Council: Corporate Honesty and Climate Change: Time to Own Up and Act.* 2019. Available at: https://www.nrdc.org/bio/josh-axelrod/corporate-honesty-and-climate-change-time-own-and-act

Chapter 1 – The Wider Reach of the Business and Human Rights Agenda: Tackling Climate Change

1.1 - Business and Human Rights: from voluntary standards to mandatory obligations

For years, the dominant perspective in international law followed the understanding that corporations did not have human rights obligations, attributing it only to states.[14] As an effect, corporate activities remained having paradoxical consequences on society. From one side, they were to the service of development as they could positively impact peoples' lives by creating job opportunities, economic wealth, generating revenue for the government, and more[15], but, from the other side, they showed to be to the disservice of development, as they could severely affect human lives, human rights and the environment when their activities were not conducted responsibly.[16]

Several scandals of corporate activities that did not respect social and environmental concerns, such as the Bhopal accident in India[17], the Chevron disposal of toxic waste into the Amazon rainforest, the Coca-Cola's harmful labour practices in Colombia and environmental practices in India, the killing of the Nigerian activist Ken Saro-Wiwa for protesting against Shell's activities in Niger Delta[18], and much more, fuelled discontentment with corporate impunity over the last decades inciting the discussions whether multinational corporations should continue not responsible for their impacts on people and the environment, especially after corporations' role in society shifted from only increasing profit and serving its shareholders, to a vision that businesses should also be to the service of the community.[19]

The first discussions to make businesses look beyond its shareholders' interests when conducting its activities dates back to the 1950s. The concept of Corporate Social Responsibility (CSR) solidified as an expectation that corporations had a role in society on a voluntary basis,

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[14]WETTSTEIN, Florian. *Business and Human Rights: Ethical, Legal, and Managerial Perspectives*. 2022. Cambridge: Cambridge University Press. pgs. 1-5.
[15]UNITED NATIONS, *The impact of Multinational Corporations on Development and on International Relations. New York. Digital Library*. 1974. Pg. 28. Available at: https://digitallibrary.un.org/record/819904
[16]ORTEGA, Olga Martin and DEHBI, Fatimazahra. *An integrated approach to corporate due diligence from a human rights, environmental, and TWAIL perspective.* 2023. Available at: https://onlinelibrary.wiley.com/doi/10.1111/rego.12538
[17]BERNAZ, Nadia. '*Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap'*. 2016. London: Routledge. 'Business and human rights, corporate social responsibility and related concepts'. Introduction .
[18]RUGGIE, John Gerard. *Just Business*, 2013. New York : W. W. Norton & Company, First Edition. pg.9-14.
[19]ROUNDTABLE, Business, *STATEMENT ON THE PURPOSE OF A CORPORATIO*N. 2019. Available at: https://www.businessroundtable.org/opportunity-commitment

such as engaging with philanthropy or providing aid when governments failed with their duties).[20] The CSR discussions dealt with issues that could be characterized as human rights challenges in their essence, however, they never addressed actual human rights issues and were viewed as a voluntary and residual responsibility within a state regulation framework.[21]

Corporate Social Responsibility (CSR) remained the principal discourse to express corporates' commitment with social causes for approximately 40 years, and terms such as "corporate complicity" turned very popular around the 1990s pushing businesses to be more careful not to be identified as complicit with human rights violations[22]. Nonetheless, companies would still hold the decision whether to have a role in society and respect human rights and environmental standards or not, and activities that resulted in adverse human rights impacts persisted leaving victims of incidents unremediated.

It was only after the emergence of a force from scholars mostly from the legal and development departments, aiming to shift the CSR voluntary nature and reinterpret corporate human rights responsibility, that a real possibility of having business activities operating in accordance with human rights law and sustainability came to existence.[23] This force pushed the regulation of the field of BHR, which focused on establishing real obligations for companies to respect human rights and environmental standards throughout their activities.

Business and Human Rights scholars worked to consolidate an objective: preventing business from violating human rights, and holding corporations accountable and legally responsible for human rights violations arising from their activities.[24] Contrary to the CSR's voluntary and optional nature, the BHR field proposed more rigid enforcement of corporate's responsibility through legal and policy means, irrespective of what domestic laws would say. It meant that corporations would have to be responsible to respect human rights even if it conflicted with the laws of the country in which they operate.[25]

The idea behind establishing real consequences to corporate human rights abuses was due to the observation of the general structure of business activities which allowed corporate impunity. Many scholars noticed that a parent company would most of the time be incorporated

[20]RAMASASTRY, Anita. *Corporate Social Responsibility Versus Business and Human Rights*. Bridging the Gap Between Responsibility and Accountability; 2015. Journal of Human Rights, 14:237-259. University of Washington School of Law.
[21]WETTSTEIN, Florian. Business and Human Rights: Ethical, Legal, and Managerial Perspectives. 2022. Cambridge: Cambridge University Press. 1-5.
[22]Ibid.
[23]Ibid, pgs. 4-8
[24]BERNAZ, Nadia, *'Business and Human Rights: History, Law and Policy - Bridging the Accountability Gap'*. . 2016. London: Routledge. 'Introduction'.
[25]Op. Cit. pg. 5.

in the Global North, where the main administrative operations would happen, while the subsidiary would be incorporated in the Global South, where it would get the labour force or the necessary goods for production, and where the laws applicable to its operations would not ensure accountability or responsibility for any harm caused. Thus, the human and environmental costs of extractions and labor would be paid by people and communities in the Global South, while profits would flow into private businesses in the Global North.[26]

On these grounds, Business and Human Rights (BHR) scholars focused on the fundamentals basis of corporate responsibility, looking if international law could give corporations human rights obligations regardless of their size, the location where they were established, their sector, and the domestic laws of their home countries, They aimed to help clarifying the means to seek legal redress, access to justice for victims of corporate abuses, and to push the international agenda to create obligations that could apply to parent companies' whole value chain of activities.

Previous attempts of the United Nations to regulate corporate conduct on a mandatory basis existed since the 70s, but were unsuccessful. From all of the attempts, the endorsement of the United Nations' Guiding Principles on Business on Human Rights (UNGPs) in 2011, a soft-law, was the biggest achievement of the field on a global level, and, even though not mandatory, the voluntary nature of the UNGPs was successful to create a smart mix of reinforcing policy measures that would be able to generate change over time.

The UNGPs' consistent standards for corporate conduct turned out to be the leading instrument to shift the voluntary nature of corporate responsibility to mandatory rules. After its endorsement, more than half of the EU Member States expressly publicly committed to implement the UNGPs in national, regional and international context[27], and many of these new legislative proposals put forward liability provisions in order to make companies accountable for their negative impacts on people and the environment.

1.2 - Milestones of Corporate Accountability

[26]TÜRKELLI, Gamze Erdem, et al., *Rights As Usual*: *Righting the Wrongs of the Past: using public and private international legal tools to account for historical and continued global inequalities.* 2024.Blog Post. Available on: https://rightsasusual.com/2024/01/30/righting-the-wrongs-of-the-past-using-public-and-private-international-legal-tools-to-account-for-historical-and-continued-global-inequalities/

[27]UNITED NATIONS, *Statement by the United Nations Working Group encourages European Union Member States to adopt the draft Corporate Sustainability Due Diligence Directive.* 2024. Available at: 20240207-Corporate-Sustainability-Due-Diligence-Directive.pdf (ohchr.org)

1.2.1 United Nations Guiding Principles on Business and Human Rights (UNGPs)

The first attempt to draft a code of conduct for transnational corporations at the United Nations' level was in the 1970s. The negotiations of the UN Code of Conduct on Transnational Corporations did not last long before it failed. States representatives did not agree on the provisions of the norm, and due to these disagreements, the Code was abandoned two years after the proposition. The UN Centre on Transnational Corporations was also abolished in 1992.[28]

Still in the 1970s, the first OECD Guidelines for Multinational Enterprises was adopted as part of the Declaration on International Investment and Multinational Enterprises, bringing important recommendations for business to act responsibly, but was still very limited in relation to environmental and social aspects.[29] Increasingly, human rights scholars and policymakers focused their attention on the creation of universal approaches to regulate corporate conducts, and governments and companies tried to find quick responses to specific issues by settling lawsuits, forming commissions, and multi-stakeholder initiatives, which served as a partial solution to address issues of business impacts on human rights.[30]

For instance, in 1999 the United Nations Global Compact was launched as a voluntary initiative to propose companies to make a public pledge to follow ten standard principles when conducting their operations, and implementing universal sustainability principles. The Global Compact aimed to encourage corporations to make commitments to operate in ways that, at a minimum, would meet fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption.[31]

Still, the discussion whether these kinds of responsibilities should continue to hold a voluntary status continued, and the search for universal approaches to regulate corporate conduct led a UN working group (the Sub-Commission on the Promotion and Protection of Human Rights) to draft new norms in order to put forward mandatory responsibilities of companies concerning human rights in the late 1990s. These norms aimed to apply to businesses

[28]RAMASASTRY, Anita. Corporate Social Responsibility Versus Business and Human Rights; Bridging the Gap Between Responsibility and Accountability. Journal of Human Rights, 14:237-259. 2015.. University of Washington School of Law.
[29]OECD, *Policy Brief on the OECD Guidelines for Multinational Enterprises.* 2001.Available at: https://www.oecd.org/investment/mne/1903291.pdf
[30]Op. Cit, 14:242-243.
[31]UNITED NATIONS GLOBAL COMPACT, *The Ten Principles of the UN Global Comp*act. Available at: https://unglobalcompact.org/what-is-gc/mission/principles

the existent international human rights standards that were mentioned by the Global Compact as mandatory requirements, that, if not followed, could lead to accountability.[32]

The "Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" were a major attempt to shift the existing voluntary standards to mandatory rules on BHR. However, the draft norms were very controversial and were not endorsed. The private sector referred to them as "a large and daunting list of treaties prepared by academic experts which were not negotiated by states", [33] and the global south did not approve them either. Facing the abandonment of the Draft Norms, it became clearer that it was unlikely to achieve much progress without finding a common terrain on which to move forward.

As a result, in 2005 the UN Secretary-General appointed the mandate of "Special Representative on the issue of human rights and transnational corporation and other business enterprise" to Professor John Ruggie, who had been his advisor for Strategic Planning from 1997 to 2000. He was mandated with the task of "identifying what international human rights standards regulated corporate conduct and clarifying the role of states and business in safeguarding these rights".[34]

Professor John Ruggie acknowledged it would be necessary to move beyond the mandatory and voluntary discussions on BHR norms, and thought it would be better to design a smart mix of reinforcing policy measures that would be able to generate change over time[35], instead of having another failed attempt to create binding norms.

It was under his mandate that the first milestone of Corporate Accountability, the United Nations Guiding Principles on Business and Human Rights (UNGPs), a soft-law, but recognised as an authoritative international framework,[36]was created.

The UNGPs established a set of foundational principles to promote human rights protection through three pillars: the state's duty to protect, the corporate's responsibility to respect and access to remedy, and reached a wide acknowledgement by business and states.[37] The Framework defined scope in terms of the actual and potential adverse human rights impacts

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[32]RUGGIE, John Gerard. *Just Business,* 2013. New York : W. W. Norton & Company, First Edition. "Introduction".
[33]RAMASASTRY, Anita. *Corporate Social Responsibility Versus Business and Human Rights; Bridging the Gap Between Responsibility and Accountability.* Journal of Human Rights, 14:242-243. 2015. University of Washington School of Law.
[34]Op. Cit.
[35]Ibid.
[36]THE HAGUE DISTRICT COURT, *Judgment of 26 May 2021 in the case of Milieudefensie et al. vs Royal Dutch Shell (RDS). 2021.*. Available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339
[37]RUGGIE, John Gerard. Just Business, 2013. New York : W. W. Norton & Company, First Edition. pg. 97.

arising from a business enterprise's own activity, and from the relationship with third parties associated with those activities. In order to meet their responsibility to respect human rights, corporations were encouraged to put in place policies and processes to commit to meet their responsibility to respect human rights. Additionally, they were encouraged to put in place a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights, and, lastly, to enable the remediation of any adverse human rights impacts they caused or to which they contributed to.[38]

The Guiding Principles introduced a different approach to the use of the term due diligence. Instead of using the due diligence process to discharge an obligation that could represent a risky operation (the common use of due diligence processes), businesses were invited to conduct due diligence processes to find out if their own activities were risky to both the environment and the people and communities living where their activities operate.[39] This new use of the term due diligence allowed businesses that were already familiar with the due diligence procedure to, instead of learning a new procedure from scratch, expand their approach and include human rights in the structure of their common due diligence processes.

Since the endorsement of the Guiding Principles in 2011, the concept of human rights due diligence introduced under the UNGPs has been the object of extensive literature and pieces of general and sectoral international guidance[40], and has been the primary source of the most recent judicial and administrative decision-making, public policy, multi-stakeholder norms, commercial and financial transactions, and the advocacy of civil society[41]. In addition to that, different mandatory human rights due diligence legislations were proposed as a logical continuation of the UNGPs and shifted the voluntary basis of these instruments to mandatory obligations.

The UNGPs were also the basis for the development of human rights due diligence laws in international, regional and national context, and for the improvement of international guidelines such as the OECD guidelines for multinational enterprises, which are also of critical importance for the BHR field. By the time the UNGPs were endorsed, however, the OECD Guidelines for Multinational Enterprises had come under heavy criticism for its lack of a human

[38]UNITED NATIONS, *Guiding Principles on Business and Human Rights.* Principle 15. 2011. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf
[39]BONNITCHA, Jonathan and MCCORQUODALE, Robert. The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights. 2017.
[40]BRIGHT, Claire and BUENO, Nicolas. *Implementing Human Rights Due Diligence Through Corporate Civil Liability.* 2020. Cambridge University Press for the British Institute of International and Comparative Law. Pg. 3.
[41]SHERMAN, John. *Beyond CSR: The Story of the UN guiding Principles on Business and Human Rights, Corporate Responsibility Initiative*. 2020. Harvard Kennedy School. Working Paper nº1. Pg. 2.

rights chapter, as the two instruments could end up settling conflicting business and human rights standards.

As a consequence, the guidelines were revised and incorporated a human rights chapter as well as some concepts brought by the UNGPs, continuing to be a useful tool to promote responsible business conduct together with the UNGPs.

1.2.2 The OECD Guidelines for Multinational Enterprises and Mandatory Human Rights Due Diligence Legislation

Since the OECD Guidelines were first adopted in 1976, they were reviewed four times before 2011, when business associations began to call for another update that would bring convergence between the UNPGs and the OECD Guidelines. As a consequence, the OECD Guidelines were updated again in 2011 to extend the content of the recommendations of its various areas (employment, industrial relations, information disclosure, competition, taxation, science and technology), to include chapters on human rights and the environment. [42]

Similarly to the UNGPs, the OECD Guidelines introduced a set of voluntary recommendations on responsible business conduct to encourage sustainable development and address adverse impacts associated with business and activities. However, differently from the UNGPs, the OECD Guidelines required all OECD members and adhering governments to establish a National Contact Point (NCP), which is a government-supported office with the duty to advance the effectiveness of the OECD Guidelines by promoting and implementing the guidelines, and which can handle complaints against companies who have failed to meet the Guidelines' standards.[43]

The National Contact Points (NCPs) complaint mechanism handles complaints of non-alignment with the OECD Guidelines that occur inside the NCP's country (by a multinational enterprise headquartered anywhere else in the world), or that occur anywhere in the world (by a multinational enterprise headquartered in the NCP's country). More than four hundred complaints[44] were filled worldwide denouncing non-alignment with the guidelines until the present moment. Nonetheless, the NCP's complaint mechanism proved to be ineffective mainly due to its voluntary nature.[45] In spite of that, efforts to seek corporate accountability for human

[42]RUGGIE, John Gerard. *Just Business*, 2013. New York : W. W. Norton & Company, First Edition. pgs. 160-161.
[43]OECD WATCH, *National Contact Points (NCPs).* 2024. Available at: https://www.oecdwatch.org/oecd-ncps/national-contact-points-ncps/
[44]OECD WATCH, *Complaint Database*. 2024. Available at: https://www.oecdwatch.org/complaints-database/
[45]HOLM, Alisson. '*Understanding the effectiveness of OECD National Contact Points: uncovering corporate commitments as outcomes of NCP dialogue on human rights issues',* 2022. Nova Centre on Business, Human

rights abuses did not lose force because the instruments put in place showed many times not to be effective. On the contrary, after the endorsement of UNGP and the actualization of the OECD Guidelines on MNEs in 2011, different laws were adopted as a response to the global lack of accountability for business-related human rights abuses.

For instance, in the UK, the Modern Slavery Act was adopted in 2015, in France the Corporate Duty of Vigilance Law in 2017, in the Netherlands the Child Labour Due Diligence Law in 2019, in Australia the Modern Slavery Act in 2019, in Norway the Transparency Act in 2022, in the US the Uyghur Forced Labor Prevention Act in 2022, in Germany the Supply Chain Due Diligence Act, in 2023, and most recently in Canada the Forced and Child Labour in Supply Chains Act January 2024.[46]

On top of that, legislative proposals on BHR continue to emerge in national context, such as in Austria, Belgium, Finland, India, Spain, Sweden, and Brazil[47], in the regional context, the EU a Directive on Corporate Sustainability Due Diligence has been adopted recently [48], and in the international context, the UN binding treaty on BHR is being developed and is currently in its third revised draft.[49] All of these legislative developments enriched the BHR field to a large extent, helped to improve the effectiveness of the initiatives already in place, and brought new elements to be implemented in the broad terms of human rights due diligence requirements.

Expectedly, the OECD Guidelines on MNEs were revised again in 2023 to encompass the new aspects included in the referred laws and updated lots of new concepts, principles and general policies. This update made them the first internationally agreed standard that covered how businesses should address their environmental and climate impacts, and that included environmental and climate considerations as part of human rights protection.[50] It created

Rights and the Environment Blog, Available at: https://novabhre.novalaw.unl.pt/understanding-the-effectiveness-of-oecd-national-contact-points-uncovering-corporate-commitments-as-outcomes-of-ncp-dialogue-on-human-rights-issues/

[46]WORD FAVOUR, *The ultimate guide to Human Rights Due Diligence Laws – who's affected and how to comply.* 2023.Available at: https://blog.worldfavor.com/the-complete-list-of-national-human-rights-due-diligence-laws-whos-affected-and-how-to-comply

[47]NOVA BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT CENTRE. *Mapping on Legislative and Policy Developments on Business and Human Rights.* 2024. Available at: https://novabhre.novalaw.unl.pt/legislative-developments/#info

[48]EU COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final)*, 2022. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071

[49]UNITED NATIONS, *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises.* 2021. Available at: https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf

[50]OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. 2023.* Pp.33. Available at:https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htmhttps://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm

recommendations for enterprises to align their activities with internationally agreed goals on climate change and biodiversity, and a specific provision that clarifies how to conduct human rights due diligence taking into consideration environmental and climate aspects.[51]

The inclusion of climate change into the non-exhaustive list of environmental impacts that enterprises could be involved in clarified previous doubts in relation to compatibility of climate change as a part of human rights due diligence requirements[52], showing that corporations have an important role in contributing towards net-zero greenhouse gas emissions and a climate-resilient economy[53]. This update represented a mark-point in the discussion whether climate due diligence and environmental standards are or not an inherent dimension of human rights due diligence.

1.3 Human Rights and the Environment: Interlinkages

As the UN Guiding Principles did not expressly mention environmental rights or climate change as part of its context anywhere, environmental and climate matters were understood as a separate matter by some[54], while others saw them as a sphere of human rights which should be included as part of the duty to conduct human rights due diligence.[55]

Already in the 1980s, important documents such as the Brundtland Report highlighted that the paths thrilled to achieve human aspirations and the satisfaction of human needs (food, clothing, shelter, etc.), led economic growth to drive environmental disasters, uneven development, widening inequalities, hunger, poverty and waste of opportunities and resources. The Brundtland Report addressed the need of achieving a balanced and integrated development by looking at the economic, social and environmental spheres of development to guarantee that economic growth would not destroy the environment and harm the population.[56]

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[51]Ibid.

