# DUE DILIGENCE "HARD LAW" REMEDIES FOR MNC LABOR CHAIN WORKERS

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**ABSTRACT**

This Article discusses the appropriateness of making due diligence a binding obligation for human rights and labor rights. It examines the evolution of traditional soft law into hard law, with recent domestic legislation imposing civil liability for failure, and discusses "due diligence" standards, processes, and remedies. It evaluates whether non-binding due diligence without the

potential for legally enforceable "domestic hard law" remedies is adequate, and concludes with a call for exploring obligations of legally binding due diligence with flexible remedies. This would make Multinational Corporations (MNCs) responsible for results that provide protection of the labor standards of the global labor supply workers. The author concludes and proposes that while all the current approaches, such as soft law, dialogue, transparency laws, reforms to improve labor protection laws and enforcement, should proceed expeditiously, the most effective remedy is for governments to legislatively mandate an expanded due diligence requirement and, as in recent French legislation, provide liability with enforceable remedies for failure to comply.

## I. INTRODUCTION

In 2016, the International Labor Organization (ILO) was urged to create a new *binding* standard of "due diligence" for Multinational Corporations (MNCs) to realize decent employment for workers in its labor supply chains in the face of continued violations of workers' labor standards, and provide equity and fair competition for companies who act responsibly.[1] The due diligence standard emanates from the UN Guiding Principles on Business and Human Rights (UNGPs)[2] and the Organization for Economic Co-operation

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[1] *See* HUMAN RIGHTS WATCH, HUMAN RIGHTS IN SUPPLY CHAINS: A CALL FOR A BINDING STANDARD ON DUE DILIGENCE (2016), https://www.hrw.org/sites/default/files/report_pdf/human_rights_in_supply_chains_brochure_lowres_final.pdf. The Committee recommended that "[*g*]*overnments* should . . . [c]reate an enabling environment to help enterprises . . . implement due diligence procedures in their management systems" and "[i]n line with the UN Guiding Principles, *business enterprises* should carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts." Int'l Labour Org., *Report of the Committee on Decent Work in Global Supply Chains: Resolution and Conclusions Submitted for Adoption by the Conference*, at 5, 6, ILC.105/PR/14-1 (June 10, 2016), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489115.pdf (emphasis added).

[2] *See* UN WORKING GRP. ON BUS. & HUMAN RIGHTS, THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: AN INTRODUCTION, http://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf. UNGPs Guiding Principle 2 underscores this need, stating all "[s]tates should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights through-out their operations." This includes workers' rights in the supply chain. Int'l Trade Union Confederation, *Global Supply Chains and Decent Work Trade Union Input to the G7 — 16 March 2015*, at 2, (Nov. 3, 2016), http://www.ituc-csi.org/global-supply-chains-and-decent [http://perma.cc/K7MG-7E49].

[Human rights due diligence] refers to the process of identifying and addressing the human

and Development (OECD) Guidelines, which were thereafter embedded in the ILO MNE Tripartite Declaration.[3] Primarily, the OECD Guidelines on Multinational Enterprises[4] was an attempt to curb human rights violations by urging voluntary action by MNCs in their global labor supply chains, though it has also come to overlay and embrace many labor rights. The ILO Committee's concern in 2016 was "that current ILO standards may not be fit for the purpose to achieve decent work in global supply chains."[5] This was followed by its addition of the 2017 *due diligence* "Guidance."[6]

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rights impacts of a business enterprise across its operations and products, and throughout its supplier and business partner networks. Human rights due diligence should include assessments of internal procedures and systems, as well as external engagement with groups potentially affected by its operations.

UN WORKING GRP. ON BUS. & HUMAN RIGHTS, *supra* note 2, at 3.

[3] Enterprises, including multinational enterprises, should carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.

INT'L LABOUR ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 5 (5th ed. 2017), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

[4] "The *OECD Guidelines for Multinational Enterprises* [the Guidelines] are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards." ORG. FOR ECON. CO-OPERATION AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 3 (2011), http://www.oecd.org/daf/inv/mne/48004323.pdf [http://perma.cc/K7MG-7E49].