[52]ECGI BLOG, *Why Article 15 (combating climate change) should be taken out of the CSDD.* 2022. Available at: https://www.ziv.unibe.ch/unibe/portal/fak_rechtwis/c_dep_private/ziv/content/e7688/e50302/e150986/e196606/e248813/e1267906/ECLE_Article15CSDD_ECGIAugust22_ger.pdf

[53]Op. Cit, pg. 33

[54]ECGI BLOG, *Why Article 15 (combating climate change) should be taken out of the CSDD.* 2022. Available at: https://www.ziv.unibe.ch/unibe/portal/fak_rechtwis/c_dep_private/ziv/content/e7688/e50302/e150986/e196606/e248813/e1267906/ECLE_Article15CSDD_ECGIAugust22_ger.pdf

[55]MACCHI, Chiara, *The Climate Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'. 2021.* Pgs. 93-94. Available at: https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/climate-change-dimension-of-business-and-human-rights-the-gradual-consolidation-of-a-concept-of-climate-due-diligence/5684628BFA270FB974050824231E1744

[56]WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *Our Common Future (Brundtland Report*). 1987. Pg 12. Available at: https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf

This report also highlighted that some tragedies such as the leak of a pesticide factory in Bhopal, India, and the nuclear disaster of Chernobyl, Ukraine, could be seen as grave predictions about the human future, and represented trends that the planet and its people could no longer bear[57]. Up to now, a number studies continue to draw attention to different urgent concerns such as global warming, threats to the Earth's ozone layer, deserts consuming agricultural land, and all other forms of environmental degradation[58], and the same of strategies to minimizing climate and environmental damages that were raised in 1987[59] continue to be urged (balancing social, economic and environmental spheres).

It was only very recently, in July 2022, when the right to a clean, healthy and sustainable environment was recognized as a human right by the UN General Assembly, based on the assertion that environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy human rights, including the right to life.[60] Before that, the exercise of human rights was not expressly linked with the protection of the environment by international authorities.

This acknowledgement drew from important findings of the former UN Special Rapporteur on the environment, professor John Knox, who published a framework reinforcing the inherent interlinkages between human rights and the environment. He brought to light 16 principles that summarized the main human rights related to the enjoyment of a safe, clean, healthy and sustainable environment, and explained which environmental harms can interfere with the enjoyment of human rights.[61]

The framework explained that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights. Consequently, the right of a healthy environment is a human right. Under principle 2, for example, the framework recognises that rights such as the right to life, to physical and mental health, to an adequate standard of living, to adequate food, to safe drinking water and sanitation, to housing, to participation in cultural life and to development, are dependent on the right of a healthy environment.[62]

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[57]Ibid.
[58]UN RESEARCH LIBRARY, *Climate Change - A Global Issue: Major Reports.* Available at: https://research.un.org/en/climate-change/reports
[59]Op. Cit. pg.89.
[60]UNITED NATIONS GENERAL ASSEMBLY, *The human right to a clean, healthy and sustainable environment.* 2022. Available at: https://digitallibrary.un.org/record/3982508?ln=en.
[61]UNITED NATIONS, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/37/59 (24 January 2018).* 2018.Available at:https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/A_HRC_37_59_EN.pdf
[62]Ibid, pgs. 6-7.

Accordingly, in order to respect human rights and to protect the enjoyment of human rights from harmful environmental interferences, principle 2 of the framework asserts that states should refrain from violating human rights through causing or allowing environmental harm, and protect against interferences from other actors, including business enterprises.[63] The second principle also suggested that states should undertake due diligence to prevent such harms, reduce it to the extent possible, and provide for remedies for any remaining harm. In doing so, it draws a connection with the UNGPs and its three fundamental pillars, the state's duty to protect, corporate's responsibility to respect, and access to remedy.[64]

As many of the unwanted outcomes for the environment and human rights were and still are linked to or directly attributable to business practices[65], in the course of time, more consensus among the international community on the responsibility of states and private actors to protect environmental harms which interfere with human rights solidified[66]. The means to achieve this legal duty were studied in the BHR field by taking a holistic approach to human rights due diligence requirements, such as by interpreting due diligence obligations through a comprehensive exercise of risk-based due diligence[67], and in the light of mutually reinforcing principles of environmental law, climate law and human rights law[68]. Slowly, a connection between human rights, the environment and climate change was drawn and these three aspects were integrated as a new dimension of corporate processes and policies.

1.4 Environmental and Climate Requirements in Human Rights Due Diligence Laws

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[63]Ibid.

[64]UNITED NATIONS, *Guiding Principles on Business and Human Rights.* 2011. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

[65]TURNER, Stephen J. *Business practices, human rights and the environment.* 2019. Senior Lecturer, University of Lincoln, UK. DOI:10.4337/9781788111461.VII.28.

[66]ALOGNA, Ivano and SMIT, Lise, *Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report.* British Institute of International and Comparative Law (BIICL). 2021. available at: https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf

[67]BRIGHT, Claire and BUHMANN, Karin, *Risk-based Due Diligence, Climate Change, Human Rights and the Just Transition*. Sustainability, 13, 10454. Page 7. 2021. Available at: https://www.mdpi.com/2071-1050/13/18/10454

[68]MACCHI, Chiara, *The Climate Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'*. Business and Human Rights Journal , Volume 6 , Issue 1 , 2021 , Introduction. pp. 93 – 119. Available at: https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/climate-change-dimension-of-business-and-human-rights-the-gradual-consolidation-of-a-concept-of-climate-due-diligence/5684628BFA270FB974050824231E1744

Arguments in favour of including environmental and climate requirements in the context of human rights due diligence laws also gained force in front of the growing number of climate litigation cases targeting corporations to account for their climate impacts, as well as in front of the regulatory developments appearing in the EU level, such as the Corporate Sustainability Reporting Disclosure Directive (CSRD), that increased attention of investors towards climate-related risks. Corporations were gradually exposed to legal, reputational and financial consequences when not aware of their climate impacts.[69]

The French Duty of Vigilance Law of 2017 was the first piece of national human rights due diligence legislation that established the duty to prevent human rights harm and environmental damage in corporate operations and commercial relationships. This law was adopted as a legally binding obligation, and required parent companies to identify and prevent not only adverse human rights, but also environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers. [70] After the French Duty of Vigilance Law came into force, climate-related lawsuits were filed in France demanding corporations to address the level of their greenhouse emissions or to increase their transparency in relation to the climate impacts they were linked to, on the basis that corporations were expected to account for their climate impacts as part of the duty to prevent environmental damage that the law posed[71].

As a consequence, in 2021 the UN Working Group on Business and Human Rights delivered a roadmap for the next decade of Business and Human Rights appointing the paths to raise ambition, increase the pace of implementation, improve coherence, and create greater impact in the field. The roadmap identified progress towards sustainable development as a priority goal and target for the next decade, and highlighted the need for just transition and climate mitigation. Additionally, the document suggested that States should integrate in their policy agendas the Paris Agreement goals and the 2030 Agenda, and business enterprises demonstrate throughout their human rights due diligence practices their just transition planning.[72]

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[69]Op. Cit, pg. 118.

[70] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1). Article 1. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/

[71]As a matter of fact, the Sabin Center for Climate Change law counts 28 environmental claims which corporations and states are targeted in the French Jurisdiction. Source: SABIN CENTER FOR CLIMATE CHANGE LAW, '*Non-U.S. Jurisdiction, France*'. Available at: https://climatecasechart.com/non-us-jurisdiction/france/

[72]UNITED NATIONS. *United Nations Working Group on Business and Human Rights, UNGP 10+: A roadmap for the next decade of Business and Human Rights.* Introduction. 2021. Available at: https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf

As an effect, the third revision of the UN Draft Norms (2021) explicitly included that HRDD (human rights due diligence) measures undertaken by business enterprises should include environmental and climate change impact assessments throughout their operations[73]. Still in 2021, when the German Act on Due Diligence Obligations in Supply Chains was proposed, environment-related obligations were addressed in more detail in the German legislation, and climate-related lawsuits targeted German companies as well.[74] In 2022, the Norwegian Transparency Act was adopted and included the duty to carry out due diligence in accordance with the OECD Guidelines[75], which now set out guidelines on how enterprises should address adverse environmental impacts to contribute to reaching the goals of climate change mitigation and adaptation.

Furthermore, the European Commission proposed the Corporate Sustainability Due Diligence Draft Directive (CSDDD) in 2022 aiming to establish a corporate duty to account for negative human rights and environmental impacts, as well as to ensure that EU business strategies are compatible with the Paris Agreement. For the purpose of limiting global warming and being in line with the Paris Agreement, the Draft Directive included among its 32 articles a specific provision which requires corporations to tackle climate change.[76] Likewise, other proposals for MHRDD (mandatory human rights due diligence) laws included an environmental dimension to the human rights' due diligence process.

For instance, the Austrian's proposal for a corporate supply chain due diligence law requires companies to identify, prevent, and remedy human rights abuses and environmental harm throughout their supply chains[77]. The Belgian proposal for a MHRDD law includes the duty to care for the environment under the requirements to take measures to prevent and address adverse impacts of business operations on human rights.[78] The Spanish Preliminary Draft Proposal on Human Rights and Environmental Due Diligence Law equally includes the right

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[73]UNITED NATIONS, *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises.* Article 6.4. 2021. Available at: https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf

[74]SABIN CENTER FOR CLIMATE CHANGE LAW, '*Non-U.S. Jurisdiction,* Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG. Available at:https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/

[75]NORWEGIAN MINISTRY OF CHILDREN AND FAMILIES, *Transparency Act*. 2022. Available at: https://lovdata.no/dokument/NLE/lov/2021-06-18-99

[76]EU COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final),* 2022, Art. 15. available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071

[77]ISELIN, Brian. *Austria's Step Towards Corporate Accountability.* 2023. Available at: https://www.linkedin.com/pulse/austrias-step-towards-corporate-accountability-brian-iselin-/

[78]NOVA BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT CENTRE, *Mapping on Legislative and Policy Developments on Business and Human Rights: Tiffany Perna - Belgium.* 2024 Available at: https://novabhre.novalaw.unl.pt/legislative-developments/#info

to a healthy environment as a key concern for the protection of human rights when discussing what this regulation will encompass.[79] The Finish's government preparation's report with the purpose to enact a law on "corporate social responsibility" showed the intention to lay down provisions to require companies to identify, prevent, mitigate, and remedy the adverse effects of their operations on human rights and the environment.[80] Similarly, Brazil's proposal for a mandatory due diligence law establishes that companies must carry out due diligence to identify, prevent, monitor and repair violations of human rights, including social, labor and environmental rights.[81]

Some of these proposals are less specific and only include environmental aspects as a general standard in the context of the HRDD requirements. In turn, others include provisions clarifying the duties corporations have in order to conduct environmental and climate due diligence. In both cases, environmental and climate change requirements are already part of the context of conducting the HRDD process. The next chapter will be dedicated to analysing some of the instruments that have already entered into force and that brought environmental and/or climate aspects to the due diligence requirements, aiming to study the progress of environmental and climate requirements in the BHR field.

Chapter 2 – Environmental and Climate Due Diligence Requirements

In first place, it is important to distinguish the two different natures of instruments containing human rights and environmental due diligence requirements. There are instruments that put forward standards of care through soft-law instruments, and the ones that put mandatory obligations on corporations through hard-law. Regardless of the nature of the instrument used, structuring an effective plan for conducting human rights and environmental due diligence should include and be guided by the content of soft-law instruments as well as of hard-laws.

Soft law instruments are norms, agreements, principles and declarations that are not legally binding. These instruments have their strengths and weaknesses and serve different purposes; they can be a better alternative to hard law when regulating complex problems that

[79] GOBIERNO DE ESPAÑA, *Anteproyecto De Ley De Protección De Los Derechos Humanos, De La Sostenibilidad Y De La Diligencia Debida En Las Actividades Empresariales Transnacionales.* 2022. Available at: https://www.mdsocialesa2030.gob.es/agenda2030/documentos/220208-consulta-publica-definitiva.pdf

[80] MINISTRY OF ECONOMIC AFFAIRS AND EMPLOYMENT HELSINKI, *Memorandum on the due diligence obligation – Review of the national corporate social responsibility act.* 2022. Available at: https://tem.fi/documents/1410877/0/Memorandum+on+the+due+diligence+obligation.pdf/768b3219-db5b-7643-4a98-889d5f351515/Memorandum+on+the+due+diligence+obligation.pdf?t=1649930584536

[81] CONGRESSO NACIONAL, Projeto de Lei: Marco nacional sobre Direitos Humanos e Empresas e Diretrizes para a promoção de políticas públicas no tema. 2022. Available at: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2148124

can end up on non-adoption and non-compliance of a rule, as well as can codify and provide greater precision on a certain matter through their written text that fill existing gaps. However, a soft law instrument is often reached as a compromise between states in a technique to avoid the failure of international negotiations, and, as a non-binding agreement, many times leave a broad discretion in the implementation and enforcement criteria.[82] Two soft law instruments that are of great importance to the BHR field are the UNGPs and the OECD Guidelines for MNEs.

Hard law, on the contrary, refers generally to legal obligations that are binding on the parties and which can be legally enforced before a court.[83] However, the process of adoption of a hard law can be complex and reaching an agreement on the text of the law can cost leaving important provisions behind. One of the most recent forms to impose legal obligations on companies concerning their human rights and environmental impacts is the adoption of mandatory human due diligence laws. These laws transcribe the standards of care of the soft-laws into hard laws, and can effectively apply to companies resulting in accountability in case of breach of obligations.

In Europe, human rights due diligence national laws that included environmental and/or climate obligations for corporations can be identified in the French, German, Norwegian, and Dutch jurisdictions. Additionally, in some of these jurisdictions very important climate litigation cases were filed to try to bridge the gap of corporate impunity. Together with the legislative initiative these cases bring rich elements to be taken into account for this research. Therefore, the context of these soft-law and hard-law instruments in relation to human rights, the environment and climate change, and the climate-litigation cases that add to the construction of these instruments will be analysed throughout this chapter.

2.1 – Concepts Derived from Soft-laws: UNGPs and the OECD Guidelines

Courts have already referred to soft-law instruments that regulate the BHR field as sources of interpretation of legal obligations in the field of BHR. For instance, in the landmark judgment of Milieudefensie versus Royal Dutch Shell (RDS) in 2021, the Dutch court understood that the RDS had contributed to climate change and had breached the duty of care that derived from unwritten standards of care under Dutch law, explicitly referencing the

[82]JIANG, Lili, *An Evaluation of Soft Law as a Method for Regulating Public Procurement from a Trade Perspective.* 2009. Pgs. 23-33. University of Nottingham. Available at: https://eprints.nottingham.ac.uk/10700/1/Thesis_Final.pdf
[83]ECCHR, "*European Center For Constitutional And Human Rights Glossary: Definition Hard law/soft law.* 2024. Available at: https://www.ecchr.eu/en/glossary/hard-law-soft-law/

UNGPs as an universally endorsed instrument that have an authoritative nature, as well as the OECD Guidelines due to its persuasive authority.[84] Due to their persuasive authority, they carry the same weight as a precedent[85], and can have a significant weight when used to build up case-laws. In essence, the UNGPs and the OECD Guidelines are considered to be the foundations of the BHR field bringing the essential requisites to carry on HRDD.

Even outside courts, their relevance is highly significant. As duly noted by Crispim, the OECD Guidelines are, together with the UNGPs, embedded in many regional and national laws, such as the Sustainable Finance Disclosure Regulation (SFDR), in the EU Taxonomy Regulation, the Corporate Sustainability Reporting Directive (CSRD), [86] and in section four of the Norwegian Transparency Act, to guarantee that these laws are aligned with their content.

The UNGPs are a global standard on how business should go about to respect human rights. They are constructed upon three pillars: the states' duty to protect, the corporate responsibility to respect, and the access to remedy, which are interlinked and interdependent. Pillar two, the corporate responsibility to respect human rights, divides businesses responsibilities to respect human rights in a preventive approach, that requires businesses to avoid infringing on the human rights of others, and in an active and operative approach, that requires businesses to address the adverse human rights impacts with which they are involved and remediate adverse impacts if needed.[87]

In order to comply with this responsibility, enterprises are called to establish three requirements: a "policy commitment to meet their responsibility to respect human rights"; a "human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights"; and "processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute"[88].

The concept of human rights due diligence, mentioned as the second requirement, was introduced by the UNGPs and later incorporated to various international standards and

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[84]THE HAGUE DISTRICT COURT, *Milieudefensie and other NGOs vs. Royal Dutch Shell*. 2021. Pag. 32, p. 4.4.11. Available at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339

[85]STATE LIBRARY NEW SOUTH WALES, *Hot Topics: Courts and Tribunals, Section 4: Precedent and Evidence. Online Books*. Available at: https://www.sl.nsw.gov.au/find-legal-answers/books-online/hot-topics-courts-and-tribunals/precedent-and-evidence

[86]CRISPIM, Inês. *Demystifying the Due Diligence Process under the 2023 OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*. 2024. Available at: https://thinktank.plmj.com/pt/sustentabilidade-corporativa/forum/demystifying-the-due-diligence-process-under-the-2023-oecd-guidelines-for-multinational-enterprises/70/

[87]UNITED NATIONS HUMAN RIGHTS COUNCIL, *Guiding Principles on Business and Human Rights.* 2011. Principles 11 and 13. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

[88]Ibid. Principle 15.

instruments to help businesses both identify and act upon actual and potential human rights risk that they may cause or contribute to through their own activities or throughout their value chains. Thus, the UNGPs invited businesses to conduct human rights due diligence processes to find out if their own activities were risky to people and to the community where their activities operate.

This process was designed in four steps: assessing, integrating, tracking and communicating. In the first step, impact assessment, businesses were called to identify and assess any actual or potential adverse human rights impacts they may be causing or contributing to. In the following step, they should integrate the findings from their impact assessment across relevant internal functions to prevent, mitigate, or eliminate the adverse human rights impacts. For the third step, tracking, they should track the effectiveness of their responses, and, for the fourth step, communication, they should prepare to communicate everything externally.[89]

This procedure refers to an on-going standard of conduct that corporations should adopt to prevent negative human rights impacts, and equally works as a tool for companies to address their major challenges and risks. In fact, the UNGPs can be useful to corporations to ensure their reputational safety and to reduce the cost of supply chain disruptions through the prevention and minimisation of human rights and environmental violations. In addition to that, when following a structure of coherent and consistent standards contained in the UNGPs, businesses can transform their nature to a sustainable business operation.[90]

The UNGPs did not expressly include sustainable requirements to be added to the human rights' due diligence process, as mentioned before. However, the UNGPs are Sustainable Development Goals (SDG) related principles[91] and the requirements brought by the UNGPs are non exhaustive, so other requirements that may be understood as necessary and complementary to the process can be applied.

Recent literature understands that the requirements described by the UNGPs should be interpreted and expanded beyond a closed human rights perspective to an all-encompassing approach which includes sustainability, environmental and climate standards within the human rights requirements. Bright and Buhmann propose the use of a "risk-based due diligence" approach to extend the concept of human rights due diligence and include other issues beyond

[89]Ibid. Principle 17 to 21.

[90]UNDP, *Global: Rule of Law and Human Rights – Business and Human Rights.* Available at: https://www.undp.org/rolhr/business-and-human-rights

[91]UN FORUM ON BUSINESS AND HUMAN RIGHTS, *The UNGPs and the SDGs: Separate, Related, or Integrated?* 2017. Available at: https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ForumSession6/14_IntroductionUNGPs_SDGs.pdf

human rights. They argue that the concept of risk-based due diligence, which was set out in the OECD Guidelines for Multinational Enterprises of 1976 and included in the following versions, should be used to account both environmental and climate change impacts in the context of business operation.[92]

The risk-based approach to human rights due diligence developed by Bright and Buhmann comprises three aspects when used to climate-related issues: prevention, mitigation and remediation. The preventive aspect would be the action "to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects", expecting companies to put in place measures to prevent climate change using measurable and evidence-based targets in line with the Paris Agreement. The second aspect, mitigation, would be putting in place mitigation strategies to combat climate change and to contribute to green and fair transition without creating disproportionate burdens to people (specially the most vulnerable). The third facet, remediation, would be to take necessary steps to provide for remediation for the adverse climate impacts a company has caused or contributed to. [93]

In 2020, the European Commission published a study on due diligence requirements through the supply chain, and among its extensive study a chapter on environmental due diligence and climate change was included describing that following the introduction of the UNGPs climate change-related human rights impacts emerged as a dimension of human rights due diligence requirements. The trends analysed by the study concluded that "climate impacts were to be viewed as included within due diligence insofar as they related to the impacts of the individual company on the planet".[94]

Accordingly, the 2023 revision of the OECD Guidelines on Multinational Enterprises revised the concept of risked-based due diligence and aligned it with the propositions of Bright and Buhmann, as it will be seen next. The developed framework guided enterprises to conduct their activities taking due account of the need to protect the environment and the climate, and to contribute to the wider goal of sustainable development. The update aimed to enhance

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[92]BRIGHT, Claire and BUHMANN, Karin. *Risk-based Due Diligence, Climate Change, Human Rights and the Just Transition*. Sustainability, 13, 10454. Pgs. 7-14. 2021. Available at: https://www.mdpi.com/2071-1050/13/18/10454

[93]Ibid.