The OECD Guidelines embed the expectation that enterprises carry out due diligence to avoid causing or contributing to adverse impacts through their own activities and address such impacts when they occur. Enterprises are also expected to seek to prevent or mitigate adverse impacts directly linked to their operations, products or services by a business relationship.

Jennifer Schappert & Barbara Bijelic, *Promoting* Responsible *Business Conduct International Standards, Due Diligence and Grievance Mechanisms*, OECD (Mar. 6, 2017), http://www.oecd.org/investment/globalforum/2017-GFII-Background-Note-Promoting-Responsible-Business-Conduct.pdf [https://perma.cc/EDV5-Y4TG]. "The OECD has developed a Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. This Guidance, developed through an intense multi-stakeholder process, supports a common understanding of due diligence and responsible supply chain management in the sector." *Responsible Supply Chains in the Garment and Footwear Sector*, OECD GUIDELINES (Feb. 27, 2017), https://www.oecdguidelines.nl/latest/news/2017/02/27/due-diligence-guidance-garment-and-footwear-industry [https://perma.cc/9RKP-DY33].

[5] *Report of the Committee on Decent Work in Global Supply Chains*, *supra* note 1, at 8.

[6] *See Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, *supra* note 3.

France has embraced the need for binding due diligence ("vigilance") through new legislation that determined due diligence by itself is insufficient and added legal responsibility and liability for its failure.[7]

*The issue raised in this paper is whether the current non-legally enforceable due diligence should be made binding with legally enforceable remedies when an MNC fails to meet its due diligence standards and the labor supply chain workers suffer economic harm.*

For some, the need for new regulation is clear. Globalization has changed the world in many ways; one way is the growth of MNCs. For example, Wal-Mart has been reported to have revenues that put it on par with the GDP of the 25th largest economy in the world, surpassing 157 smaller countries.[8] MNCs' business models use the common practice of "fissurization"; that is, by subcontracting down the chain of labor suppliers, they push liability and responsibility for the workers under the protection of labor laws outside the MNC.[9] New research from the International Trade Union Confederation (ITUC) finds that the global supply chains of 50 multinational companies, including Samsung, McDonalds and Nestle, with combined revenue of $3.4

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[7] *See* CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L225-102-4 (Fr.), *translated in* EUR. COALITION FOR CORP. JUST., *French Corporate Duty of Vigilance Law*,http://corporatejustice.org/duty-of-vigilance-bill-en-.pdf [https://perma.cc/B5UW-47LU]; *see also French Corporate Duty of Vigilance Law: Frequently Asked Questions*, EUR. COALITION FOR CORP JUST. (Mar. 24, 2017), http://corporatejustice.org/documents/publications/french-corporate-duty-of-vigilance-law-faq.pdf [https://perma.cc/FJ6W-ZJMC].

[8] Vincent Trivett, *25 US Mega Corporations: Where They Rank If They Were Countries*, BUS. INSIDER (June 27, 2011, 11:27 AM), http://www.businessinsider.com/25-corporations-bigger-tan-countries-2011-6#yahoo-is-bigger-than-mongolia-1 [https://perma.cc/U5XN-FH47]. For example, Wal-Mart uses contractors in China where it has its crucial location for sourcing the goods that it sells worldwide.

> Wal-Mart's Global Procurement Center moved from Hong Kong to Shenzhen in 2002, and the retailer's supplier networks are heavily concentrated in China. . . . More than 70% of the goods sold in Wal-Mart stores around the world are made in China, with Chinese exports to Wal-Mart estimated at about $25 billion for 2006. If Wal-Mart were a country, it would rank just above the United Kingdom ($24 billion) and just below all of Africa ($26 billion) . . . .

Gary Gereffi & Ryan Ong, *Wal-Mart in China: Can the World's Largest Retailer Succeed in the World's Most Populous Market*, 9 HARV. ASIA PAC. REV. 46, 48 (2007).