[94]EUROPEAN COMMISSION, *Directorate-General for Justice and Consumers, Torres-Cortés, F., Salinier, C., Deringer, H. et al., Study on due diligence requirements through the supply chain – Final report*, Publications Office, 2020. . Pg. 186. Available at: Study on due diligence requirements through the supply chain - Publications Office of the EU (europa.eu)

"business contribution to sustainable development and address adverse impacts associated with business activities on people, planet, and society".[95]

One of the biggest novelties brought by the 2023 Guidelines is the guidance for enterprises to establish and maintain a system of environmental management that accounts for environmental impacts of their own operations and of enterprises associated with the operations. The new framework mentions seven criteria that enterprises should follow to account for their environmental impacts: establish a (i) management system, (ii) conduct meaningful engagement with relevant stakeholders affected by adverse environmental impacts, have (iii) consistent use of scientific and technical understanding of the operations risks, create (iv) contingency plans and (v) improve its environmental performance, (vi) provide education and training, and (vii) contribute to the development of efficient public policies.[96]

The first step, putting in place and maintaining an environmental management system should be done observing five sub steps: in first place, have a mechanism to identify and assess adverse environmental impacts to prepare an appropriate environmental impact assessment; the second, to establish and implement measurable objectives, targets and strategies for addressing these adverse environmental impacts; the third one, regularly verifying the effectiveness of its strategies and monitoring progress toward environmental objectives and targets; the fourth one, providing relevant stakeholders with adequate, measurable, verifiable, and timely information on the findings; and the fifth one, providing for, or co-operating in, remediation.[97]

As it can be noticed, the first guidance adapted the human rights due diligence procedure set forth by the UNGPs to the environmental context by following the four steps of the UNGPs, assessing, integrating, tracking and communicating, and added the need for providing for remediation under the process of due diligence, as proposed by Bright and Buhmann.

After establishing and maintaining a system of environmental management, which is the first step of the OECD Guidelines to account for environmental impacts, the second guidance is to conduct meaningful engagement with relevant stakeholders affected by the adverse environmental impacts. The commentaries on Chapter VI of the OECD Guidelines explain that meaningful stakeholder engagement is a key component of the due diligence process and that communication with stakeholders is particularly important when they are or may be people

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[95]OECD, 2*023 update of the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct: "Key updates". 2023.* Available at: https://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm

[96]OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct,* OECD Publishing, 2023, Paris, Pgs. 33-34. Available at: https://doi.org/10.1787/81f92357-en

[97] Ibid.

affected by adverse impacts, as well as where scarce environmental resources are at stake. [98] Relevant stakeholder engagement means that rights holders can have space to speak freely about adverse impacts they are suffering or which they fear suffering without being subject to any kind of retaliation[99].

The OECD guidelines identify a non-exhaustive list of relevant stakeholders that should be taken into account, such as employees, customers, investors, suppliers, contractors, local communities, individuals or groups in situations of vulnerability or marginalization, persons possessing special rights or legitimate tenure rights, Indigenous Peoples, and with the public-at-large. It highlights the importance of integrating meaningful stakeholder engagement as a component of the due diligence process in order to effectively identify human rights impacts and respond to stakeholder's concerns.[100]

Following the previous requirement, the third step outlines the need to use consistent scientific and technical understanding of the environmental risks a corporation may be involved in, and not to use the lack of full scientific certainty or pathways as a reason for postponing to put in place effective measures to prevent or minimise its impacts. [101]

The fourth step requires businesses to maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, as well as for controlling accidents and emergencies, such as by putting in place mechanisms for immediate reporting to the competent authorities.[102]

In relation to the fifth step, it advises enterprises to seek to improve its own environmental performance and of the entities with which they have a business relationship. It suggests to do so by adopting the necessary technologies to improve their environmental performance, and when dealing with products or services that have no undue environmental impacts, ensuring that they are safe, durable, reparable, can be reused, recycled, or disposed safely, as well as that are produced in an environmentally sound manner. Additionally, it requires companies to promote awareness among customers of the environmental implications of using the products and services of the enterprise, such as by providing relevant and accurate information of their environmental impacts, greenhouse gas emissions, and similar other environmental issues.[103]

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[98] Ibid.
[99]BHRC, *Support for Meaningful and Safe Stakeholder Engagement as A Central Aspect of The EU Framework on Mandatory Human Rights and Environmental Due Diligence.* 2021. Available at: https://www.business-humanrights.org/en/latest-news/support-for-meaningful-and-safe-stakeholder-engagement-as-a-central-aspect-of-the-eu-framework-on-mandatory-human-rights-and-environmental-due-diligence/
[100]Op. Cit.
[101]Ibid.
[102]Ibid.
[103]Ibid.

The sixth step includes providing support and capacity building to workers in environmental, health and safety matters, such as by promoting education and adequate training in the areas needed in order to prevent environmental accidents.

Lastly, the seventh step calls business to contribute to the development of environmentally responsible and economically efficient public policy, such as through partnerships or other initiatives.[104]

As noticeable, the 2023 version of the Guidelines brought important elements to guide enterprises on how to avoid and address their adverse environmental impacts. These requirements guide corporations on how to contribute to reaching sustainable development goals by explaining how to take a risk-based due diligence approach when assessing their risks. In spite of that, these requirements are still part of a soft law instrument and are not legally binding. The referred soft-law instrument provides great precision and fills previous gaps on how companies should account for environmental and climate impacts; however, it lacks means to be properly enforced. Given that, the author of this thesis understands that its use to impose and enforce obligations on companies is insufficient and for greater compliance outcomes its use should be complemented with other legal instruments.

As mentioned before, the OECD Guidelines count with a government-supported office which handles complaints of non-alignment with the guidelines. The NCPs are mandated to further the effectiveness of the Guidelines and can handle enquiries and contribute to the resolution of issues. Up to this moment, over 650 specific instances have been treated by NCPs in over 100 countries and territories[105] and 154 of the cases filled were environmental-related issues.[106] Nonetheless, due to the voluntary nature of this mechanism they have been described to be inconsistent and its use unpredictable for remediating corporate impacts.[107]

This fact, however, does not exclude the importance of this instrument in a global perspective and its effectiveness when used together with other soft-laws and hard-laws instruments, as it will be better explained in the next section.

2.2 – Concepts Derived from Hard-law and Case-law

[104]Ibid.

[105]OECD, *Database of Specific Instances.* 2024. Available at: https://mneguidelines.oecd.org/database/

[106]OECD, *Database of Specific Instances: "Environment".* 2024 Available at: https://mneguidelines.oecd.org/database/?hf=10&b=0&r=%2Bf%2Fmne_mne_theme%2Fenvironment&s=desc(mne_datereceived)

[107]OECD WATCH. *Briefing Paper: State of Remedy - Understanding OECD Guidelines complaints through the lens of remedy*. 2021. Pg. 10. Available at: - https://www.oecdwatch.org/wp-content/uploads/sites/8/2022/06/OECD-Watch-2021-State-of-Remedy.pdf

The requirements brought by the soft-law instruments should suffice for corporations to adopt processes to avoid major human rights harms and diminish their risks of being exposed to human rights abuses. However, a study for the European Commission on due diligence requirements through the supply chain identified the limitations of voluntary approaches and soft-law regulation[108], reinforcing that hard-laws are needed to ensure compliance with human rights due diligence standards.

Following the endorsement of the UNPGs, the first initiatives to adopt hard-laws emerged as a response to the lack of accountability for corporate human rights abuses. Not all of these laws proposed climate and environmental requirements as part of their due diligence obligation. For those who proposed, the criteria differed in each legislation. Moreover, in each jurisdiction the results of the adoption of such requirements were different. For instance, in some jurisdictions, lawsuits based on the adopted MHRDD legislation emerged to require corporations to comply with their climate and environmental requirements, while in others these lawsuits were based on tort law, soft-laws or other laws.

Therefore, in the next divisions of this chapter these new requirements in MHRDD national law will be analysed and the most recent outcomes of such requirements will be assessed, aiming to identify the consequences of corporate inaction towards climate change as well as its human rights implications in the French, German, Norwegian, and Dutch jurisdictions.

2.2.1 - French Duty of Vigilance Plan

The 2017 French Duty of Vigilance Law was the first national human rights due diligence legislation to include environmental obligations as part of the duty to establish, implement and publish a vigilance plan. Depending on the nature and the circumstances of a particular enterprise, different adverse environmental impacts could arise from its activities, and the plan would need to address these impacts.

Under the vigilance plan, corporations have to include 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 (…)".[109]

[108]EUROPEAN COMMISSION, Directorate-General for Justice and Consumers, Torres-Cortés, F., Salinier, C., Deringer, H. et al., Study on due diligence requirements through the supply chain – Final report, Publications Office, 2020, https://data.europa.eu/doi/10.2838/39830

[109]Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1). Article 1. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/

Therefore, the vigilance plan needs to identify the environmental damage arising from a company's own operations or of the companies it controls, and the company has to take appropriate measures to mitigate or prevent these damages.[110]

In case of a breach of this duty, Article 2 states that "the action to establish liability shall be filed before the relevant jurisdiction by any person with a legitimate interest to do so"[111], so it indicates by which ways it would be possible to hold corporations accountable if needed. The legislation, however, did not clarify the terms of this plan, the extension of the plan, how to effectively implement it, or any other detail. As a result, lawsuits targeting corporations to question their inaction in relation to the new environmental requirements brought by the legislation emerged.

For instance, TOTAL S.A, the French oil company that ranks as one of the world's major petroleum corporations and among the big Carbon Majors published in 2018 how it integrated climate mitigation strategies in its vigilance plan[112]. In June 2019, a formal notice was sent to TOTAL S.A highlighting that the group had solely defined climate risks as a "global risk for the planet" [113] and a result "from various diverse human actions including the production and consumption of energy"[114], without conducting the analysis and the prioritization of this risk in relation to the activities of the group, its suppliers and subcontractors.

The formal notice required that TOTAL S.A published a new vigilance plan within three months including, in first place, an identification of the risk resulting from the greenhouse gas (GHG) emissions generated by the use of goods and services that the group produces; in second place, an identification of the risks of serious harm as outlined in the last IPCC special report of October 2018; and in third place, the actions to ensure that the group was on a trajectory compatible with the Paris Agreement.[115] TOTAL S.A did not act upon the formal notice, and the NGOs Notre Affaire à Tous, along with other representatives, started a legal proceeding against the oil company.

The plaintiffs alleged that the plan did not comply with legal requirements of the French law in relation to the identification of the risks linked to climate change, or in terms of taking real measures to prevent serious damage resulting from those risks, and that the assessment was

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[110] Ibid. Article 1, 3º.
[111] Ibid. Article 2.
[112] TOTAL, *Intégrer le climat à notre stratégie.* 2018. Available at : https://totalenergies.com/sites/g/files/nytnzq121/files/atoms/files/total_climat_2018.pdf
[113] MABILE, Sébastien and CAMBIAIRE, Francois, *Formal notice to comply with the Duty of Vigilance Law – article L. 225-102 4.-I et II of the French commercial Code.* Pg. 2. 2019. https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2019/20190719_NA_na-1.pdf
[114] Ibid.
[115] Ibid.

widely incomplete aiming to conceal the company's liability as the main contributor to global warming.[116] It was also claimed that the corporation did not analyse risks resulting from climate change that were demonstrated by the scientific works summarized by the IPCC and in regard to emission reduction trajectories. The plaintiffs also added that, at that time, TOTAL was representing almost 1% of the direct and indirect global GHG emission.[117]

The plaintiffs required, among other things, that the company published a new vigilance plan including in its risks identification chapter a "complete and exhaustive mapping of the risks resulting from its activities and, in particular, GHG emissions by each activity sector and project including their primary energy mix"[118] that would reference the IPCC's most recent and relevant work and the Paris Agreement objectives.

This risk identification chapter should follow "an analysis and prioritization of each of these risks according to their seriousness in order to highlight the importance of climate-related risks"[119], such as risks of serious damage to the ecosystem[120], and the risks of serious violations to human rights and fundamental freedoms.[121]

Additionally, TOTAL was demanded to publish and implement a new vigilance plan "with a direct and indirect GHG emissions reduction trajectory (scope 1, 2 and 3[122]) compatible with limiting global warming to 1.5°C without overshoot, in order to achieve carbon neutrality by 2050". That would include aligning its activities with the "P1"[123] GHG emissions reduction, and a trajectory based on scientific and technological knowledge. It was also required that the corporation reduced gas production by 25% by 2030, and 74% by 2050, as well as that it reduced oil production by 37% by 2030, and 87% by 2050 (compared to 2010). Lastly, it was

[116]NOTRE AFFAIRE À TOUS and OTHERS Vs. TOTAL, *Summons Before Le Tribunal Judiciaire De Nanterre.* 2020. Pages 27-28. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200128_NA_complaint-3.pdf
[117]Ibid.
[118]Ibid. Pg. 49.
[119]Ibid.
[120]Risks of serious damage to land ecosystems, risks of serious damage to ocean ecosystems, increase in heat waves, increased risk of droughts, increased risk of heavy rainfall and floods, increased risks of flooding related to sea-level rise, risks of serious damage to human rights and fundamental freedoms. (Ibid. pg. 37).
[121] Ibid. pages 48-49.
[122]Scope 1 emissions are the emissions directly resulting from a company's own activities and processes. Scope 2 are indirect emissions resulting from the energy consumed by a company, including electricity, heat and cooling. Scope 3 emissions are all other indirect emissions in a company's value chain. This category includes not only things like buildings, machinery and purchased goods and services, but also franchises selling the company's products and the emissions generated from the use of a company's products. (Source: Milieudefensie – Friends of the Earth Netherlands, *How we defeated Shell*. pg.51. 2021. Available at: https://www.foei.org/wp-content/uploads/2021/11/How-we-defeated-Shell.pdf,).
[123]The classification of what is a P1 can be found at the IPCC explanation at: https://archive.ipcc.ch/pdf/special-reports/sr15/sr15_spm_fig3b.pdf

demanded to immediately cease the exploration and exploitation of new hydrocarbon deposits.[124]

The plaintiffs' request encompassed key elements that were lacking in the broad content of the French legislation and missing in the corporation's vigilance plan. Mainly, a vigilance plan that addresses climate impacts would have to identify the GHG emissions both from operations and from products (Scopes 1, 2, and 3), prioritize and analyse each of the risks coming from these operations, use quantitative indicators or other appropriate indicators to align its objectives with a trajectory plan compatible with global warming of 1.5°C, and set consistent objectives to plan a reduction trajectory.

On July 6 2023, the case was dismissed for procedural reasons, and the impact of Total Energies' activities on climate change was not examined. Plaintiffs have appealed the decision, and the first hearing has taken place before the Court of Appeal of Paris on March 5, 2024.[125]

This case brought a great clarification on what is expected to be included in a vigilance plan in relation to climate impacts, and, as it will be shown in the succeeding chapters, it aligns with the requirements of the most recent mandatory human rights due diligence laws.

In a similar case, Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v. BNP Paribas, the French Bank BNP Paribas was sued for not identifying with sufficient clarity the climate risks deriving from its activities in the vigilance plan. The main issue was related to the analysis of the projects in which the bank is involved and the companies it supports through its financing and investments.[126] The type of involvement of financial institutions on adverse human rights impact is usually between contributing to an adverse impact or having a direct link depending on its own actions and omissions. In the BNP Paribas case, the bank's financing of new fossil fuel projects both through direct and indirect means was the object of questioning its compliance with its vigilance duty and with the Paris Agreement goal of limiting global warming to 1.5°C. In particular, BNP Paribas's involvement with eight European and North American oil and gas Majors (including TOTAL S.A) was at stake.

The allegations against BNP Paribas were that the vigilance plan was deficient, with insufficient and inaccurate information in relation to the identification of climate risks in BNP

[124]NOTRE AFFAIRE À TOUS and OTHERS Vs. TOTAL, *Summons Before Le Tribunal Judiciaire De Nanterre.* 2020 Pages 48-49. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200128_NA_complaint-1.pdf
[125]SABIN CENTER FOR CLIMATE CHANGE LAW, *Notre Affaire à Tous and Others v. Total*. "Summary" Available at: https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/
[126]SABIN CENTER FOR CLIMATE CHANGE LAW, *Notre Affaire à Tous Les Amis de la Terre, and Oxfam France vs BNP Paribas.* Available at : https://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/

Paribas' operations, and that it did not contain any precise and exhaustive information on the amounts and shares of financing and investments to companies active in the fossil fuel sector, particularly those developing new projects. Also, it was alleged that the plan did not include what would be the appropriate action to be taken to prevent risks and mitigate serious harm arising from its financing and investment activities, or an exit plan for financing and investment in the oil and gas sector, as well as no mechanisms of periodic monitoring and verification of the objectives settled, among other things[127]. Therefore, BNP Paribas would be failing to meet their obligations to be vigilant with regards to climate change.

The plaintiffs' requested BNP Paribas to publish and implement a new vigilance plan which would contain i) a regularly updated map presenting, analyzing, and ranking the risks of serious environmental, health and safety, and human rights violations related to climate change resulting from its activities, ii) which would include an exhaustive carbon footprint in CO2 equivalent (scopes 1, 2 and 3), in intensity and absolute value, resulting from its activities, and iii) with a separate part for the fossil fuel sector by sectors (coal, oil and gas), subsectors, and types of activity along the value chain underlying companies they supported. [128]

In addition to that, the plan should disclose i) the type of financial services and amount and share of financing and investments, ii) the exhaustive methodologies associated with all the data published and the measures taken within the framework of the BNP Paribas Compliance Plan, and iii) the adapted actions to prevent and mitigate its climate risks given the state of scientific knowledge on the day of the assignment. That would imply a reduction in GHG emissions, covering scopes 1, 2 and 3, of at least 50% by 2030, intermediate reduction targets established on a five-year basis, and the adoption and effective implementation of a gradual plan to exit the fossil fuel sector, as well as of a periodic monitoring system for the objectives and measures of the plan implemented, under a financial penalty condition.[129]

This case in particular touched upon the nature of involvement with an adverse environmental impact, and the extent of responsibilities that can be attributed to each kind of involvement. Until the present moment, when institutions "cause" adverse impacts (when they are immediately responsible for the actions causing the violations), they are required to exercise ongoing due diligence processes and provide for remediation. When they contribute to the adverse impacts, for example when its actions or omissions assist/increase the likelihood of the

[127]NOTRE AFFAIRE À TOUS LES AMIS DE LA TERRE, AND OXFAM FRANCE VS BNP PARIBAS, *Writ Of Summons In Front Of The Judicial Court Of Paris.* Pages 77-91. Available at: https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2023/20230223_18777_summons.pdf
[128]Ibid. Pages 117-122.
[129]Ibid.

impacts, they are similarly required to exercise ongoing due diligence processes and provide for remediation. When they are linked to an adverse impact, meaning that they have not caused or contributed to it, but there is a direct link between the operations, products or services of the company and the adverse impact, they should exercise ongoing due diligence processes, and even though it is not required to provide for remediation, they should, however, use its power of influence to prevent and mitigate the impact.[130]

The case did not include any request for remediation, but it still offers a general clarification of what is already expected from financial institutions in relation to a vigilance plan that covers climate impacts. As it is still pending, the extent of obligations the Bank will have according to the relationship it has, and if remediation will have to be provided or not, is yet to be defined.

Lastly, another case-law from the French Jurisdiction that can clarify the practical terms of the vigilance duty will be analysed, even though this case is not purely climate-related and it targets a corporation owned by the French State. Nonetheless, it is the first conviction issued by the Paris Judicial Court which decided on the merits of a case based on the French Duty of Vigilance Law convicting a company for failing with its duty of care. Therefore, this case will be briefly discussed.

The trade union SUD PTT started a legal action against the company La Poste, alleging that the company's vigilance plan had only general identification of risks that lacked sufficient information on where the risks were occurring, had incorrect risks prioritization of its activities, and did not track the risks of the operations of own operations, subcontractors, subsidiaries, and suppliers. It also alleged that the reporting mechanism was put in place without stakeholders' consultation, and that the vigilance plan did not include any actions to prevent or mitigate its negative human rights and environmental impacts.[131]

The Court understood that, in accordance with Article L.225-102-4, 3º of the code de commerce, appropriate actions to mitigate risks or prevent serious human rights and environmental harms could not be limited to general declarations, but should focus on risk identification prioritizing those risks that are considered to be the most critical ones, being

[130]OHCHR, *Response to Request from Bank Track for Advice Regarding the Application of the UN Guiding Principles on Business and Human Rights in the Context of the Banking Sector.* Pg. 5. 2017. Available at: InterpretationGuidingPrinciples.pdf (ohchr.org)

[131]TRIBUNAL JUDICIAIRE DE PARIS, *Jugement Rendu Le 05 Décembre 2023 Demanderesse (Sud Ptt) Défenderesse S.A. La Poste.* 2023. Available at:http://www.sudptt.org/IMG/pdf/sudptt_laposte_jugement_ddv_5_dec_2023.pdf

sufficiently specific. The Court recognised that the plan was inaccurate and insufficient.[132] The final judgement, however, considered that the company had published a vigilance plan annually since the Duty of Vigilance entered into force and for this reason did not impose a penalty on the company. Rather than that, the Court required LaPoste to supplement the vigilance plan with a risk map that would have to: identify, analyse and prioritise risks; establish procedures for assessing subcontractors on the basis of the specific risks identified by the risk mapping; supplement its vigilance plan with a grievance mechanism after the consultation with trade unions representative; and publish a real system for monitoring its vigilance plan, recalling that the decision was provisionally enforceable.[133]

What these three cases have in common is that they questioned the disclosed vigilance plans on the basis of their insufficient information. As the climate-based lawsuits have not reached a merits decision yet, the LaPoste decision is a clear example on what is an insufficient vigilance plan: a plan that is limited to general declarations without identifying the risks of the operations according to its own activities, its suppliers' activities, and subcontractors. In addition to that, the decision reinforces that the vigilance plan should prioritise risks, establish procedures to act upon the findings, and put in place a grievance mechanism that is created after the consultation of affected stakeholders. In the light of this decision, it can be inferred that within the French Jurisdiction, the duty of care cannot be limited to providing general and broad information.