[9] This describes the global phenomena of fragmented workplaces where employers use subcontracting, outsourcing, franchising, and independent contractors for formerly core operations. *See generally* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT? (2014); David Weil, *Enforcing Labour Standards in Fissured Workplaces: The US Experience*, 22 ECON. & LAB. REL. REV. 33 (2011).

trillion, employ only six percent of employees directly. However, they rely on an indirect workforce of 94 percent.[10] Many of the labor supply chain workers, especially those near the end of the chain, have less than decent working conditions; thus, the need for new, more effective remedies.[11]

The search for reasonable and effective standards and remedies against pervasive violations has proven elusive, with proposed solutions vacillating between voluntary codes of conduct, social responsibility within corporate or organizational governance protocols, undertaking third-party certification programs, and engaging in due diligence efforts.[12] Some procedures have proved more effective than others.[13] However, the common themes in these endeavors are that they are voluntary, are not grievable by workers to a third-party neutral outside the employer, such as an arbitrator, and are legally unenforceable. Failure to meet these voluntary obligations results in no legal liability with monetary remedies.[14] Thus the question arises – beyond due diligence, are legally enforceable remedies required?

The driving force that addresses human rights violations in the labor supply chains for change and improvement comes from the United Nations (UN), ILO, OECD, ITUC, and other NGOs, with the international labor standards themselves emanating from the UN and its organizations, such as the ILO and its "partners" (the OECD).[15] Many of these *human rights* of

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[10] INT'L TRADE UNION CONFEDERATION, SCANDAL INSIDE THE SUPPLY CHAINS OF 50 TOP COMPANIES 10 (2016), https://www.ituc-csi.org/IMG/pdf/pdffrontlines_scandal_en-2.pdf [https://perma.cc/YB2X-CPFD].

[11] *See generally* CHINA LABOR WATCH, THE CHAOS IN GLOBAL SUPPLY CHAIN EXACERBATES TERRIBLE WORKING CONDITIONS OF CHINA (2016), http://www.chinalaborwatch.org/upfile/2016_06_20/UNEEC%20Full%20Report.pdf [https://perma.cc/U47G-GRHZ]; UL, ADDRESSING HUMAN RIGHTS ISSUES IN GLOBAL SUPPLY CHAINS (2013), http://library.ul.com/wp-content/uploads/sites/40/2015/02/UL_WP_Final_Addressing-Human-Rights-Issues-in-Global-Supply-Chains_v7-HR.pdf.

[12] Radu Mares, *The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments*, 79 NORDIC J. INT'L L. 193 (2010).

[13] *See* APPLE, SUPPLIER RESPONSIBILITY 2015 PROGRESS REPORT (2015), https://www.apple.com/my/supplier-responsibility/pdf/Apple_SR_2015_Progress_Report.pdf; *Supplier Responsibility*, APPLE, https://www.apple.com/supplier-responsibility/ [https://perma.cc/2FUR-87B9].

[14] *See* Ronald C. Brown, *Up and Down the Multinational Corporations' Global Labor Supply Chains: Making Remedies that Work in China*, 34 PAC. BASIN L.J. 103, 109–18 (2017).

[15] The UN and the OECD instruments share the same values of business ethics, including human rights, labour and industrial relations, environment and anti-corruption. The OECD Guidelines are recommendations addressed by governments to enterprises, while the UN Global Compact provides a public platform for enterprises to express their corporate

course overlap with the *labor rights* of the ILO's core labor rights and the OECD's obligations. The obligations emanating from guidelines of these international organizations include an obligation of "due diligence," which has been periodically expanded with specific guidelines in several areas of MNCs' supply chains, and include conflict minerals, garment and footwear,[16] etc. These provide standards, processes, and remedies to guide the MNCs in their compliance.

While the OECD's Guidelines are regarded by some to be meaningfully shaping the conduct of MNCs with their "due diligence" requirements toward human rights and overlapping labor rights, others lament their lack of meaningful enforcement absent the consent of the parties.[17] International Framework Agreements (IFAs) may create an environment for labor rights

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responsibility engagement.

Richard Boucher, Deputy Secretary-General, OECD, Remarks at the Ministerial Session of the UN Global Compact Leaders Summit 2010 (June 23, 2010), http://www.oecd.org/corporate/mne/oecdisapartneroftheunglobalcompact.htm [https://perma.cc/J9GM-E496].