As these cases bear similarities, namely, the TOTAL case was brought before court once the identification of the risks linked to climate change and the measures to prevent serious damage resulting from those risks were widely incomplete, and similarly, the BNP Paribas case was brought before court once the identification of climate risks did not contain any precise and exhaustive information and did not include what would be the appropriate action to be taken to prevent risks and mitigate serious harm arising from its financing and investment activities, and LaPoste was convicted of having an inaccurate and insufficient plan, it is possible that broad climate identification plans such as these three can be considered as breach of the duty of vigilance.

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[132] "En application de l'article L.225-102-4, 3° du code de commerce, les actions adaptées d'atténuation des risques ou de prévention des atteintes graves ne peuvent se limiter à des déclarations générales d'intention mais doivent porter sur les risques identifiés, prioritairement ceux pour lesquels les risques d'atteinte aux personnes et à l'environnement ont été jugés les plus critiques dans la cartographie. Même raisonnables, les mesures doivent être suffisamment précises pour revêtir l'efficacité attendue afin d'empêcher la réalisation des atteintes les plus graves et limiter l'impact des autres risques identifiés". (Source : Ibid. Pag. 25).

[133] Op.Cit. Pages. 30-31.

Even though the climate cases are still pending, there seems to have promising prospects for considering general and broad information in the climate adaptation plan as not valid. If not, one aspect is clear, the expectations on corporations to reduce and account for their climate and environmental impacts continues to increase and climate aspects are expected to be included in a vigilance plan.

In this regard, the French legislation seems promising for catalysing a role of corporations in tackling climate change. It requires companies to account for their negative environmental impacts and stipulates concrete consequences in case of non-compliance with the law. Yet, the legislation does not detail how companies are expected to avoid infringing human rights arising from their climate impacts or how they are expected to remediate these adverse human rights impacts. The consequences of climate inaction on human rights have not been discussed in judicial instances either. Therefore, the author of this thesis sees the French legislation as a good and solid start for the development of corporate duties towards climate change, yet, imprecise to deal with the core human rights issues deriving from harmful corporate emissions.

2.2.2 - The German Act on Due Diligence Obligations in Supply Chains

The German Act on Due Diligence Obligations in Supply Chains entered into force on the 1 of January 2023 and included within the duty to exercise due regard for human rights, environment-related obligations.[134] The due diligence obligation deriving from the German Act includes nine steps[135], and the law provides guidance on what are the appropriate manners to act in accordance with the due diligence obligations, as well as it establishes that these manners are determined to the nature and extent of the enterprise's business activities, the leverage it has, the severity, reversibility and probability or new occurrences of the violation, and the type of contribution the enterprise had in each case.[136]

Notwithstanding, unlike under the French Duty of Vigilance Law, a violation of the German legislation does not give direct liability under civil law. It is explained under division 2, section 3 (3) of the German Act that other kinds of liability under civil law can arise

[134]FEDERAL MINISTRY OF LABOUR AND SOCIAL AFFAIRS. *Act on Corporate Due Diligence in Supply Chains of July 16 2021.* 2023. Available at: https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=4

[135]One: establishing a risk management system; two: designating a responsible person within the enterprise; three: performing regular risk analyses; four: issuing a policy statement, five: putting in place preventive measures in its own operations and in relation to its suppliers; six: taking remedial action; seven: establishing grievance mechanisms; eight: implementing the due diligence obligations with regards to risks of indirect suppliers; and nine documenting and reporting (Ibid. Division 2, Section 3).

[136]Op. Cit. (Division 1, Section 3 (3).)

independently of the Act, meaning that a violation of a provision of the Act alone does not give rise to civil liability, but a pre-existing liability that is based on provisions other than the Supply Chain Act is not waived by the Act.[137] The German MHRDD legislation gave a single authority, the Federal Office for Economic Affairs and Export Control (BAFA), the powers of monitoring an enterprise's supply chain management, demand information, inspect documents, as well as to enforce corporate's compliance by imposing financial penalties"[138].

Despite the provision that indicates that no civil liability would derive from the Act, European Center for Constitutional and Human Rights (ECCHR) has recently filed two judicial complaints alleging non-compliance with the Act[139][140]which are still pending, (not related to environmental or climate concerns) and which will define whether the corporations can be found liable under the German Act.

On top of that, similarly to the French Law, the German Law did not clarify specific requirements on environmental and/or climate obligations to be included in the due diligence plan, and not a single case of climate litigation was based on the German Act yet. For this reason, there is still a great uncertainty in relation to what is expected from corporations in relation to their climate and environmental obligations under the German Act.

Examples of climate-related lawsuits which were based on the German Tort Law, not specifically on the German Due Diligence Act, tried to pursue corporate accountability for the breach of the fundamental right of climate protection in the German jurisdiction. For instance, in Allhoff-Cramer v. Volkswagen AG a farmer sued Volkswagen AG for its excessive emissions of carbon dioxide claiming that Volkswagen was partly responsible for climate change and that the excessive emissions were adversely impacting his personal liberty and property rights (the dry soil and heavy rains that were caused by climate change have affected his family business, cows and forest operations). [141] The plaintiff sought the reduction of the enterprise's CO2

[137]RÖLD AND PARTNER. *The German Supply Chain Act – A High Risk of Liability.* 2023. Available at: https://www.roedl.com/insights/international-supply-chain-law/liability-act-litigation-status-civil-law

[138]FEDERAL MINISTRY OF LABOUR AND SOCIAL AFFAIRS, *Business and Human Rights, Supply Chain Act: Act on Corporate Due Diligence Obligations in Supply Chain.* 2024. Available at: https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html

[139]LIBBY, Annat*, First case filed under the German Supply Chain Due Diligence Act against Tom Tailor, Amazon, and IKEA by Bangladeshi workers, Due Diligence Design Blog Post*. 2023. Available at: https://duediligence.design/first-case-filed-under-the-german-supply-chain-due-diligence-act-against-tom-tailor-amazon-and-ikea-by-bangladeshi-workers/

[140]SCHAPPERT, Jennifer. *Second case filed under the German Supply Chain Due Diligence Act.* 2023. Available at: https://duediligence.design/second-case-filed-under-the-german-supply-chain-due-diligence-act/

[141]SABIN CENTER FOR CLIMATE CHANGE LAW, *Allhoff-Cramer v. Volkswagen AG*. 2023. Available at: https://climatecasechart.com/non-us-case/allhoff-cramer-v-volkswagen-ag/

emissions by 65% as compared to its 2018 emissions, and to phase out the internal combustion engine, but the case did not proceed.

Other cases, such as Deutsche Umwelthilfe (DUH) against Mercedes-Benz AG, Bayerische Motoren Werke AG (BMW) and Volkswagen, which were built upon the request of reducing CO2 emissions and not exceeding a certain CO2 budget allocated to the company, questioning whether specific emission targets could be derived from an unwritten duty of care on human rights and soft law instruments as the German law does not comprehend specific requirements in relation to climate change. The German Federal Constitutional Court rejected the requests understanding not to be its role, as a judicial body, to establish adequate emission targets and to ensure a predictable legal framework, but the legislator's role.[142]

Even though the German Act does not clarify what the duty to conduct environmental due diligence entails nor defines a civil liability mechanism for these environmental and climate requirements, corporations operating within the German territory already face pressure to improve their climate goals. The Federal Office for Economic Affairs and Export Control (BAFA), has recently issued initiatives such as the "Immediate Climate Action Programme" and "National Action Plan on Energy Efficiency (NAPE)" that create policy measures to improve climate action, energy efficiency and promote the adoption of renewable energies[143] that apply to corporations. If not complying with these specific contents would be deemed as a failure to comply with the obligation of conducting due diligence and be punished with administrative fines[144] or not, is not yet clear.

Nonetheless, the fact that the German Legislation does not provide clarification on specific terms of climate requirements and the practical application of its enforcement mechanism is yet to found out, does not exclude the possibility of corporations of using soft-law instruments as a guidance to the obligation of conducting a climate and environmental due diligence that derives from the German Act. In fact, there is already a pressing question on whether civil actions brought in Germany could lead to comparable judgements of those that

[142]FRESHFIELDS, *German court dismisses climate-related lawsuit against Mercedes-Benz*. 2022. Available at: https://sustainability.freshfields.com/post/102hya7/german-court-dismisses-climate-related-lawsuit-against-mercedes-benz

[143]FEDERAL OFFICE FOR ECONOMIC AFFAIRS AND EXPORT CONTROL, *Energy and Climate Protection. 2024.* Available at: https://www.bafa.de/EN/Energy/energy_node.html

[144]According to BAFA, the application of fines under the German Act can amount to up to 8 million euros or up to 2 % of annual global turnover. The fines system based on turnover applies only to enterprises with an annual turnover of more than 400 million euros. Moreover, if an administrative fine is imposed above a certain minimum level, enterprises may be excluded from the award of public contracts. Information available at: (https://www.bafa.de/EN/Supply_Chain_Act/Overview/overview_node.html#doc1444772bodyText2)

apply soft-law instruments as a basis to rule in favour of the claimants[145], namely similarly to how the Dutch court in the Shell has ruled basing its decision on unwritten duty of care on human rights (this decision will be analysed two topics ahead).

In sum, the adoption of the German Act on Due Diligence Obligations in Supply Chains is still quite recent (2023) and there is plenty of space to explore its application and its effectiveness. At present, what is certain is that the duty of conducting due diligence under the German Act includes environmental aspects which naturally entangle climate change, and there is already a pressing question on whether civil law actions brought in Germany could be decided on the basis of the soft-law instruments requirements.

Therefore, the German law can also be seen as a promising step for strengthening the role of corporations in addressing climate change. However, as it remains limited when it comes to defining concrete legal consequences for non-compliance and outlining specific actions to prevent and remedy human rights abuses linked to corporate climate impacts, it can prove challenging to ensure legal accountability for climate inaction and to provide remedies for climate-affected victims with the use of this framework, which is a disadvantage of this law.

2.2.3 - Norwegian Transparency Act

Norway was, together with France, one of the first countries to adopt a hard law aiming to ensure the respect for fundamental human rights throughout corporate activities. The Norwegian Transparency Act entered into force in June 2022, and obliged the companies under the scope of the Act to conduct risk assessment, due diligence, and to ensure access to information regarding human rights and working conditions in corporates' own activities and the ones of their supply chains.

According to the Norwegian Ethics Information Committee, the legislation aimed to put in practice the "value of transparency" which represents Norwegian long-lasting traditions of access to information, and the law arose as a "natural response"[146] to the difficulty of obtaining information on the production of goods and services across supply chains, as well as obtaining

[145]WELLER, Marc-Philippe and TRAN Mai-Lan. *Climate Litigation against companies, Chapter IV: Can the statements of the Shell case be applied to German law?* Clim Action 1, 14. 2022. Available at: https://doi.org/10.1007/s44168-022-00013-6
[146]NORWEGIAN ETHICS INFORMATION COMMITTEE, *Report from the Ethics Information Committee, appointed by the Norwegian government on June 1, 2018. Report delivered on November 28, 2019:'2-Introduction – The Value of Transparency'.* 2019. Available at: https://media.business-humanrights.org/media/documents/files/documents/Norway_Draft_Transparency_Act_-_draft_translation_0.pdf

information of the social impacts of businesses, despite the existence of the value of transparency.[147]

The Act required companies to carry on a due diligence process in relation to fundamental rights and decent work conditions, but did not explicitly include topics such as the environment and climate change. In relation to its enforceability, similarly to the German Law and unlike the French one, the Transparency Act did not include a rule on civil liability as a consequence of a breach of its duties. In case of non-compliance, the Norwegian Consumer Authority (NCPA) is the only possible authority to enforce the law by issuing infringement penalties, prohibition or orders, and/or enforcement penalties.[148]

Since the Transparency Act entered into force, this enforcement authority has received seventeen complaints of which only two were investigated and one is still in process. The two analysed cases were understood not to have breached the Transparency Act.[149] In the Posten's case, the NCPA ruled that the request was out of the scope of the Act, and in IKEA's case the NCPA understood that it could not have been expected from the company to have a more robust due diligence process in place once the legislation had just entered into force at the time of the claim. The remaining complaints were dismissed without the reasons being made public.[150] Yet, the NCPA has recently warned that they will expect a higher level of due diligence and disclosure from companies now that the law is fully in effect[151], but not much has been seen in relation to the enforcement of the Act since this declaration (2023).

Recent scholarship has also explored the consequences of a breach of the Transparency Act as the Act itself does not give rise to civil liability, and Norwegian private law does not give Norwegian courts a basis to apply Norwegian tort law to breaches of the duties laid down in the Transparency Act. It concludes that a new conflict rule should be introduced in Norwegian law to permit victims of HR abuses to choose the applicable law in order to connect the torts that occurred within the scope of application of the Transparency Act.[152]

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[147]Ibid.
[148]MINISTRY OF CHILDREN AND FAMILIES. *Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act).* Sections 7 to 11. Available at: https://lovdata.no/dokument/NLE/lov/2021-06-18-99/%C2%A71#%C2%A71
[149]BUCKNELL, Emilly. *The Norwegian Consumer Protection Authority (NCPA), the regulator for the Norwegian Transparency Act, announced that it will start actively monitoring companies' compliance with the law. We expect aggressive monitoring of company compliance by the NCPA*. 2023. Available at: The Norwegian government will start monitoring compliance with the Transparency Act | Due Diligence Design
[150]Ibid.
[151]Ibid.
[152]CORDERO-MOSS, Giuditta. *Corporate Social Responsibility and the Norwegian Transparency Act: the Importance of Choice of Law.* 2023. Oslo Law Review Volume 10, No. 2-2023, p. 1–14ISSN online: 2387-3299 Available at: https://www.idunn.no/doi/epdf/10.18261/olr.10.2.7

As no cases were successful yet, the uncertainties in relation to what arises from a breach of the Act, what is its duty of care about, what are the main points to be included in the due diligence process, and, more specifically, in relation to its environmental and climate reach, remains. The Norwegian Ethics Information Committee affirmed that climate change accentuates the need for improved risk assessments and access to information about global supply chains[153] when it resealed its recommendation for the adoption of the Act, but this recommendation was not incorporated into the legislation.

Nevertheless, scholars have been pointing out that, even though the Transparency Act' main purpose is the promotion of respect for "fundamental human rights" and "decent working conditions", the nature of which human rights are relevant to focus on must be assessed individually and will vary from enterprise to enterprise once the fundamental rights brought on the legislation are understood as non exhaustive[154]. In addition to that, the Act was built upon the UNGPs and the OECD guidelines for MNEs and its duty to carry out due diligence was rooted in these guidelines aiming not to "to replace said principles and guidelines", but to ensure that all Norwegian enterprises "implement and comply"[155] with them.

In particular, Article 4 of the Norwegian Act establishes that the duty to perform due diligence processes should be in accordance with the OECD guidelines for MNEs, i.e "The enterprises shall carry out due diligence in accordance with the OECD Guidelines for Multinational Enterprises"[156].

As previously described in chapter 2, the new Guidelines include now an extensive list of environmental requirements that are part of the due diligence process, and recent overviews of the Norwegian Act recognise that steps to integrate the environment into the reporting obligations of the Act are seen as part of the obligations of the law[157], and that an extension of the scope of the legislation to include environmental consideration is expected to happen.[158] In sum, the interpretation on the reach of the Transparency Act evolves in the direction of encompassing environmental and climate issues.

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[153]Ibid.

[154]STUBHOLT, Monica et al. *The Norwegian Legislation on Social Sustainability: An Overview of the Transparency Act*. *The Norwegian Transparency Act – "2.2: Object"*. 2024. Available at: https://www.idunn.no/doi/10.18261/olr.10.2.10

[155]Ibid.

[156]MINISTRY OF CHILDREN AND FAMILIES. *Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act). Section 4. Duty to carry out due diligence.* Available at: https://lovdata.no/dokument/NLE/lov/2021-06-18-99/%C2%A71#%C2%A71

[157]Op. Cit. *2.5.4 Reporting obligations.*

[158] Ibid. *Conclusion: What now?*

Similarly to the other jurisdictions, climate-related lawsuits trying to pursue accountability for harms deriving from corporate activities were also filed in Norway. Once the Norwegian State owns most of the large enterprises, these lawsuits target the Government most of the time. For instance, in the People v. Arctic Oil (2021) the Government was required to account for the GHGs emissions coming from Norwegian-produced oil as the plaintiffs alleged that drilling for oil violated the Paris Agreement as well as the Norwegian constitution. This case did not succeed[159]. However, a recent Norwegian court ruling of 2024 invalidated three petroleum production licenses due to the lack of consideration to their downstream emissions (scope 3 emissions), and ordered oil firms to consider full climate effects of new drillings reinforcing that climate obligations are to be considered in business operations.[160]

As it is noticeable, there are increasing forces and initiatives to push corporate accountability regarding climate change in Norway as well. A result of a study released in October 2023 which analyses corporate awareness, integration and barriers in relation to climate change, showed that one of the biggest barriers to climate change adaptation in corporate activities in Norway is the lack of a clear legal framework. Around half of respondents pointed to unclear regulations (55.7%), lack of strategy and/or guidelines (48.3%), and unclear division of responsibilities between the private and public sector (48.4%) as important barriers to climate change adaptation.[161] Therefore, initiatives to interpret the Norwegian Transparency Act in an overarching perspective that comprises climate matters as part of its duties[162] represents a possible alternative to this challenge. On the other hand, the Norwegian law still holds a high degree of uncertainty in relation to non-compliance with the Transparency Act, which can undermine much of its purposes.

The Norwegian MHRDD initiative, together with the French and German laws, show important advances both in relation to the development of the BHR field as to in relation to corporate climate accountability. Each jurisdiction advances at its own pace, and certainly mentioning the environment as part of the duty to perform due diligence facilitates the process of consolidation of these requirements rather than leaving room for interpretation.

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[159]VOIGT, Christina. *The first climate judgment before the Norwegian Supreme Court: aligning law with politics. Journal of Environmental Law 33(3), 697-710.* 2021. Available at: First Climate Judgment before the Norwegian Supreme Court: Aligning Law with Politics | Journal of Environmental Law | Oxford Academic (oup.com)

[160]THE CONVERSATION. *Oil firms forced to consider full climate effects of new drilling, following landmark Norwegian court ruling.* 2024. Available at:. https://theconversation.com/oil-firms-forced-to-consider-full-climate-effects-of-new-drilling-following-landmark-norwegian-court-ruling-221810

[161]HENKE, Lilo et al. *Climate change adaptation in Norwegian businesses - awareness, integration and barriers.* 2023. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4610483

[162]STUBHOLT, Monica et al. *The Norwegian Legislation on Social Sustainability: An Overview of the Transparency Act. The Norwegian Transparency Act – 2.2: Object.* 2024. Available at: https://www.idunn.no/doi/10.18261/olr.10.2.5#fn26

Another important example of the reach of corporate obligation in regard to climate change can be studied in the Dutch jurisdiction. This time, not so much due to the inclusion of this duty as part of the context of a MHRDD legislation, but due to a judicial recognition of such duty.

2.2.4 - The Milieudefensie et al. v Royal Dutch Shell and the Dutch Human Rights Due Diligence Proposals

In 2019 the Dutch Senate passed a human rights due diligence-related legislation entitled the "Dutch Child Labor Due Diligence Law" which would require all companies selling or supplying goods or services to Dutch consumers to exercise due diligence in order to investigate child labour occurrences throughout their value chain.[163] This legislation was proposed in 2016, adopted by the Dutch house of representatives in 2017 and by the Dutch Senate in 2019, and was expected to enter into force in 2022. The Act, however, never really entered into force and there still remains doubts if it will come into effect at all.[164]

The focus on the prevention of child labour rather than a broad protection of human rights was a highly debated topic among the Dutch institutions, once between the period of the adoption of the legislation and its entry into force much evolved in terms of similar legislative approaches in the European Union and the Act ended up being too restrictive.[165]

The Dutch government decided to issue in 2020 a revised policy on international business responsibility which focused on a broad HRDD obligation and expressed a preference to await further developments taking place at the EU level before allowing the legislation to enter into force.[166] In the beginning of 2021, a new bill for international responsible business conduct was drafted requiring companies to conduct due diligence to identify and address the adverse impacts of their operations and value chains on human rights, the environment, and governance.[167]

[163]ENNEKING Liesbeth, *Putting the Dutch Child Labour Due Diligence Act into Perspective,* Erasmus Law Review, 4, (2019):20-36. Introduction. Available at: Putting the Dutch Child Labour Due Diligence Act into Perspective · Erasmus Law Review · Erasmus Law Review
[164]Ibid. 2.2 *Main Points of Criticism and Status Quo.*
[165]Ibid.
[166]Ibid.
[167]THE MINISTER FOR FOREIGN TRADE AND DEVELOPMENT COOPERATION, *A bill introduced by the members Voordewind, Alkaya, Van den Hul and Van den Nieuwenhuijzen providing for rules regarding due diligence in value chains to combat violations of human rights, labour rights and the environment in the conduct of foreign trade (the Responsible and Sustainable International Business Conduct Act (Wet verantwoord en duurzaam internationaal ondernemen).* 2021. Pag. 24 Available At: https://www.mvoplatform.nl/en/wp-content/uploads/sites/6/2021/03/Bill-for-Responsible-and-Sustainable-International-Business-Conduct-unofficial-translation-MVO-Platform.pdf

At that time, other MHRDD proposals were already addressing broad human rights aspects and environmental issues similarly to what was proposed by the new bill, but a limited number of them addressed corporate liability in relation to climate change. During the adoption process of this new bill, the Hague District Court gave the first worldwide ruling on a climate case that clarified corporate duties in relation to climate change. The court ordered a private company to mitigate its GHG emissions, which, according to the Court, was a duty that derived from soft-law obligations on corporate due diligence (UNGPs and OECD Guidelines). As a consequence, the reach of HRDD obligations expanded even more and the proposed legislation was out-of-date again, so it did not enter into force either.

In the referred case, Milieudefensie et al. vs Royal Dutch Shell (RDS), the plaintiffs alleged that RDS had the duty to contribute to the prevention of climate change by ensuring to reduce the CO2 emissions attributable to the Shell group (Scope 1, 2 and 3) through the corporate policy of the RDS group. The plaintiffs asserted that RDS had violated this duty or was "at risk of violating this obligation with a hazardous and disastrous corporate policy for the Shell group"[168], which was not consistent with the global climate target. The plaintiffs required, therefore, that RDS reduced by 45% its levels of CO2 emissions in comparison with the 2019's level[169] through the corporate policy of the RDS group, and claimed that this obligation resulted from soft laws endorsed by RDS, such as the UNGPs, the UN Global Compact and the OECD Guidelines for Multinational Enterprises, among other instruments.[170]

The Hague District Court's ruling considered that the referred soft laws, which set out the responsibilities of businesses in relation to human rights, indeed brought obligations to be followed. It affirmed that the UNGPs constitute an authoritative and internationally endorsed soft law instrument, and are in line with the content of other widely accepted soft law instruments such as the UN Global Compact and the OECD guidelines. It also highlighted that since the endorsement of the UNGPs, the European Commission has expected European businesses to meet their responsibilities to respect human rights, and for this reason the UNGPs are suitable guidelines to the interpretation of unwritten standards of care. The court also based its decision in the Dutch Civil Code, as well as principles laid down by the Supreme Court of

[168]THE HAGUE DISTRICT COURT. *Judgment of 26 May 2021 in the case of Milieudefensie et al. vs Royal Dutch Shell (RDS),* "*3 – The Dispute*". 2021. Available at: ECLI:NL:RBDHA:2021:5339, Rechtbank Den Haag, C/09/571932 / HA ZA 19-379 (engelse versie) (rechtspraak.nl)
[169]Alternatively, by 35% or by 25%. (source: Ibid).
[170]Ibid, "*3.2 Milieudefensie et al. have based their claims on the following*".

the Netherlands in the Kelderluik and Ugenta cases, the Paris Agreement, and IPCC Special Report, and a vastly diverse set of normative instruments.[171]

In its decision, the Court ordered RDS to limit the aggregate annual volume of all CO2 emissions (Scope 1, 2 and 3) into the atmosphere in relation to its direct or indirect operation, and reduce by at least 45% at the end 2030 its emissions relative to 2019 levels.[172] The court also clarified that the reduction of scope 1 emissions and the part of RDS' scope 2 emissions that can be attributed to the Shell companies constituted an obligation of result[173], and other scope 2 and 3 emissions constituted a best-efforts obligation[174]. It explained that in relation to the best-effort obligations, the RDS was expected to "take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by them, and to use its influence to limit any lasting consequences as much as possible".[175]

The Milieudefensie et al. v Royal Dutch Shell case had a big repercussion worldwide as it was the first ruling to connect the duty of companies to respect human rights to climate change. Climate litigation cases have targeted corporations globally seeking to hold corporations accountable for their share of climate change's impacts, however, these cases were many times dismissed for procedural or other reasons. For example, some courts understood that the role of corporations in tackling climate change should be set by the legislator[176], and legislative proposals were mainly setting broad or general obligations in relation to the environment or climate without much criteria to be followed, hindering the fulfilment of these obligations.

After this ruling, the role of corporations in tackling climate change and in achieving the goals of the Paris Agreement was clarified and reinforced, and the attention on corporate responsibility towards their climate impacts increased. This decision equally confirmed that climate change mitigation and adaptation can be seen as a dimension of human rights due

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[171]Ibid, "*4.4 RDS' Reduction Obligation*".
[172]Ibid, "*5. The Decision*".
[173]For own activities (both Scope 1 and 2) an obligation of result applies, while a significant best-effort obligation applies for business relations and consumers (both Scope 2 and 3). Source: KNIGGE, Albert, *NEWS UPDATE CLASS ACTIONS: The Hague Court rules that Shell must reduce its CO2 emissions with 45% by 2030*. 2021. Available at: https://www.houthoff.com/insights/news-update/class-actions---27-may-2021
[174]Obligation of means focus on the process to achieve a result and not the final outcome of the plan. Obligations of results bind the parties to achieve a specific result. The difference between them will be explained in chapter III.II.
[175]Ibid, *"4.1.4 The Assessment 'Introduction'"*.
[176]GROß, Thomas, *Why Courts will not Stop Global Warming, but Climate Litigation is Still Useful*, VerfBlog, 2024/3/12, 2024. Available at: https://verfassungsblog.de/why-courts-will-not-stop-global-warming-but-climate-litigation-is-still-useful/ , DOI: 10.59704/e23abe15c86ddfe4.

diligence requirements and businesses are required to use BHR instruments in order to set climate targets and risk mitigation plans for the reduction of their emissions.

Not very long after this decision was published, an amendment bill to the new Dutch "Sustainable and Responsible Business Conduct" proposal was submitted and included climate as part of the adverse impacts on human rights and the environment of the legislation.[177] The legislative proposal integrated the fast changes of the BHR field. Yet, this Act is still under analysis and awaiting to be voted on by the Dutch House of Representatives and the Senate, that awaits the European MHRDD legislation to enter into force (which will be analysed in chapter III).

2.3 - Concurrent Efforts

As the BHR agenda evolves, concurrent efforts to clarify the role of business in combating climate change and addressing their environmental adverse impacts scale up. For instance, at the UN level, the third revision of the UN Draft Norms clarifies under Article 1, which points out the definitions of each concept, that human rights abuses are harms that impede the full enjoyment of internationally recognized human rights and fundamental freedoms, "including the right to a safe, clean, healthy and sustainable environment"[178].

The third revised UN Draft Norms also clarified that human rights due diligence measures undertaken by business enterprises shall be conducted "undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments throughout their operations" and indicated that the due diligence process should include publicly reporting of the information of the conjecture of these environmental and climate change issues.[179]

[177]ELLIOT, Samanta et al, *An Update on Proposed Dutch Mandatory Human Rights Due Diligence Legislation – The November 2022 Amended Bill.* 2023. Available at: https://www.ropesgray.com/en/insights/alerts/2023/01/an-update-on-proposed-dutch-mandatory-human-rights-due-diligence-legislation-the-november-2022
[178]UNITED NATIONS, 2021. *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises.* Article 1. Available at: https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf
[179]Ibid. Article 6.4

Likewise, national legislative proposals for MHRDD laws, such as the Austrian[180], the Belgian[181] , the Spanish[182], the Finish[183] and the Brazilian[184], entail environmental obligations within the duty to carry out human rights due diligence. These legislations are not in force yet, so the effectiveness and enforceability of their climate duties cannot be studied at the present moment. However, they will certainly bring further materials to be explored as soon as they are in force.

Along with that, a large number of complaints have been brought before the OECD Guidelines' complaints mechanism, the National Contact Points (NCPs), to examine the responsibilities of corporations in relation to their climate-related impacts. For instance, in the complaint filed against British Petroleum (BP) before the UK's NCP, it was required that the BP published clear, honest, accurate and informative communications between enterprises and the public, and the NCP asserted that indeed the way BP was presenting its low-carbon energy activities was misleading[185]. Additionally, a complaint was filed under the Dutch NCP against ING Bank for a failure to report its indirect climate contribution and failing to set targets to reduce the GHG emissions resulting from its financial products, and the NCP demanded the ING Bank to set concrete climate goals to its financial services.[186]

Scholarship has also identified emerging features of a climate due diligence obligation that revolve around "risk mitigation" (the reduction of GHG emissions in corporations' activities and projects), and "integration" (requiring from corporations to integrate climate-related objectives in their policies and processes).[187] These features are described to integrate a

[180]ISELIN, Brian. *Austria's Step Towards Corporate Accountability.* 2023. .Available at: https://www.linkedin.com/pulse/austrias-step-towards-corporate-accountability-brian-iselin-/

[181]NOVA Business, Human Rights and The Environment Centre. *Mapping on Legislative and Policy Developments on Business and Human Rights: Tiffany Perna – Belgium.* 2024.. Available at: https://novabhre.novalaw.unl.pt/legislative-developments/#info

[182]GOBIERNO DE ESPAÑA.. *Anteproyecto De Ley De Protección De Los Derechos Humanos, De La Sostenibilidad Y De La Diligencia Debida En Las Actividades Empresariales Transnacionale.* 2022. Available at: https://www.mdsocialesa2030.gob.es/agenda2030/documentos/220208-consulta-publica-definitiva.pdf

[183]MINISTRY OF ECONOMIC AFFAIRS AND EMPLOYMENT HELSINKI. *Memorandum on the due diligence obligation – Review of the national corporate social responsibility act.* 2022. Available at: https://tem.fi/documents/1410877/0/Memorandum+on+the+due+diligence+obligation.pdf/768b3219-db5b-7643-4a98-889d5f351515/Memorandum+on+the+due+diligence+obligation.pdf?t=1649930584536

[184]CONGRESSO NACIONAL. Projeto de Lei: Marco nacional sobre Direitos Humanos e Empresas e Diretrizes para a promoção de políticas públicas no tema. 2022.Available at: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2148124

[185]SABIN CENTER FOR CLIMATE CHANGE LAW. *Complaint against BP in respect of violations of the OECD Guidelines*. 2019. Available at: https://climatecasechart.com/non-us-case/complaint-against-bp-in-respect-of-violations-of-the-oecd-guidelines/

[186]OECD WATCH. *Complaint Database: Dutch NGOs vs. ING Bank: ING bank violation of OECD Guidelines on climate change.* 2019. Available at: .https://www.oecdwatch.org/complaint/dutch-ngos-vs-ing-bank/

[187]MACCHI, Chiara, *The Climate Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'*: *2- Emerging merging Features of the 'Climate Due Diligence' of Corporations: Risk Mitigation and Integration.* 2021. Pgs. 98-101. Available at:

climate change dimension to the business responsibility to perform an adequate risk assessment and to settle concrete climate objectives within the key concepts articulated by the UNGPs.[188] Additionally, more features of the climate dimension of the human rights due diligence process were identified, such as the "prevention", "mitigation" and "remediation" already mentioned previously[189].

All of these efforts are essential for understanding the environmental and climate features of the human right due diligence requirements. However, these different definitions also bring a paradoxical situation: while all of this context together provides a direction to follow, it also lacks consistency and clarity on the exact rules governing HRDD, what impedes the consistent implementation of these practices from the business side, and what to rely on from civil society and the public side.

In the light of the all of these measures coming from national, international, mandatory, voluntary regulations, case-law, and academia that put together efforts to implement the UNGPs and clarify their environmental and climate change requirements, on the 23th of February 2022 the European Commission proposed a harmonized framework on BHR so that all countries within Europe could follow coherent, reliable and consistent standards.

The Corporate Sustainability Due Diligence Directive (CSDDD) was proposed by the European Commission aiming to settle down rules that would standardize the legal expectations to foster sustainable and responsible corporate behaviour, as well as to consolidate human rights and environmental considerations in companies' operations at the European level[190]. The CSDDD constituted a necessary tool to address the lack of systematic integration of human rights responsibility in business operations, and more than that, it integrated many of the duties of the HRDD laws already in place, together with the content of the climate litigations discussed. The terms of this legislative proposal will be analysed in the next chapter.

https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/climate-change-dimension-of-business-and-human-rights-the-gradual-consolidation-of-a-concept-of-climate-due-diligence/5684628BFA270FB974050824231E1744

[188] Ibid.Pg.100.

[189] BRIGHT, Claire and BUHMANN, Karin. *Risk-based Due Diligence, Climate Change, Human Rights and the Just Transition*. Sustainability, 13, 10454. Pgs. 7-14. 2021. Available at: https://www.mdpi.com/2071-1050/13/18/10454).

[190] EU COMISSION OFFICIAL WEBISTE, *Doing business in the EU: Corporate sustainability due diligence.* 2022. Available at: https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en

Chapter 3 - The Corporate Sustainability Due Diligence Directive and the Transition Plan

The European Commission's proposal for a Corporate Sustainability Due Diligence Directive came after an increasing pressure from stakeholder groups, civil society representatives, EU citizens, as well as business associations to settle down standardized norms for a MHRDD legislation at the European level[191]. More than half of the EU Member States had already publicly committed to implement the UNGPs in their jurisdictions when the European Commission proposed the CSDDD[192], and the legislation came to define the corporate duty to account for negative human and environmental impacts at a regional level.

In the European Union, all ordinary legislative procedures follow specific elements. The right of the legislative initiative belongs to the European Commission, who submits a proposal to the Council of the European Union and the European Parliament. Both the Council and the Parliament have to adopt the proposal either at first or second reading. If the two institutions do not reach an agreement after the second reading, a conciliation committee may be convened, and if the text agreed by the conciliation committee is acceptable to both institutions at the third reading, the legislative act is adopted. If the text is rejected at any stage of the procedure, or both institutions cannot reach a compromise, the proposal is not adopted and the procedure ends.[193] The proposal for the CSDDD followed this exact procedure.

After the European Commission proposed the CSDDD (23th of February 2022), the Council of the European Union adopted the text and resealed its general approach (30th of November 2022), and subsequently the European Parliament published its amendments to the text (1th of June 2023). A provisional agreement was reached among the three institutions on the 15th of December 2023, which was expected to be endorsed and formally adopted by the Parliament and the Council in the beginning of the year of 2024. However, due to lack of consensus between the EU's Member States (MS) in the Council of the European Union, the legislation was modified and watered-down before its final adoption by the Council (15th of March 2024) and by the Parliament's plenary (24th of April 2024).

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[191]Ibid. *Why does the EU need to foster sustainable corporate behaviour?*
[192]UNITED NATIONS WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, *Statement by the United Nations Working Group encourages European Union Member States to adopt the draft Corporate Sustainability Due Diligence Directive: Topic 1*.2024. Available at: [20240207-Corporate-Sustainability-Due-Diligence-Directive.pdf (ohchr.org)]
[193]COUNCIL OF THE EU, *Decision-making process: The ordinary legislative procedure*. 2024. Available at: https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/

The original proposal of the CSDDD introduced the criteria on how enterprises should address their adverse environmental and climate impacts by carrying out human rights and environmental due diligence with respect to: their own operations, operations of their subsidiaries, and operations of their business partners in companies' chains of activities. It combined the two types of enforcement mechanisms of the existing national laws, namely, a civil liability provision and the designation of one or more supervisory authorities to monitor company's compliance with the obligations of the Directive[194] and was the first HRDD legislation that required MS to ensure that companies would adopt a transition plan for climate mitigation.

During its adoption process, the EU Commission, the Council of the EU, and the EU Parliament presented different propositions on how to integrate climate obligations into the due diligence process and how to enforce these duties. The content of these requirements will be discussed throughout this chapter once the concepts proposed by each EU institution provide valuable insights for understanding the challenges and achievements reflected in the final version of the transition plan.

Chapter 3.1 –The European Commission's Proposal, the Council of the European Union's General Approach, the Parliament's Amendments and the Provisional Agreement

Under Article 15 of the former version of the Directive (which moved to Article 22 in the adopted text), companies would have to adopt a transition plan for climate mitigation and a company's business model and internal strategies would have to be compatible with the transition to a sustainable economy, in line with the Paris Agreement. The proposed text for the requirements of the transition plan came as the following:

> *"***1**. Member States shall ensure that companies referred to in **Article 2(1), point (a), and Article 2(2), point (a),** shall adopt a plan to ensure that the business model and strategy of the company are **compatible** with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. **This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which** climate change **is a risk for,** or **an impact of,** the **company's operations.**

[194]EU COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final),* 2022. Art. 18 and 22. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071

2.Member States shall ensure that, **in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes emission reduction objectives in its plan.**

3.Member States shall ensure that companies duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability."[195]

The Commission proposed that the application of this article would cover the companies falling under the general scope of the Directive, apart from the ones from the high-risk sector (manufacture and wholesale trade of textiles, clothing and footwear, agriculture, and others), so the transition plan requirements would apply to a very limited number of companies and its reach would be even more limited than of the general provisions of the Directive[196].

This plan would have to be "compatible"[197] with the transition to a sustainable economy and with the Paris Agreement (no explanation was given on what would be compatible with that), identifying on the basis of "information reasonably available"[198] the extent to which climate change is a "principal risk for or an impact of" the "company's operations".[199]Only in case climate change is, or should have been identified, as a "principal" risk or a "principal" impact of a company's own operations**,** a company would have to include "emission reduction objectives"[200] in its transition plan.

In practice, it means that companies would have to create a plan to transition to a sustainable economy, but only if they had identified climate change as a "principal risk" or "principal impact" of their own operations (scope 1 and not their supply chain) they would have

[195]Ibid. Art. 15.

[196]Art. 2, which sets the scope of the directive, defines that the Directive applies only to EU companies with more than 500 employees and a net worldwide turnover of more than EUR 150 million (Article 2(1)(a)), and third country companies with a net worldwide turnover of more than EUR 150 million. In case they are operating in high-risk sectors, the number of employees drops from 500 to 250 and the net worldwide turnover to EU 40 million. Article 15 did not apply for companies of the high-risk sector. (Source: Ibid. Art. 2 and 15).

[197]EU COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final),* 2022. Art. 15 (1). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071

[198]Ibid.

[199]Ibid. Art. 15 (2).

[200]Ibid.

to include emissions reduction targets in its transition plan, otherwise it would not be mandatory.

The third criterion of the transition plan required companies to take into account the fulfilment of Article 15 when setting the variable remuneration of directors. This part of the text came as an attempt to ensure accountability in case of non-compliance with the implementation of the transition plan. However, it added the condition that it would only be applicable “if the variable remuneration is linked to the contribution of a director to the company’s business strategy and long-term interests and sustainability”[201]. Additionally, it was not specified if the remuneration of directors would be the only factor to be taken into account when fulfilling Article 15, or if failing to comply with Article 15 would lead to any other circumstances such as civil liability or other consequences imposed by the supervisory authority.