[16] *See Roel Nieuwenkamp, A Responsibility Revolution in the Fashion Industry*, FRIENDS OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (Feb. 6, 2017), https://friendsoftheoecdguidelines.wordpress.com/2017/02/ [https://perma.cc/96QF-WXMT]; *see also OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, OECD (2016), http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf [http://perma.cc/26BJ-XU67]. Additionally, new transparency pledges have been recently introduced. "The Transparency Pledge establishes a floor for supply chain transparency, through companies publishing important information about supplier factories and authorized subcontractors. . . . While transparency is a foundation for accountability, companies still need to do more. Due diligence requires identifying the risks of violating human rights." *ITUC Calls on Apparel Brands to Join Transparency Pledge*, INT'L TRADE UNION CONFEDERATION (Apr. 21, 2017), https://www.ituc-csi.org/ituc-calls-on-apparel-brands-to_[https://perma.cc/HX3L-4WD4] (internal quotation marks omitted). For a report by ITUC on the transparency pledge, see *Follow the Thread: The Need for Supply Chain Transparency in the Garment and Footwear Industry*, HUMAN RTS. WATCH (Apr. 20, 2017), https://www.hrw.org/sites/default/files/report_pdf/wrdtransparency0417_brochure_web_spreads_3.pdf [https://perma.cc/RC5T-SGZ3]. *See also* Holly Cullen, *The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond*, 48 GEO. WASH. INT'L L. REV. 743, 763 (2016).

[17] Weil, Gotshal & Manges LLP, *Submission to the Corporate Law Project, Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transactional Corporations and other Business Enterprises*, U.N. CORP. L.PROJECT(Aug.2010),https://business-humanrights.org/sites/default/files/media/documents/ruggie/corp-law-tools-usa-weil-gotshal-for-ruggie-aug-2010.pdf [https://perma.cc/FHA5-B954] [hereinafter Weil, *Corporate Law Project*].

and arguably enforceable provisions, but much depends on the nascent unions to engage and embrace their rights and whether the IFAs can provide meaningful or enforceable complaint procedures or remedies. New remedies of joint liability, transparency of subcontractors, and others have been offered and in some cases implemented.[18] Other "hard law" actually requiring due diligence and providing monetary remedies are being offered through legislation in France and the Netherlands.[19]

Of course, domestic labor laws in the invested country should remedy labor violations, but they often don't because foreign direct investors go to low-cost countries where enforcement of labor standards may not be consistent or within the goals of economic development.[20]

Part I of this Article discusses the appropriateness of making due diligence a binding obligation for human rights and labor rights. Part II examines the traditional soft law evolving to hard law, with recent domestic legislation imposing civil liability for failure.[21] Part III discusses "due

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[18] *See generally* Brown, *supra* note 14; Ronald C. Brown, *Made in China 2025: Implications of Robotization and Digitalization on MNC Labor Supply, Chains and Workers' Labor Rights in China*, 9 TSINGHUA CHINA L. REV. 186 (2017).

[19] Roel Nieuwenkamp, *Drilling Down and Scaling Up in 2015*, FRIENDS OECD GUIDELINE FOR MULTINATIONAL ENTERPRISES (Jan. 16, 2015), https://friendsoftheoecdguidelines.wordpress.com/2015/01/16/drilling-down-and-scaling-up-in-2015 [https://perma.cc/WXH4-AS9P]; *see also* Michael Congiu et al., *Dutch and French Legislatures Introduce New Human Rights Due Diligence Reporting Requirements*, LITTLER MENDELSON P.C. (Mar. 13, 2017), https://www.littler.com/publication-press/publication/dutch-and-french-legislatures-introduce-new-human-rights-due-diligence [https://perma.cc/WJ9R-P9W3].

[20] [S]urveys suggest that while there is variation in the ways in which corporate governance codes and guidelines address CSR issues, there is also a commonality in that they *are* starting to deal with these issues; they are rarely entirely "voluntary" in practice; and they increasingly rely on international CSR initiatives to help frame any relevant guidance. Nevertheless, direct references to human rights in relevant codes and guidelines remain rare."

Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Corporate Law Project: Overarching Trends and Observations, (July 2010), https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggiecorp orate-law-project-Jul2010 [https://perma.cc/BKV5-HM88]. The responsibility exists even where national laws are absent or not enforced because respecting rights is the very foundation of a company's social license to operate. *See* Weil, *Corporate Law Project*, *supra* note 17; *see also Reports on Corporate Law Tools*, BUS. & HUM. RTS. RESOURCE CTR., http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools [https://perma.cc/YM5R-J59G].

[21] Michael Congiu et al., *supra* note 19.

The UN Human Rights Council's Open-Ended Intergovernmental Working Group (OEIWG)

diligence" standards, processes, and remedies. Part IV evaluates whether non-binding due diligence without the potential for legally enforceable "*domestic* hard law" remedies is adequate. Part V concludes with a call for exploration of obligations of legally binding due diligence with flexible remedies making MNCs responsible for results that provide protection of the labor standards of the global labor supply workers.

## II. "SOFT LAW" MOVING TOWARD "HARD LAW"

### *A. Evolving "Soft Law"*

John Ruggie, Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, recommends:

> [C]ompanies [should] conduct ongoing human rights due diligence whereby they become aware of, prevent, and mitigate adverse human rights impacts. The responsibility exists even where national laws are absent or not enforced because respecting rights is the very foundation of a company's social license to operate. It is recognized as such by virtually every voluntary business initiative, including the UN Global Compact, and soft law instruments such as the International Labour Organization Tripartite Declaration and the OECD Guidelines on Multinational Enterprises. [22]

Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct, underscores that these soft law approaches "have been important tools for filling these regulatory gaps. For example, the OECD Guidelines establish an expectation that businesses behave responsibly throughout not just within their direct operations, but also their supply chains,

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has been negotiating a multi-lateral treaty that makes the UN Guiding Principles binding law. Moreover, an ever-increasing number of countries have been adopting "national action plans" to implement the UN Guiding Principles, which include introducing and adopting legislation that binds those countries' companies to certain of those UN Guiding Principles.

Michael Congiu et al., *Advancing Human Rights Claims Based on Global Supply Chain Activities: Recent Developments in California and Canada*, JD SUPRA (Feb. 15, 2017), http://www.jdsupra.com/legalnews/advancing-human-rights-claims-based-on-53663/ [https://perma.cc/Z2PB-PA4D]; *see also* Michael Congiu et al., *The U.S. Issues a National Action Plan on Responsible Business Conduct*, LITTLER MENDELSON P.C. (Jan. 17, 2017), https://www.littler.com/publication-press/publication/us-issues-national-action-plan-responsible-business-conduct [https://perma.cc/G6C7-Y2SS].

[22] Weil, *Corporate Law Project*, *supra* note 17, at 3; *see also Reports on Corporate Law Tools*, *supra* note 20.

extending to activity in potentially institutionally weak contexts where international standards and domestic laws may not be adequately enforced."[23]

The evolution of "soft law" is attributable to social responsibility and self-interest. MNCs often invest in and place their labor supply chains in developing countries where wages are cheap, working conditions are poor, and labor law enforcement is not usually a high priority for the hosting government because of other benefits coming with foreign investment. Therefore, the introduction of hard law can increase risk, including liability, for such investors. As MNCs developed and chains were used, pressures from consumers and internal institutions also grew for better treatment of workers on the labor supply chain. Such pressures, possibly affecting corporate reputation and profits, along with intense public opposition of these conditions, prompted many of the MNCs to adopt codes of conduct and corporate social responsibility in line with international institutional guidance that applied to corporate and supply chain workers.[24]

Free trade agreements (FTAs), World Bank Organization (WBO) requirements, etc., may seek to encourage and require compliance with ILO standards and laws, but often their ultimate remedy is dialogue and alternative dispute resolution (ADR), not liability. Unlike sanctions for trade violations under the World Trade Organization (WTO), labor violations are addressed by the *soft law* of Corporate Social Responsibility (CSR),[25] codes of conduct,