In 2022, a set of suggestions to strengthen Article 15 was elaborated by the Institute for European Environmental Policy. The first one was the extension of the scope of the article to include the high-risk sector, and extend the provisions beyond just the company’s operations to cover the entire supply chain, as most of the majority of companies GHG emissions are in scope 3. In second place, the removal of the word principal on “principal risk” or a “principal impact” was seen as necessary as climate risks are highly likely to be a risk for most companies. Additionally, more details to the understanding of “emissions reduction objectives”, such as science-based information instead of reasonably available information, and targets with short, medium and long-term emissions reductions objectives to Scopes 1,2 and 3 were suggested. In the last place, the removal of the condition to settle the variable remuneration of directors was suggested.[202]

The institute finally highlighted that any amendments to Article 15 would have to be embedded in the core due diligence provisions of the Directive and in the whole meaning of its text and objectives in order to produce desirable effects. The institute understood that the version of the framework presented by the Commission could not be effective to drive changes if the suggested modifications were not made.[203]

The Council of the European Union adopted a general approach on the legislation on the 30th of November 2022 and, despite the new elements proposed to the article, not much evolved

[201]Ibid. Art. 15 (3).
[202]GORE, Tim and MEYSNER, Agata, *EU Climate Change Due Diligence: Addressing climate change in the Corporate Sustainability Due Diligence proposal', Discussion Paper - 3.2.1 What are the options for strengthening Article 15?,* Institute for European Environmental Policy. 2022, Available at: https://ieep.eu/wp-content/uploads/2022/12/Discussion-Paper-EU-Climate-Change-Due-Diligence.pdf
[203]Ibid.

in terms of the suggested changes. The text proposed by the Council for article 15 was the following:

> **1.** Member States shall ensure that companies referred to in **Article 2(1), point (a), and Article 2(2), point (a),** shall **adopt** a plan, including **implementing actions and related financial and investments plans**, to ensure that the business model and strategy of the company **are compatible** with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement **and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119, and where relevant, the exposure of the undertaking to coal-, oil- and gas-related activities, as referred to in Articles 19a(2), point (a)(iii), and 29a(2)**, **point (a)(iii), of Directive 2013/34/EU. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations**.
>
> **2**. Member States shall ensure that, **in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes greenhouse gas emission reduction objectives in its plan.**
>
> **3**. […][204]

The Council followed the scope of the original text, kept the application of the requirements to only companies' own operations (scope 1), did not clarify what the "emissions reduction objectives" entailed, and excluded the provision settling the variable remuneration of directors due to "strong concerns of Member States"[205].

On the other hand, it removed the "principal" terminology and proposed to go beyond the obligation of adopting the plan to also include the obligation of implementing the plan as well. Additionally, the text included the objective of achieving "climate neutrality" to the transition plan as established in Regulation (EU) 2021/1119, and where relevant, to disclose the exposure of the undertaking to "coal-, oil- and gas-related activities".[206]

[204]COUNCIL OF THE EU, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, Article 15,* 2022. Available at: https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf

[205]"Due to the strong concerns of Member States regarding the provision proposed by the Commission linking the variable remuneration of directors to their contribution to the company's business strategy and long-term interest and sustainability, this provision has been deleted (Article 15(3)). The form and structure of directors' remuneration are matters primarily falling within the competence of the company and its relevant bodies or shareholders. Delegations called for not interfering with different corporate governance systems within the Union, which reflect different Member States' views about the roles of companies and their bodies in determining the remuneration of directors." (Source: Ibid. *Main Elements of the Compromise - Page 9: D.26*).

[206]Op. Cit. Art. 15 (1).

Still, the article did not give any indication what type of liability would emerge from non-compliance with the transition plan and what would be the role of the supervisory authority in monitoring this plan. The Council's general approach to Article 15 was, therefore, highly criticized for not changing the vagueness of the text and not clarifying the terms of its implementation[207]. Overall, the Council proposed minor alterations to the article.

In contrast, the European Parliament amendments to the text of the Directive explored further propositions to improve the article. The European Parliament adopted its amendments on the 1st of June 2023 and proposed changes to the article as the following:

> "1. Member States shall ensure that **companies referred to in Article 2**, shall adopt **and effectively implement** a plan to ensure that the business model and strategy of the company are **aligned** with the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement, **the objective of achieving climate neutrality by 2050 and the 2030 climate target established in Regulation (EU) 2021/1119, and pursuant to the latest recommendations of the IPCC and the European Scientific Advisory Board** on Climate Change. **That plan shall be developed in consultation with stakeholders, and the plan and its implementation shall be approved by the company's shareholders, where applicable. It shall include, in particular:**
>
> **(a) short, medium and long-term targets related to sustainability matters, including absolute greenhouse gas emission reduction targets for scope 1, 2 and 3 emissions for 2030 and reviewed every five years up to 2050, explaining their alignment with a 1.5ºc climate scenario with no or limited overshoot and where such targets are based on science, pursuant to the latest recommendations of the IPCC and the European Scientific Advisory Board on Climate Change. Before targets are set, the identification of risks and impacts shall be done beforehand. Companies active in the energy and agricultural sectors shall specify the share of methane emissions, including their methane emissions reduction plan;**
>
> **(b) a consideration of the risks and impacts of climate action for the company, an identification of decarbonisation levers within the company's business and value chain, and related financial and investment plans;**

[207] FEIGERLOVÁ, Monika and KARAGEDIK, Betül, *Is Article 15 of the Corporate Sustainability Due Diligence Effective to Combat Climate Change? What Obligations Does the Proposal by the European Commission for a Directive on Corporate Sustainability Due Diligence Impose upon Greenhouse Gas Emitters?*', NOVA Centre on Business, Human Rights and the Environment Blog. 2023. Available at: https://novabhre.novalaw.unl.pt/is-article-15-of-the-corporate-sustainability-due-diligence-effective-to-combat-climate-change/

(c) implementing actions to achieve the company's climate targets, based on current scientific evidence and data covering their scope 1, 2, and 3 emissions.

2. Member States shall ensure that **each** company's plan **is evidence-based, regularly updated and is clear, transparent, accurate, comprehensive, comparable and consistent, by following best practices."**

3. Deleted (Justification: Moved to Article 26) [208]

In first place, the Parliament proposed that "all companies" referred to in article 2 should adopt the transition plan, including those in the high-risk sector. It also reinforced the Commission's suggestion that companies should not only adopt, but "effectively implement" plans that are "aligned" (not only compatible) with the transition a sustainable economy and in line with the Paris Agreement, and with the objective of achieving climate neutrality by 2050, and the 2030 climate target established in Regulation (EU) 2021/1119).[209]

Additionally, while the Commission and the Council understood that the plan should identify climate risks on the basis of "information reasonably available to the company", the Parliament proposed that it should be in accordance with the "latest recommendations of the IPCC" and the "European Scientific Advisory Board on Climate Change".[210]

Moreover, the Parliament added the criteria that "each" company's plan should be "evidence-based", "regularly updated", and "clear", "transparent", "accurate", "comprehensive", "comparable" and "consistent", by following "best practices".[211]

As importantly, the Parliament clarified what the plan should entangle: "short, medium and long-term targets", including absolute GHG emission reduction targets for "scope 1, 2 and 3" for 2030, that should be reviewed every five years up to 2050.[212]

The Parliament also proposed that the plan should be developed in "consultation with stakeholders"[213], and that the plan and its implementation should be "approved by the company's shareholders"[214] where applicable.

[208]WOLTERS, Lara. *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))*, *Amendments 168 to 171 for Article 15.,* EP Committee on Legal Affairs, 2022, available at: https://www.europarl.europa.eu/doceo/document/JURI-PR-738450_EN.html
[209]Ibid. Art. 15(1).
[210]Ibid. Art. 15 (1a).
[211]Ibid. Art. 15 (1a) and (2).
[212]Ibid. Art. 15 (1a) and (1c).
[213]Ibid. Art. 15 (1).
[214]Ibid.

Up to here, the Parliament incorporated many of the factors that were pointed out as missing by the Institute for European Environmental Policy and brought more concrete standards to be applied in the transition plan.

Besides that, the Parliament added other requirements to define the plan, namely for companies active in the energy and agricultural sectors the obligation to create a “methane emissions reduction”[215] plan, as well as the obligation of all companies to consider their “climate risks and impacts”, identify its “decarbonisation levers”[216], create a related “financial and investment plan”[217], and put in place actions to achieve the company’s climate targets, and “data covering their scope 1, 2, and 3” emissions. [218]

In terms of directors’ duties, under the text of the recitals the Parliament assigned to the company’s directors the responsibility to i) put in place and oversee the due diligence actions and plans to combat climate change, ii) adopt the company’s due diligence policy and plan to combat climate change taking into account the input of stakeholders.[219] In regard to the provision settling the variable remuneration of directors, the Parliament developed the subject on the Amendments 205 to 208 which proposed that directors of companies formed within the EU would have to ensure to “put in place”, “oversee” and “incentivise” due diligence and the plan to combat climate change, as well as that companies should take into account the fulfilment of these obligations when setting variable remuneration for directors.[220]

The idea of creating remuneration consequences for directors in case of non-compliance was convenient, but it could be more effective if personal sanctions against directors such as fines and banishing from corporate roles were added[221], coupled with the corporation’s own civil liability (which was again not developed). About this subject, the Parliament clarified that the decisions of supervisory authorities regarding a company’s compliance with the Directive would happen without prejudice to the company’s civil liability under Article 22[222], but it did not link how these two mechanisms would interact in case of non-compliance with the transition

[215]Ibid. Art. 15 (1a).
[216]Ibid. Art. 15 (1b).
[217]Ibid.
[218]Ibid. Art. 15 (1c).
[219]Ibid. Amendment nº 46 for recitals 64 recitals.
[220]Ibid. Amendments 205 to 208 for article 26.
[221]SCHELTEMA, Martijn and MCCORQUODALE, Robert, *Supervisory Mechanisms and Directors Duties: Innovations in the Proposed EU Directive on Corporate Sustainability Due Diligence'*, NOVA Centre on Business, Human Rights and the Environment Blog, 2022. Available at: https://novabhre.novalaw.unl.pt/supervisory-mechanisms-and-directors-duties-innovations-in-the-proposed-eu-directive-on-corporate-sustainability-due-diligence/#_ftn39
[222]Op. cit. Amendment 183 for Article 18, p. 7c (new).

plan, leaving doubts if the consequences for directors would be the only form of liability for failing to comply with Article 15.

Overall, the Parliament proposed a comprehensive approach to the design and implementation of the transition plan in comparison with the Commission and Council's proposal, improving a lot of the previous propositions, but did not clarify the consequences of non-compliance with the transition plan, still leaving room for ambiguity in that matter.

After several rounds of negotiations, the three institutions reached a provisional agreement on the text of the legislation on the 15th of December of 2023, which combined some of the main ideas proposed by them. The agreement proposed the following content to the transition plan:

> "**1**. Member States shall ensure that companies referred to in Article 2(1), **(a) and (c)**, **adopt a plan adopt and put into effect a transition plan for climate change mitigation which aims** to ensure, **through best efforts,** that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. **and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the undertaking to coal-, oil- and gas- related activities.**
>
> **The design of the transition plan referred to in the first subparagraph shall contain:**
>
> **(a) time-bound targets related** to climate change f**or 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and including, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category;**
>
> **(b) a description of decarbonisation levers identified and key actions planned to reach targets referred to under point (a), including where appropriate changes in the undertaking's product and service portfolio and the adoption of new technologies;**
>
> **(c) an explanation and quantification of the investments and funding supporting the implementation of the transition plan;**
>
> **(d) a description of the role of the administrative, management and supervisory bodies with regard to the plan.**
>
> Add to recital 50 (…) aiming to ensure, through **best efforts** to put into effect the plan should be **understood just as an obligation of means and not of results**.
>
> **2**. Deleted

3.Companies that report a transition plan for climate change mitigation in accordance with Article 19a, 29a or 40a, as the case may be, of Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to have complied with the adoption obligation set out in paragraph 1 of this Article.

Companies that are included in the transition plan for climate change mitigation of their parent undertaking, reported in accordance with Article 29a or 40a, as the case may be, of Directive 2013/34/EU of the European Parliament and of the Council, shall be deemed to have complied with the adoption requirement set out in paragraph 1 of this Article.

Recital saying: the CSRD and CSDDD plans are the same on content and CSRD compliance lead to adoption compliance (but adoption only)

3a. Member States shall ensure that the transition plan referred to in paragraph 1 is updated every 12 months and contains a description of the progress the company has made towards achieving the targets referred to under paragraph 1, point (a).

3b. Member States shall ensure that companies with more than 1000 employees on average have an appropriate policy to promote the implementation of the plan referred to in this Article including through, among others, financial incentives to members of the administrative, management or supervisory bodies concerned. The first subparagraph is without prejudice to Directive 2007/36/EC of the European Parliament and of the Council.[223]

The Draft Agreement included the duty of companies not only to adopt, but to put into effect actions to transition to a sustainable economy, putting together the propositions elaborated by the Parliament and the Council. Notwithstanding, the provisional text agreed on leaving small and medium companies from the high-risk sector (article 2, (2, b) out of the scope of application of Article 15, differing from the proposition of the Parliament.[224]

In relation to the design of the transition plan, it was accorded that corporations would have to design a plan with time-bound targets related to climate change operations for 2030 and for 2050, and create reduction targets for greenhouse gas scope 1, 2 and 3. The requirements of having absolute GHG emission reduction, methane emissions reduction plan, or the need to consult with stakeholders were excluded from the text. Additionally, a new requirement was

[223]PROVISIONAL AGREEMENT, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (Text with EEA relevance) 2022/0051(COD), Article 15*, 15-12-2023 at 17h15 166/234.
[224]Ibid. Article 15 (1).

added stipulating that all transition plans would have to be updated every 12 months and describe the progress made to achieve the proposed targets.[225]

Moreover, the Draft Agreement added a new topic (3.b) requiring companies with more than 1000 employees to put in place an appropriate policy to implement the transition plan (such as financial incentives) which did not come from any of the previous propositions. It also required that the transition plan included a description of decarbonisation levers identified, the key actions to reach the targets, the transition funding plan, and the description of the role of the corporate bodies with regards to the plan, according to the Parliament's amendments. [226]

A final clarification was added to the text of Article 15 explaining that companies that report a transition plan in accordance with the Corporate Sustainability Reporting Directive (CSRD), which sets out reporting obligations on sustainability-related disclosures in the financial services sector for financial undertakings, should be deemed to have complied with the adoption requirements of paragraph 1 of article 15. The purpose of this additional clarification served to avoid duplicity when fulfilling the requirements of both legislations, as the CSRD and the CSDDD are interrelated and complementary to each other.[227]

Lastly, the propositions of the Parliament in relation to directors' remuneration were completely removed, and again not much was clarified on the consequences from a failure to meet the obligations of the article. In that regard, the Draft Agreement identified the nature of the mitigation plan, which should be understood as an obligation of means and not of results.[228]

The obligations of results are described to bring clarity and provide a better understanding of what needs to be achieved. It fosters a sense of responsibility and commitment, and increases accountability once the party can be held accountable for not delivering the results. The obligations of means allow room for ambiguity as having no clear goals may lead to misunderstandings or misalignment between parties. It can also result in the lack of accountability once it can be hard to hold parties accountable for failures or shortcomings when they are not required to achieve any results.[229]

On that account, the obligations derived from Article 15 would be understood as obligations of means, which focus on the process and only encourage parties to achieve and

[225]Ibid. Article 15 (1a) and (3a).
[226]Ibid. Article 15 (1.b, c, d) and (3b).
[227]Ibid. Article 15 (3).
[228]Ibid. Article 15 (1) '*Add to recital 50 (...) aiming to ensure, through best efforts to put into effect the plan should be understood just as an obligation of means and not of results.'*
[229]U-NEGO, *Obligations of Results vs. Obligations of Means in IT Project Contracts. What You Need to Know.* 2023. Available at: https://www.linkedin.com/pulse/obligations-results-vs-means-project-contracts-what-you-need-know/

outcome, instead of binding the parties to achieve a specific result or deliver a particular outcome.

By the time of the Commission's proposal, Article 15 was already highly criticized for leaving room for ambiguity and lacking precision regarding the targets and content of the transition plans.[230] Throughout the CSDDD adoption process, Article 15 was modified to include clearer objectives for the transition plan, as it was shown. What it did not take into account, however, was that among more than 1,500 climate laws or policies that exist globally[231] it is still a big challenge to properly enforce them, and the CSDDD, without proper enforcement language and without clear enforcement mechanisms, could also result in the lack of accountability and not reach effective practical results.

In spite of that, the text of the provisional agreement was expected to be endorsed and formally adopted by the Parliament and the Council in the beginning of the year of 2024. However, the final approval of the text faced setbacks and the European Council's final vote came with additional modifications in the text.

Chapter 3.2 - Approved Text

Due to lack of consensus among EU's MS in the Council of the European Union, the final vote of the CSDDD was postponed several times and the text of the legislation was weakened before its final adoption, slightly affecting the transition plan requirements. The Council only adopted the legislation on the 15th of March 2024 and the final vote of the Parliament's plenary was held on the session of April 24th. Article 15 was moved to Article 22, and the transition plan was defined by the following content:

> 1. Member States shall ensure that companies referred to in Article 2(1), **points (a), (b) and (ba)**, and Article 2(2**), points (a), (b) and (ba),** adopt and **put into effect a transition plan for climate change mitigation which aims** to ensure, through **best efforts**, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement **and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its**

[230] E3G, *A climate-fit EU Corporate Sustainability Due Diligence Directive.* 2022. Available at: https://www.e3g.org/publications/a-climate-fit-eu-corporate-sustainability-due-diligence-directive/

[231] CLIENTHEARTH. *Climate Accountability: We need urgent action to tackle the climate emergency.* 2023. Available at: https://www.clientearth.org/what-we-do/climate-accountability/

intermediate and 2050 climate neutrality targets, and where relevant, the exposure of the company to coal-, oil- and gas-related activities.

The design of the transition plan referred to in the first subparagraph shall contain:
(a) time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and including, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category;
(b) a description of decarbonisation levers identified and key actions planned to reach targets referred to under point (a), including where appropriate changes in the undertaking's product and service portfolio and the adoption of new technologies;
(c) an explanation and quantification of the investments and funding supporting the implementation of the transition plan;
(d) a description of the role of the administrative, management and supervisory bodies with regard to the plan.

2. Companies that report a transition plan for climate change mitigation in accordance with Article 19a, 29a or 40a, as the case may be, of Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to have complied with the adoption obligation set out in paragraph 1 of this Article. Companies that are included in the transition plan for climate change mitigation of their parent undertaking, reported in accordance with Article 29a or 40a, as the case may be, of Directive 2013/34/EU of the European Parliament and of the Council, shall be deemed to have complied with the adoption requirement set out in paragraph 1 of this Article.

3. Member States shall ensure that the transition plan referred to in paragraph 1 is updated every 12 months and contains a description of the progress the company has made towards achieving the targets referred to under paragraph 1, point (a). [232]

In the first place, the scope of application of Article 22 changed once the scope of the entire legislation was altered in the final adoption of the text. High-risk classification of industries or sectors were completely removed from Article 2 (which defines the scope of the

[232]EUROPEAN PARLIAMENT AND COUNCIL OF THE EU, AMENDMENTS BY THE EUROPEAN PARLIAMENT to the Commission proposal of the DIRECTIVE (EU) 2024/…OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. *Article 22.* 2024. *Available at:* https://www.europarl.europa.eu/doceo/document/A-9-2023-0184-AM-430-430_EN.pdf

Directive) and the new scope of Article 2 encompassed EU companies comprising a minimum of 1000 employees with a net turnover of €450 million, and third country companies who had generated more than EUR 450 million in the Union (among other criteria). As a consequence, companies subject to the obligations of Article 22 changed to the ones defined by this new scope brought by Article 2 (1)(2), without any differentiation to specific sectors.[233]

Since this change created a higher threshold for the application of Article 22, point 3.b of the Draft Agreement which required companies with more than 1000 employees to include appropriate policies to promote the implementation of the mitigation plan through financial incentives was removed. Hence financial incentives were not required from bigger companies any longer.

Despite this change, the adopted text maintained the Draft Agreement's requirements to adopt and put into effect actions to transition to a sustainable economy by designing a plan with time-bound targets for 2030 and for 2050, and reduction targets for greenhouse gas scope 1, 2 and 3.[234]

Likewise, it maintained the following requirements of having i) a description of the decarbonisation levers identified and key actions planned to reach its targets[235], ii) the transition funding plan[236], and iii) the role of the administrative, managements and supervisory body in regard to the plan [237]. It equally agreed that all transition plans would have to be updated every 12 months and describe the progress made to achieve the proposed targets.[238]

In addition to that, the final text reinforced that companies that report a transition plan in accordance with the CSRD should be deemed to have complied with the adoption requirements of paragraph 1 of article 22.[239]

Furthermore, a new clarification on the interaction between parent companies and their subsidiaries when fulfilling the transition plan was added. Under Article 6 and Recitals 21, it was explained that a parent company can fulfil the obligation of combating climate change on behalf of the subsidiary, but that would create the condition that the subsidiary would have to comply with those obligations in accordance with the parent company's plan.[240]

[233]Ibid. Art. 2 and Art. 22.
[234]Ibid. Art. 22 (1.a).
[235]Ibid. (1.b)
[236]Ibid. (1.c)
[237]Ibid. (1.d).
[238]Ibid. (2).
[239]Ibid. (3).
[240]Ibid. Article 6(3) and Recitals 21.

It was explained that irrespective of whether these obligations were carried out by the parent company on the behalf of the subsidiary, or by the subsidiary itself, the subsidiary could still be held liable if the conditions for liability are met.[241] Moreover, the fulfilment of obligations by a parent company would be be without prejudice to the subsidiaries being subject to the exercise of the supervisory authority's powers, and to them being subject to civil liability under the Directive (when the conditions are met), if the subsidiary falls under the scope of the Directive.[242]

In spite of this new element, the final text did not elaborate on whether failing to implement the transition plan would give rise to civil liability. It clarified that supervisory authorities should be required to at least supervise the adoption and design of the plan and the updates[243], not necessarily if they are effectively implemented[244], and that in regard to civil liability arising from adverse environmental impacts, persons who suffer damage can claim compensation under the Directive even where such claims overlap with human rights claims[245]. Therefore, non-compliance with the transition plan does not expressly give rise to civil liability, but persons suffering from adverse climate impacts may claim compensation according to recitals 89, once environmental impacts encompass climate impacts by logic.