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[23] Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct (and in that position is also chair of the network overseeing NCPs' network), commenting on possible due diligence legislation in France, suggests that it should be supportive of current due diligence approaches. Roel Nieuwenkamp, *Legislation on Responsible Business Conduct Must Reinforce the Wheel, Not Reinvent It,* OECD INSIGHTS (April 15, 2015), http://oecdinsights.org/2015/04/15/legislation-on-responsible-business-conduct-must-reinforce-the-wheel-not-reinvent-it/ [https://perma.cc/A4EC-LWH4]. The Australian Government has announced the launch of a broad inquiry into establishing a Modern Slavery Act in Australia. The inquiry will consider whether the introduction of anti-slavery legislation would help combat supply-chain-based slavery and human trafficking, even though human trafficking, slavery and slavery-like practices are already criminal offences in Australia. Recent slavery-like practices in Australian supply chains have motivated a new inquiry. Paul Harper, *Australia Launches Supply-Chain-Based Anti-Slavery Inquiry*, WORKPLACE PROF BLOG (Feb. 21, 2017), http://lawprofessors.typepad.com/laborprof_blog/2017/02/australia-launches-supply-chain-based-anti-slavery-inquiry.html [https://perma.cc/6AAW-DWE9]. *See also International Business Obligations, Focus: Supply chains in the spotlight: Establishing an Australian Modern Slavery Act*, ALLEN'S HUB FOR TECH., LAW & INNOVATION (Feb. 21, 2017), http://www.allens.com.au/pubs/ibo/foibo21feb17.htm [https://perma.cc/D33G-JDST].

[24] *See* Brown, *supra* note 14.

[25] The Commission has defined CSR as the responsibility of enterprises for their impact on society. CSR should be company led. Public authorities can play a supporting role through a

and non-binding guidelines; but there is a growing trend of hardening soft law.[26]

Also, in an attempt to find effective solutions, there has been movement toward more "shared responsibility" between MNCs and their chain contractors. New approaches under domestic legislation have attempted to place *liability* on lead firms in certain labor supply chains, such as construction, as well as the use of extra-territorially-aimed legislation.[27]

However, over the years, it became apparent to some, especially human rights watch groups, that foreign labor supply workers, particularly at the end of the chain, were regularly falling victim to wage and labor standard infractions, often in violation of domestic labor laws.[28] Attempts to utilize and legally enforce the soft law provisions of internal codes proved unsuccessful because they were not legally binding and the MNC's defense that under the law, the labor supply chain contractors were responsible third-parties, and neither "employees" nor "joint employers."[29] The international human rights and labor standards continue to pressure MNCs, but they are not legally enforceable unless incorporated into domestic laws or enforceable

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smart mix of voluntary policy measures and, where necessary, complementary regulation. Companies can become socially responsible by: following the law; integrating social, environmental, ethical, consumer, and human rights concerns into their business strategy and operations.

*Corporate Social Responsibility (CSR)*, EUROPEAN COMM'N, http://ec.europa.eu/growth/industry/corporate-social-responsibility_en [http://perma.cc/PCJ5-74UD].

[26] *See supra* note 23 and accompanying text.

[27] *See* Brown, *supra* note 18; *see also* NAT'L EMP'T LAW PROJECT, CONTRACTED WORK POLICY OPTIONS 51–56, http://www.nelp.org/content/uploads/2015/03/Subcontracting_policy_templates_FINAL4.17.pdf [http://perma.cc/3YLS-3PX3]; Mark Anner, Jennifer Bair & Jeremy Blasi, *Toward Joint liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL'Y J. 1 (2013); Galit A. Safaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L L. J. 419, 420 (2015). China has a 2017 initiative of "naming and shaming" employers in public media, domestic and foreign, that violate labor laws. *See* Brown, *supra* note 14.

[28] For example, the lack of law enforcement in Rana Plaza in Bangladesh resulting in the deaths of over 1000 labor supply workers is discussed in Ronald C. Brown, *Fostering Labor Rights in a Global Economy: The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, 155 INT'L LABOUR REV. 50 (2016).