Lastly, the final text of the CSDDD did not include any conditions to define director's remuneration in order to guarantee the effective implementation of the plan, and it followed the Draft Agreement's "best efforts" approach to the legislation, what can easily result in the lack of accountability for non-compliance once it can be hard to hold parties accountable for failures or shortcomings when they are not required to achieve any results.

In sum, the final text left plenty of room for discharging the obligation of creating and effectively implementing a transition plan, however, people affected by environmental impacts (such as climate change) deriving from business activities can still try to pursue compensation for the harms suffered. The idea of not creating binding obligations on corporations to put effective transition plans in place, when not doing so can make them more exposed to producing adverse climate adverse impacts on people, and, consequently, more exposed to legal or other

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[241]"The fulfilment of some of the due diligence obligations at a group level should be without prejudice to the civil liability of subsidiaries under this Directive in respect of victims to whom the damage is caused. If the conditions for civil liability are met, the subsidiary could be held liable for damage that occurred, irrespective of whether the due diligence obligations were carried out by the subsidiary or by the parent company on behalf of the subsidiary." (Source: Ibid. Recitals (22)).

[242]Ibid. Recitals 21.

[243]Ibid. Recitals 73.

[244]BUENO, Nicolas, et al. *The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise.* Business and Human Rights Journal. Published online 2024:1-7. Available at: doi:10.1017/bhj.2024.10

[245]Ibid. Recitals 89.

procedures that search redress, seems quite inconsistent when one of the aims of the Directive is to foster sustainable and responsible corporate behaviour.

Yet, the positive aspect is that the Directive was adopted on a minimum harmonisation basis and Member States need, at minimum, to develop a national law that meets the requirements of the Directive, but they are allowed to go further by setting stricter requirements when transposing this text into a national law.

Chapter 3.3 - Where Does the European Union Stand in Terms of Corporate Climate Accountability?

The adoption of the CSDDD was not achieved without several compromises. It is true that the final text of the legislation which gave a "best effort" approach to the obligation of adopting and putting in place a transition plan, and the lack of connection of Article 22 with the civil liability provision, can be interpreted as a loophole that allows corporations to avoid accountability. Even so, the adoption of one legislation of this nature on a regional basis can still be acknowledged as a big achievement. The reason why this legislation can be seen as great achievement in a global perspective for corporate climate accountability will be described looking at 3 main points: The struggle to balance different interests (civil society, business, MS, etc.), the value of this legislation in the evolution of the BHR agenda, and considering the concepts that were crystallized in the CSDDD.

The first point relates to the challenge of overcoming opposing interests when adopting legislations of this kind. The EU Commission describes in the explanatory memorandum of the CSDDD that the proposal came after a clear request of EU citizens for the EU to address adverse impacts on the "rights of millions of workers around the world"[246], "together with other adverse impacts"[247]in which the EU economy is connected to throughout its value chains. Therefore, the Commission aimed to set out a framework to foster the contribution of businesses operating in the single market to respect worker rights and avoid other adverse impacts.

In turn, businesses' reactions towards the CSDDD were unequal. While some recognized that there was a critical need for business to play their part in addressing human rights and environmental challenges, acknowledging that the CSDDD would strengthen the relationship

[246]EU COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final)*, 2022. EXPLANATORY MEMORANDUM 1. CONTEXT OF THE PROPOSAL Reasons for and objectives of the proposal. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071
[247]Ibid.

between business and society and create a level playing field across the EU[248][249], other businesses reacted with fury when the Commission launched its consultation on the CSDDD in October 2020.

For instance, lobby groups asked for meetings with officials and issued invitations to seminars and conferences in large numbers throughout 2021[250], and when the draft agreement was reached some businesses voiced their fear that the new law would increase the bureaucratic burden on businesses[251]. After the Provisional Agreement was reached, businesses managed to influence the body that was set up to oversee the Commission's proposals to reject the directive twice and business' lobby at a national level pushed the Commission towards a more lenient proposal, as the MS could not find an agreement on the adoption of the text of the Directive in the first or second attempt.[252]

As it was mentioned in the first chapter, the adoption of a norm that sets the criteria for business to operate in accordance with human rights at international level was not easy either. It was necessary to find a compromise to agree on a norm, and that meant to leave the accountability provisions apart to follow the approach proposed by Professor John Ruggie in the UNGPs of a soft-law instrument. Taking into account that at a regional level it was possible to adopt a legislation with two main provisions in relation to accountability, the civil liability and the supervisory authority, there are still chances that the interpretation of the national authorities will follow a teleological approach (according to the purpose of the law) to form an opinion about the effort a corporation has made to adjust its conducts and comply the obligations of the transition plan.

The second reason why the adoption of the CSDDD is a great achievement for corporate climate accountability relates to the difficulty of both putting in place climate laws or climate policies that can be factually enforced, and to adopt mandatory human rights due diligence laws in the first place. The BHR agenda can still be considered to be a recent field, and the adoption

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[248]BHRC, *Nordic businesses call on their governments to support the Corporate Sustainability Due Diligence Directive* . 2024. Available at: Nordic businesses call on their governments to support the Corporate Sustainability Due Diligence Directive - Business & Human Rights Resource Centre (business-humanrights.org)

[249]COCOA COALITION, *Letter in Support to the EU Corporate Sustainability Due Diligence Directive.* 2024. Available at: Sarah Dekkiche no LinkedIn: Letter from the Cocoa Coalition in support to the CS3D;

[250]CORPORATE EUROPE OBSERVATORY, *INSIDE JOB: How business lobbyists used the Commission's scrutiny procedures to weaken human rights and environmental legislation.* 2024. Available at: https://corporateeurope.org/sites/default/files/2022-06/INSIDE%20JOB%20How%20business%20lobbyists%20used%20the%20Commission%27s%20scrutiny%20procedures.pdf

[251]EUROACTIVE, *German industry fumes over new EU corporate rules.* 2023. Available at: German industry fumes over new EU corporate rules – Euractiv

[252]Op. Cit.

of MHRDD-related laws face strong opposition from certain actors (such as from business) as mentioned in the previous division. Additionally, including environmental and climate provisions in the context of these laws is a phenomenon that is even more recent. As it could be seen, this type of understanding has been gaining terrain after the French law included the environmental harms under the French Duty of Vigilance Law and lawsuits emerged to demand corporations to account for their climate impacts based on the duties of the Vigilance Law.

In light of that, including an article that explicitly requires companies to adopt a transition plan in order to combat climate change within the context of a MHRDD law represents a lot to the development of the BHR field. Another point that should be highlighted is that even though there is not an explicit reference that connects Article 22 to the civil liability provision, the final text of Directive defined in Article 5 entitled "due diligence" that companies are required to conduct "risk-based human rights and environmental due diligence"[253]. Risk-based human rights due diligence and environmental due diligence encompass assessing the climate impacts that derive from corporate activities. That is the understanding of the new OECD Guidelines, of the scholars referred throughout this research, as well it is what can be inferred from the recent use of BHR norms in case-law which required companies to address their climate impacts.

In other words, not putting in place and implementing a transition plan can be seen as a breach of the duty to carry out "risk-based due diligence" and "environmental due diligence", once Article 5 requires companies to conduct an overarching HRDD process which embeds and encompasses climate change. Looking through this angle, not putting in place and implementing the transition plan can be a breach of the duty to carry out risk-based due diligence and environmental due diligence, and, therefore, can give rise to civil liability (together with the possibility of recitals 89). In sum, there are still possibilities in which companies can be held liable for failing with their climate duties.

The third point why this legislation can be seen as a turning point to corporate climate accountability relates to the formal crystallization of corporate duties in relation to climate change in Article 22. It is now clear that climate change mitigation is integrated in HRDD obligations as a facet of these obligations. Furthermore, which corporations should create and implement a transition plan for climate change mitigation in the EU, how this plan should be

[253]EUROPEAN PARLIAMENT AND COUNCIL OF THE EU, AMENDMENTS BY THE EUROPEAN PARLIAMENT to the Commission proposal of the DIRECTIVE (EU) 2024/…OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859. *Article 5*. 2024. *Available at:* https://www.europarl.europa.eu/doceo/document/A-9-2023-0184-AM-430-430_EN.pdf

designed, in accordance with which laws, and what is the nature of the obligation, are all clarified in the adopted law.

These three points summarize why it is still a great advancement for corporate climate accountability to have the CSDDD adopted with the current text of Article 22, even though there are loopholes that can allow corporations to evade accountability.

Apart from all of that, and the issues that were mentioned throughout this chapter, there are still other remaining challenges for corporate climate accountability that need to be considered which will be discussed next.

Chapter 4- Remaining Challenges for Corporate Climate Accountability

As discussed in the previous chapters, the adoption of the CSDDD represents a lot to the evolution of the BHR field as well as to the fight against climate change. Yet, there are still some key concepts to be considered in relation to the nature of the transition plan that the CSDDD proposes, especially when it comes to the practical effects of this plan on affected victims.

In 2021, in a webinar held by the British Institute of International and Comparative Law (BIICL) speakers were asked to work on the assumption that they had MHRDD laws in place, and to work on how the standards or care of climate change impacts would look like. Most of the speakers agreed on the same point, that "the most important added value of an EU law would not be to introduce a standard ex novo, but rather to facilitate access to remedy which is currently lacking for victims and communities."[254]

As predicted, the final version of Article 22 in the CSDDD did not innovate much with the standards it laid down. The CSRD puts very similar reporting requirements on corporations to limit global warming[255], the OECD Guidelines suggested similar steps to be followed when accounting for the environment[256], and many other voluntary measures have proposed similar standards.[257] In fact, the CSDDD is limited in comparison with some of these measures as some of them propose further requirements regarding the affected victims.

For Instance, the CSRD states that, under the reporting information, it must be informed how business models and strategies are taking into account "the interest of the undertaking's stakeholders" and of the "impact of the undertaking" on sustainability matters[258]. Under the text

[254]ALOGNA, Ivano and SMIT, Lise, *Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report.* 2021. Pag.7. Available at: https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf

[255]THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, *DIRECTIVE (EU) 2022/2464 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.* Article 19a (2.III). Available at: https://eur-lex.europa.eu/eli/dir/2022/2464/oj

[256]In chapter VI "The environment".

[257]EXPERT GROUP ON GLOBAL CLIMATE OBLIGATIONS, *Oslo Principles on Global Climate Change – 26. D Obligations of Enterprises.* 2015. Pag. 8. Available at: https://climateprinciplesforenterprises.org/wp-content/uploads/2017/12/osloprincipleswebpdf.pdf).

[258]THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, *DIRECTIVE (EU) 2022/2464 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as*

of the OECD Guidelines, the environmental management system should be done by providing relevant stakeholders with adequate, measurable, verifiable, and timely information on environmental impacts, and providing for, or co-operating in, remediation[259], as well as by conducting meaningful engagement with relevant stakeholders affected by adverse environmental impacts associated with an enterprise's operations, products or services.[260]

The Oslo Principles, a study that was based on extensive legal research and discussions that resulted in the adoption of principles that set essential obligations of States and enterprises to avert the critical level of global warming, also identified enterprises' duty to "assess their facilities and property to evaluate their vulnerability to climate change", and among other things, to "publicly disclose this information and ensure, in particular, that it is readily accessible to those who are, or are likely to be, directly or indirectly affected by their activities, including investors, clients, and securities regulators"[261].

If Article 22 is reread in the light of these requirements, its current text seems more corporate-oriented or business-centered in the sense that it settles the procedural criteria for business to incorporate a transition plan within its management strategies and show compliance with the requisites if needed, rather than to integrate human considerations into adaptation-transition approaches and strategies. As discussed in the previous chapter, non-compliance with the obligations of Article 22 could result in accountability (if corporations fail to create and implement the transition plan, fail to prove their best efforts when doing so, and if the other barriers for such are surpassed), and they can receive a fine from the supervisory authority or face a civil procedure and be required to adjust their plan (most likely similarly to the LaPoste and the Milieudefensie et al. vs RDS judgments). What about the humans that are affected by these harmful climate impacts? How would that type of accountability be helpful to them? One

regards corporate sustainability reporting. Article 19a (2.III). Available at: https://eur-lex.europa.eu/eli/dir/2022/2464/oj

[259]THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, *DIRECTIVE (EU) 2022/2464 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.* Article 19a (2.III). Available at: https://eur-lex.europa.eu/eli/dir/2022/2464/oj

[260]OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. 2023.* Pg.33. Available at:https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htmhttps://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm

[261]EXPERT GROUP ON GLOBAL CLIMATE OBLIGATIONS, *Oslo Principles on Global Climate Change – 26. D Obligations of Enterprises.* 2015. Pag. 8. Available at: https://climateprinciplesforenterprises.org/wp-content/uploads/2017/12/osloprincipleswebpdf.pdf).

question that was raised in the BIICL seminar was "who are these laws for?"[262], and in the CSDDD's case, who was the transition plan created for?

At the present moment, it is intuitive to interpret that Article 22 was designed to be integrated in a corporate internal management strategy rather than to address and redress rights holders in a way that thinks about the human rights of people being affected by climate change. Even though it is correct that climate change affects everyone on the planet, and the fulfillment of the obligations of Article 22 can have a global impact, Surya Deva recalls that climate change is not a black box that everyone is affected and impacted in the same way, and not all the rights holders are affected in an identical way, as the following:

> "Climate change is going to impact people differently and in a disproportionate manner(...), the impact on women and the impact on indigenous peoples could be very different (...) the impact on people who are already developed and have a very decent life would be very different from people in the Global South(...), and these differentiated and disproportionate impacts have to be taken into consideration. [263]

One of the major challenges of climate impacts is that they can affect people differently and reproduce systemic injustices, such as increasing gender inequality, economic inequality, racism, language and literacy barriers, discrimination against the disabled, chronically ill and elderly, indigenous exploitation and geographic context injustice, among other forms of societal inequality[264]. Hence, these stakeholders, as well as the different forms of adverse impacts they experience, need to be taken into consideration in the creation and implementation of a transition plan in order to ensure real effects of the legislation on people.

As suggested by the European Parliament in its amendments to Article 15[265], a transition plan should include ongoing stakeholder engagement that takes into consideration views of the

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[262]HAWKES, Shona, *In Lise Smit and Ivano Alogna (Eds): Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report - 2. A holistic perspective to human rights due diligence for climate change impacts.* 2021. Pag.12 Available at: https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf

[263]DEVA, Surya, *In Lise Smit and Ivano Alogna (Eds): Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report - Episode 3: Mandatory Human Rights Due Diligence Laws: What Are Their Implications Regarding Corporate Climate Change Impacts? 1. Climate Change, Human Rights and the UN Guiding Principles: Interlinkages and Red Flags.* 2021. Pag.48 Available at: https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf

[264]CONCERN WORLDWISE, *10 Climate injustices — and how to fight them, Blog post.* 2022. Available at: https://www.concern.net/news/climate-injustices

[265]WOLTERS, Lara. *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)), Amendments 168 to 171 for Article 15.*, EP Committee on Legal Affairs, 2022, available at: https://www.europarl.europa.eu/doceo/document/JURI-PR-738450_EN.html

affected people in order to understand how the impacts of climate change are being felt on the ground. The 2023 OECD Guidelines also included steps that enterprises should apply to account for their environmental impacts, mentioning “meaningful engagement”[266] as one of them. Accordingly, an effective climate transition plan needs to include stakeholder engagement as part of the whole transition process, and look at vulnerability factors[267] as well as to climate-sensitive people[268] which are the ones who can feel climate impacts disproportionately, following the principle of intergenerational equity[269] and inclusive development[270].

According to the Australian framework for stakeholder engagement on climate adaptation, climate stakeholder’s engagement should exist within three systems: regions, industries and communities. In addition to that, the working definition of vulnerability should be built by first defining its four component parts: exposure, sensitivity, potential impact and adaptive capacity.[271]

For instance, a local business of a certain industry should engage with the communities that are most exposed to the climate impacts of this specific activity and that have least adaptive capacity in that region (in a prioritization approach). It should then continue on expanding its engagement to the less critical victims[272], and leverage, when necessary, the engagement of its suppliers[273]. When dealing with contributions that can reach a global impact, businesses can be

[266]OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. 2023.* Pg.33 and 34. Available at:https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htmhttps://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm

[267]Such as demographic, geographical, biological and health statues, sociopolitical, socioeconomic, health system capacity and gender factors. (Source: CONCERN WORLDWISE, *10 Climate injustices — and how to fight them, Blog post.* 2022. Available at: https://www.concern.net/news/climate-injustices)

[268]Individuals such as women, children, ethnic minorities, poor communities, migrants, displaced persons, older populations, etc. (Source: WORLD HEALTH ORGANIZATION, *Climate Change*: *Climate Change Impacts on Health.* 2023. Available at:https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health).

[269]Which is concerned with “equity between people of the same generation and aims to assure justice among human beings that are alive today”, and mandates particular priority for the special situation and needs of the most environmentally vulnerable. (Source: UN ENVIRONMENTAL PROGRAMME, *Definitions – Intergenerational Equity.* Available at: intergenerational equity | UNEP Law and Environment Assistance Platform).

[270]The idea of an inclusive development reflects about the current uneven development and the business-as-usual approach and encourages transformative forms of inclusion to guide the way policies are designed and implemented nowadays. (Source: GUPTA, Joyeeta and VEGELIN, Courtney, *Inclusive development, leaving no one behind, justice and the sustainable development goals. Int. Environ. Agreements (2023) 23:115–121*. Available at: https://doi.org/10.1007/s10784-023-09612-y).

[271]GARDNER, Dowd, et. al, *A framework for stakeholder engagement on climate adaptation. CSIRO Climate Adaptation Flagship Working paper No.3.* 2009. Pg. 14 – 17. Available at https://research.csiro.au/climate/wp-content/uploads/sites/54/2016/03/3_CAF_WorkingPaper03_pdf-Standard.pdf .

[272]Combining approaches and tools such as linking surveys, visual tools, presentations, and open discussion worked well, and count with partnerships if necessary. (Source: Ibid.)

[273]MACCHI, Chiara, *In Lise Smit and Ivano Alogna (Eds): Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report - Episode 3: Mandatory Human Rights Due Diligence Laws: What Are Their Implications Regarding Corporate Climate Change Impacts? 2. Climate Due Diligence as an Inherent Component of Human Rights Due Diligence.* 2021. Pag.51 Available at:

invited to engage in partnerships with governments, civil society, and other initiatives to create strategies to choose the right methods for effective engagement, as suggests the OECD Guidelines.[274]

The UNGPs explain in principle 18 that the due diligence process should include "meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation".[275] Therefore, businesses are already required to have an ongoing process to interact and dialogue with stakeholders to "hear, understand, and respond to their interests and concerns".[276] The climate engagement plan can draw from the main aspects of principle 18 to create an engagement process that explores the regions, industries, and communities in which business operate, and the exposure, sensitivity, potential impact and adaptive capacity of the climate-affected victims.

In that manner, a human factor could be integrated into the transition plan once people affected by climate change would be consulted according to the priority of hearing, understanding and responding to their interests and concerns. Moreover, it could be easier to avoid that companies follow a tick-box compliance approach to the requirements of the transition plan, which is focused narrowly on "satisfying the legal requirements without any concern about whether the implemented measures actually generate any tangible impact on the situation of rights-holders on the ground"[277].

Together with that, another crucial element that would integrate the human factor in the transition plan is facilitating access to remedy (as mentioned in the BIICL seminar). The UNGPs state that companies should put in place processes to ensure that the affected stakeholders can have access to effective remedy[278], similarly, the 2023 OCDE Guidelines

https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf

[274]The seventh step calls business to contribute to the development of environmentally responsible and economically efficient public policy, such as through partnerships or initiatives. Source: OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. 2023.* Pg.33 and 34. Available at:https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htmhttps://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm

[275]UNITED NATIONS, *Guiding Principles on Business and Human Rights.* 2011. Principle 18. Available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

[276]Ibid.

[277]WETTSTEIN, Florian, *Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights. - 2. Tick-Box Compliance.* Business and Human Rights Journal 2021;6(2):312-325. Available at: doi:10.1017/bhj.2021.21.

[278]Op. Cit. Principle 25.

highlight the need for "providing for, or co-operating in, remediation"[279] under the first step of the environmental impact assessment process, and scholar have been repeatedly reinforcing the lack of this key element[280] in climate laws.

In the Royal Dutch Shell case, the Court ordered to RDS to adjust its corporate strategy and policies to reduce its emissions in relation to its scope 1 and some of scope 2 emissions under an obligation of result, and to influence the reduction of its scope 2 and 3 emissions through its corporate policy under a best-efforts obligation[281]. However, The Court has not ordered RDS to remediate the impacts of its wrongdoings.

Scholars have suggested that for impacts deriving from scope 1 and some of 2 (direct emissions), that is, when a company directly contributes to a climate impact, it should (i) cease or prevent its contribution, (ii) mitigate any remaining impacts, and (iii) cooperate in remediation through a legitimate process that involves providing for remediation proportionately to its share of responsibility in the harm[282]. For impacts deriving from scopes 2 and 3 (indirect emissions that are a consequence of a company's activities but occur from sources not owned or controlled by it)[283], that is, a case of direct linkage, companies can be required to provide remedy, but should "merely seek to prevent or mitigate the impact and take appropriate action which will vary according to the extent of its leverage".[284]

Despite this clarification, it has been duly noted by Bright and Buhmann that "it may prove challenging to determine whether a specific company contributes or is directly linked to climate change"[285], and providing remediation for climate-related impacts would require understanding the extent a corporation contributes to an impact.

How to calculate the share of contribution of a corporation to climate change on a global perspective, how to calculate the amount of compensation is due to the affected stakeholders according to the share of contribution of this corporation, how to understand if the corporate's

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[279]OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. 2023.* Pg.33 and 34. Available at:https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htmhttps://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm

[280]For instance, in the BIICL webinar.

[281]THE HAGUE DISTRICT COURT. *Judgment of 26 May 2021 in the case of Milieudefensie et al. vs Royal Dutch Shell (RDS), 3 – The Dispute*. 2021. Available at: ECLI:NL:RBDHA:2021:5339, Rechtbank Den Haag, C/09/571932 / HA ZA 19-379 (engelse versie) (rechtspraak.nl)

[282]BRIGHT, Claire and BUHMANN, Karin. *Risk-based Due Diligence, Climate Change, Human Rights and the Just Transition - 4.3. Risk-Based Due Diligence and Remediation.* Sustainability, 13, 10454. Pgs. 12 to 14. 2021. Available at: https://www.mdpi.com/2071-1050/13/18/10454

[283]NATION GRID, *What are scope 1, 2 and 3 carbon emissions?* 2023. Available at: https://www.nationalgrid.com/stories/energy-explained/what-are-scope-1-2-3-carbon-emissions

[284]Op. Cit.

[285]Ibid. pg. 13.

emission affects the global context (everyone on the planet) or has specific impacts locally (where this corporation operates), how to identify what type of emission (1,2 and 3) that arises from a corporation's own activity and of its value chain in order to understand the type of remedy it should be provided, and many similar details, will require precise data. The identification of the contribution of a specific corporation to global climate change can only be clarified with an interdisciplinary/multidisciplinary study of corporate activities. For instance, the use of qualitative and quantitative methodologies to better understand the share of responsibility of a corporation can help to advance the effectiveness of these legal instruments, and help individuals to connect the impacts of the climate harms affecting them with the emissions of corporations when searching for due compensation.

Law cases seeking emission reductions, such as the Milieudefensie vs. Royal Dutch, have been successful, whereas those seeking compensation or restitution for losses or damages have not.[286] Seeking compensation in climate lawsuits can prove to be daunting predominantly due to procedural aspects, namely, proving standing, the causality between the harm and the corporate activity, and attributing a share of responsibility for parties.

Whilst the share of contribution of a corporation to climate change is not publicly available to the affected stakeholders to prove this connection, what can and should be provided to facilitate individuals to succeed obtaining redress is the possibility of affected stakeholders to count with reversed burden of proof (which means that proving or disproving a point is the duty of the other party)[287]. Attributing the burden of proof to corporations, who have greater power, financial availability and access to information, so that they prove that the harm does not derive from their activities or of their subsidiaries, or at least prove that the share of their contribution is smaller or different than what was claimed, can be an alternative to ensure victims are properly redressed from the impacts suffered.

The third UN Draft for an international treaty on BHR highlights two moments in which the burden of proof should be reversed. The first one is in the enactment of laws: "States Parties shall enact or amend laws allowing judges to reverse the burden of proof in appropriate cases to fulfil the victims´ right to access to remedy (…)"[288], and the second one in is the application

[286]OTTO, F.E.L. et al. *Causality and the fate of climate litigation: The role of the social superstructure narrative*. Global Policy, 13, 736–750. (2022). Available at: https://doi.org/10.1111/1758-5899.13113
[287]The reversed burden of proof is a legal concept that shifts the responsibility of proving a fact from the party who normally has to prove it to the other party. Source: UOLLB FIRST CLASS LAW NOTES, *Reversed Burden of Proof.* 2023. Available at: https://uollb.com/blog/law/reversed-burden-of-proof
[288]UNITED NATIONS, *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises.* 2021. Section II, Article 7 (7.5). Available at: https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf

of law to ensure that there are not unfair and unreasonable burden on victims to commencing proceedings[289]. Additionally, it has been observed that six different international human rights bodies[290] have often employed similar approaches to decide when the burden of proof should be reversed. Firstly, they understand that the burden should be reversed in cases where there is differential access to information, and secondly the burden should be reversed where the case can be linked to evidence of a systemic pattern of violations.[291]

In regard to the first criteria, "differential access to information", the asymmetries related to access to information as well as resources can be one of the major limitations of human rights due diligence laws as they do not adequately acknowledge or address the problems flowing from the imbalance of power, information, and resources between businesses and rights holders.[292] Therefore, the facility in which corporations have access to the necessary information to understand their impacts on human rights as well as on climate change is completely different as for the affected stakeholders.

In second place, the burden should be reversed when the case can be linked to evidence of a systemic pattern of violations. In regard to that, the dynamics of the current economic system often foment an unequal exchange between global north and global south, with large transnational corporations from the north establishing a position of dominance over the resources, lands and labour of their southern suppliers and disproportionally using their resources.[293]

Despite decades of changes within the international system, this unequal relation has persisted and the effects of this structure have led to irreversible consequences in our ecosystem, harmful impacts on people including in their traditional forms of livelihoods, and increased the inequalities suffered by the marginalized and impoverished.[294]

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[289]Ibid. Article 7 (7.4).

[290]The European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights and the Human Rights Committee. (Source: ROBERTS, Chirstopher. *Reversing the Burden of Proof Before Human Rights Bodies*. Research Paper No. 2022-23. The Chinese University Of Hong Kong Faculty Of Law. Available at: https://ssrn.com/abstract=4135462)

[291]Ibid.

[292]DEVA, Surya. *Mandatory human rights due diligence laws in Europe: A mirage for rightsholders? 4.3 operational limitations*. Pg. 400. 2023. Leiden Journal of International Law, 36, 389–414 doi:10.1017/S0922156522000802.

[293]HICKEL, Jason et. al., *Imperialist appropriation in the world economy: Drain from the global South through unequal exchange*, 1990–2015. Global Environmental Change,Volume 73,2022,102467,ISSN 0959-3780, https://doi.org/10.1016/j.gloenvcha.2022.102467. Available at: https://www.sciencedirect.com/science/article/pii/S095937802200005X

[294]FRAME, Mariko, *Ecological Imperialism, Development, and the Capitalist World-System.* 2023. 1st Edition London, Routledge, DOI https://doi.org/10.4324/9780429261305, Available at: https://www.taylorfrancis.com/books/mono/10.4324/9780429261305/ecological-imperialism-development-capitalist-world-system-mariko-lin-frame

Corporate impunity over their climate impacts can reproduce these systemic patterns of violations as the impacts of climate change are disproportionately felt by people with demographic, geographical, sociopolitical and socioeconomic differences (normally post-colonial subjects)[295] and these same people cannot reach means to be redressed.

The reversed burden of proof can be an instrument to better articulate the design and implementation of the current climate policies and help to change this cycle of repetition reflecting on social justice, ecological inclusion and relational inclusion,[296] as corporations are in a favourable position of power, of access to information, and access to resources, whereas victims face legal, practical, and financial barriers when accessing judicial remedies, particularly in transnational cases.[297]

Therefore, searching for justice towards corporate-related climate impacts with the application of the reversed burden of proof can result in real redress and could "facilitate access to remedy which is currently lacking for victims and communities"[298] (as highlighted in the BIILC webinar). In sum, what is being argued is that it should not be the victims' task to identify the exact share of responsibility that a corporation has when seeking for redress for climate impacts, but rather that businesses should seek to identify their share of responsibility and provide remediation in accordance with their contribution to climate change.

The last aspect that needs to be considered is the nature of the remedies that are going to be provided to victims. One of the major points raised in the 2023 UN Forum on Business and Human Rights in the session discussing the "practical approaches to rights-based climate action

[295]WORLD HEALTH ORGANIZATION, *Climate Change*: *Climate Change Impacts on Health.* 2023. Available at: https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health .

[296]According to Gupta and Vegelin sharpening the understanding of inclusion and justice among key stakeholders and better articulation of the Earth system justice approach is a way forward to change this cycle of repetition. The authors suggest a reformation of the global system to put in place an inclusive development which leaves no one behind by creating an inclusive development which encourages transformative forms of inclusion to guide the way policies are designed and implemented nowadays. (Available at: GUPTA, Joyeeta and VEGELIN, Courtney, *Inclusive development, leaving no one behind, justice and the sustainable development goals. Int. Environ. Agreements (2023)* 23:115–121. https://doi.org/10.1007/s10784-023-09612-y).

[297] BALDI, Emma, *'Redressing Business-Related Human Rights and Environmental Harm, and Doing it the Right Way: A Critical (Snapshot) Assessment of the European Commission's Proposal for a Corporate Sustainability Due Diligence Directive in Light of International Standards on the Right to Effective Remedy and Reparation'*, Nova Centre on Business, Human Rights and the Environment Blog, 15th February 2023. Available at: https://novabhre.novalaw.unl.pt/redressing-business-related-human-rights-and-environmental-harm-and-doing-it-the-right-way/

[298]ALOGNA, Ivano and SMIT, Lise, *Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report.* 2021. Pag.7. Available at: https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf

for business enterprises" [299] was that the solutions for businesses to tackle climate change many times continue to reproduce the violation of rights of the people affected by climate change.

It was argued that the solutions proposed are not tackling the root causes of climate change and/or proposing any changes to systemic issues such as the behaviour of corporations, the manner of conducting their activities and their place in regard to the victims, nor are they analysing the ground impacts that they are dealing with.[300] It was noticed that the solutions proposed for businesses to tackle climate change and redress their climate impacts come mainly in the form of "paying" for the impacts, and these "pay off" solutions were described to be "false solutions". [301]

As explains Pamplona and Pires, many harms caused by climate change cannot be reparable "*in natura reparation*"[302] as it is impossible to revert to the "*status quo ante*"[303] of climate standards. The Author asserts that pecuniary reparation cannot meet the societal interest in preserving a liveable planet or avoid the destruction of communities' traditional livelihoods. However, it is noticed that liability provisions can be accompanied with measures to adjust the corporate conduct in order to prevent the deepening or amplification of the damage, as well as to address the need for resilience measures for those individuals to adapt within the changes[304].

The Inter-American Court of Justice has very recently ruled on the first case that recognises the right to a healthy environment as a human right, giving the protection of the environment the status of a Jus Cogen norm, and provided examples on how to remediate cases when it is not possible to repair the harm *in natura reparation*. The Court highlighted that normally the reparation of a damage caused by a breach of international obligation requires *restitutio in integrum*[305] which consists in the re-establishment of the previous situation. It was noted, however, that in cases where this is not possible, measures should be taken to guarantee the protection of the rights violated and to repair the consequences the violations produced[306].

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[299]PERMPIBUL, WANUN. *Practical Approaches To Rights-Based Climate Action For Business Enterprises. Video Time* - 7:18:15- Available at: [Day 1 (Room XX) Forum on Business and Human Rights 2023 | UN Web TV]
[300]Ibid.
[301]Ibid.
[302] Latin expression that means "In the same nature".
[303] Latin expression that means "The state of affairs existing prior to a given event".
[304] PAMPLONA, Danielle Anne and PIRES, Julia Stefanello, *Prevention and Remediation Possibilities in Climate Litigation Against Corporations in Brazil.* 2023. Connecticut Law Review. Pg. 882. Available at: https://opencommons.uconn.edu/law_review/574
[305]Latin expression that means "Full restitution".
[306]CORTE INTERAMERICANA DE DERECHOS HUMANOS, *Corte IDH. Caso Habitantes de La Oroya Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 27 de noviembre de 2023. Chap. IX REPARACIONES 120 - C. Medidas de restitución, 122 D. Medidas de rehabilitación 124 E. Medidas de satisfacción, 125 F. Garantías de no repetición, 126 G. Otras medidas solicitadas, 132 H. Indemnizaciones compensatorias, 133 H.1. Daño material*. 2023. Available at: https://jurisprudencia.corteidh.or.cr/serie-c/sentencia/980571899

In its ruling, the Inter-American Court had to apply measures to redress the effects of pollution on the inhabitants of a city where a mining corporation operated for years, and it chose to grant various measures of reparation in order to compensate the damages. The measures applied by the court were beyond a pecuniary compensation, and encompassed restitution, rehabilitation, satisfaction, and guarantees of non-repetition. For instance, the condemned State was ordered to provide free medical care to the victims of violations, to put in place monitoring systems for air, soil, and water quality, to create regulations that define air quality standards, and to create a remediation plan for environmental damage (among other measures). The decision also reiterated that reparation measures must always have a causal link with the damages suffered, so the measures really repair the respective damages.[307]

Following the example of this recent ruling, solutions for business to tackle and remediate climate change should include further approaches than the pecuniary reparation in order to meet the societal interest in preserving a liveable planet, as well as to stop the reproduction of systematic patterns of human rights violation. In regard to the climate-affected victims, the use of restorative justice is already being studied as form to give members affected by the harm the possibility to actively participate in the resolution of matters arising from the activities of the harm. Restorative justice aims to include the vision of the affected in the process of remediation when the full restitution of the harm cause cannot be provided.[308]

In relation to the remedies proposed by restorative justice, it can take the form of financial compensation for losses, but also operations to restore the natural areas degraded through human activity, and the transformation of business conducts to a regenerative business approach[309], as well as other forms proposed by the victims. The European Environment Agency explains that restorative justice "recognises how past inequities continue to shape present conditions and aims to address these injustices, deliver resolution, and enable healing" [310]. Hence, using restorative justice in the remediation process can be particularly relevant when remediating degraded environments and addressing human rights impacts of climate change.

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[307]Ibid.
[308]DEVA, Surya, *In Lise Smit and Ivano Alogna (Eds): Human Rights Due Diligence for Climate Change Impacts: Webinar Series Report - Episode 3: Mandatory Human Rights Due Diligence Laws: What Are Their Implications Regarding Corporate Climate Change Impacts? 1. Climate Change, Human Rights and the UN Guiding Principles: Interlinkages and Red Flags.* 2021. Pag.50. Available at: https://www.biicl.org/documents/125_hrdd_for_climate_change_impacts_webinar_series_report_8_jan_2020.pdf
[309]LOVE, Char, et al., *Climate Change: Embracing Business Practices That Actually Improve the World*. 2024. Harvard Business Review. Available at: Embracing Business Practices That Actually Improve the World (hbr.org)
[310]EUROPEAN ENVIRONMENTAL AGENCY, *BRIEFING Delivering justice in sustainability transitions - "Restorative justice".* 2024. Available at: https://www.eea.europa.eu/publications/delivering-justice-in-sustainability-transitions

In conclusion, the options to deal with the remaining challenges of implementing effective climate transition plans within BHR frameworks are also out there; there is no need to introduce a standard *ex novo*. The biggest remaining challenge of corporate climate accountability is still to integrate the standards out there in a manner that gives a human character to a transition plan, or any other plan to combat climate change, so that the impacts on rights holders and not the risks to businesses can be at the centre of all climate, goals, policies, programmes, actions and laws.[311]

[311]UNITED NATIONS WORKING GROUP ON BUSINESS AND HUMAN RIGHTS, *Information Note on Climate Change and the Guiding Principles on Business and Human Rights by Working Group on the issue of human rights and transnational corporations and other business enterprises*. 2023. Pg. 3 - II. Climate Change and the Guiding Principles (5). Available at: https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf

Conclusion

Throughout this thesis, corporate responsibilities related to climate change within the context of BHR frameworks and how these responsibilities are incorporated in different legal systems were analysed.

The first chapter delved into the first efforts to create the BHR field, looked at the objectives of these efforts, and brought to light the new factors the evolution of the field brought to MHRDD laws: incorporating environmental and climate aspects into their requirements. It was seen that the major aim of the BHR field is to create effective instruments to hold corporations accountable for their adverse impacts on human rights, and that, even though at first climate considerations were not envisioned as part of BHR frameworks, after some years the exercise of human rights was seen to be intertwined with the protection from harmful environmental interferences. As a consequence, a holistic approach to MHRDD laws, which encompasses broader terms of human rights and includes environmental and climate considerations into the context of the BHR instruments, slowly consolidated among scholars and policy-makers, and emerged into legislative initiatives.

In the second chapter, the first indications of this comprehensive approach in the legislative domain were studied, focusing on the soft-laws and on the European MHRDD initiatives. The application of this approach within the judicial sphere was also discussed. Firstly, the specific terms of the requirements brought by the UNGPs and the newest guidance for enterprises to establish and maintain a system of environmental management of the 2023 OECD Guidelines were analysed. The main elements corporations should follow to account for their climate impacts that derive from the soft-laws instruments were taken into account, but the limitations of these soft-laws instruments were also pointed out.

Following that, the second part of chapter two explored the adopted MHRDD laws in Europe that included environmental and/or climate law requirements, and the respective judicial procedures that emerged in each jurisdiction arguing a breach of corporate climate duties. In the French jurisdiction, it was called to attention that the French Duty of Vigilance Law included environmental obligations as part of its duties, and that legal proceeding against French corporations were filled to challenge the integration of climate mitigation strategies in corporates' vigilance plan, which clarified key elements expected to be included in corporations' vigilance plan, as well as what insufficient information within a vigilance plan means. After the analysis of the law and the cases, the French legislation was described to be a good and solid start for the development of corporate duties towards climate change, yet, imprecise to deal with the core human rights issues deriving from harmful corporate emissions.

In the German jurisdiction, more emphasis was given to climate-related lawsuits which were based on German Tort Law, but that also questioned whether specific emission targets could be derived from an unwritten duty of care on human rights and soft law instruments. Even though the German HRDD law included environmental obligations as part of its duties, a breach of the law does not give immediate rise to civil liability, which was described to be an obstacle to its effectiveness. Similarly, in the Norwegian jurisdiction case-laws trying to pursue accountability for harms deriving from corporate activities were not based on the Norwegian Transparency Act. The reach of the obligations of the Act is still observed as a possibility to encompass climate matters, and the Norwegian law still holds a high degree of uncertainty in relation to non-compliance, which was also described to be challenge to its effectiveness. Finally, in the Dutch jurisdiction, two proposals for MHRDD laws were discussed, whereby the second proposed climate obligations, and the landmark climate judgement which clarified corporate duties in relation to climate change was scrutinized. The last part of the second chapter briefly covered other initiatives that discuss consequences of corporate inaction towards climate change.

In the third chapter, the CSDDD's adoption process and the elements proposed for the climate transition plan were explored. The details of each EU institution's suggestion for the transition plan were seen in depth so that the elements of its final version could be compared with the components proposed previously. It was concluded that even tough Article 22 has critical issues, the adoption of the CSDDD is still a big achievement for the consolidation of corporate duties towards climate change for three main reasons: one, the difficulty of adopting a BHR legislation and the meaning the CSDDD has for the evolution of the BHR agenda, two, the difficulty of adopting climate laws and policies that can be factually enforced, and three, once it is now clear that climate mitigation is integrated in HRDD duties as a facet of these obligations, and once mandatory climate requirements are now crystallized in a piece of legislation.

After discussing these recent developments of the BHR field, the fourth chapter addressed the remaining issues for tackling climate change and its impacts on human rights with the use of MHRDD laws. It is argued that Article 22 did not innovate with the standards it laid down and its design ended up being business-centered rather than human-rights centered. It was seen that even though the CSDDD is a MHRDD law, corporations do not have duties in relation to the humans that are affected by climate change, and instead, they have a set of procedures to follow in order to comply with a transition plan (which allows taking a tick-boxing approach to the fulfilment of its criteria).

It was discussed that to integrate the missing human factor in a transition plan, corporations would have to conduct meaningful stakeholder engagement with the climate-affect victims paying special attention to climate-sensitive victims, bear the burden of proof when convenient, and consider forms of providing redress for their adverse climate impacts that tackle the root causes of their harmful contribution to climate change. In the conclusion of chapter four, it was identified that the biggest remaining challenge of establishing climate duties within Business and Human Rights Frameworks is to put the impacts on rights holders, and not the risks to businesses, at the centre of all climate goals.

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