[29] Thomas J. Walsh III, *Supersizing the Definition of Employer Under the National Labor Relations Act—Broadening the Joint Employer Standard to Include Franchisors and Franchisees*, 47 U. TOL. L. REV. 589 (2016); *see also* Caroline B. Galiatsos, *Beyond Joint Employment Status: A New Analysis for Employers' Unfair Labor Practice Liability Under the NLRA*, 95 BOS. U. L. REV. 2083 (2015).

international legal instruments, such as treaties or free trade agreements. But, in U.S. trade agreements, the State must agree to pursue the alleged violations.[30] There is much written and discussed about the ineffectiveness of soft law and the need for possible alternative remedies;[31] and, therefore, the more recent introduction of "hard law," particularly in relation to due diligence, offers a more robust and enforceable remedy.

### *B. Hard Law Emerging*

A common concern about "soft law" is that it is voluntary and non-binding. Recently, there is movement at national and international levels toward making "due diligence" obligations mandatory. At the domestic level, the United States has introduced legally binding due diligence obligations in labor supply chains regarding human rights. The obligation is found in Section 1502 of the U.S. Dodd-Frank Act, which incorporates a due diligence standard.[32] It provides that companies *must report* on whether they source certain minerals (tin, tantalum, tungsten and gold) of non-recycled or scrap sources from conflict areas. If they do, they may be obligated to undertake "due diligence" on the source and chain of custody of its conflict minerals and file a Conflict Minerals Report.[33] "The due diligence measures must conform to a nationally or internationally recognized due diligence framework, such as the due diligence guidance approved by the[OECD]."[34]

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[30] Ronald C. Brown, *China – U.S. Implementation of ILO Standards by BITs and Pieces (FTAs)*, *in* FUNDAMENTAL LABOUR RIGHTS IN CHINA - LEGAL IMPLEMENTATION AND CULTURAL LOGIC, 169 (Ulla, Liukkunen & Yifeng, Chen eds. 2016).

[31] *See* Brown, *supra* note 14.

[32] In the regulation of conflict minerals, § 1502 of the Dodd-Frank Act "amended § 13 of the Securities Exchange Act of 1934, [and] required the Securities and Exchange Commission (SEC) to adopt regulations of conflict minerals from the DRC and neighboring countries." Cullen, *supra* note 16, at 764. *See generally* Sarfaty, *supra* note 27, at 425.

[33] *Implementation of US Dodd-Frank Act Rule on Conflict Minerals: Commentaries, Guidance, Company Actions*, BUS. & HUMAN RIGHTS RES. CTR., https://business-humanrights.org/en/conflict-peace/conflict-minerals/implementation-of-us-dodd-frank-act-rule-on-conflict-minerals-commentaries-guidance-company-actions [https://perma.cc/GPS6-H3RK]; *see also Disclosing the Use of Conflict Minerals*, U.S. SEC. & EXCH. COMM'N (Mar. 14, 2017), http://www.sec.gov/News/Article/Detail/Article/1365171562058 [https://perma.cc/5W4B-P66J].

[34] OECD, *supra* note 16; *see* Roel Nieuwenkamp, *Legislation on Responsible Business Conduct Must Reinforce the Wheel, Not Reinvent It*, OECD INSIGHTS (Apr. 15, 2015), http://oecdinsights.org/2015/04/15/legislation-on-responsible-business-conduct-must-reinforce-the-wheel-not-reinvent-it/ [https://perma.cc/A4EC-LWH4]; *see also Disclosing the Use of Conflict Minerals*, *supra* note 33.

In 2015, Professor Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct, stated there is a trend of hardening of soft law and noted that "the UK, Switzerland and France . . . [had] proposals in the pipeline to make due diligence regarding aspects of RBC [responsible business conduct] mandatory."[35] He observed that, in fact, the trend is two-fold: soft law is developing harder consequences and soft law is becoming hard law. For example, now Export Credit Agencies may have to take into account NCP (National Contact Points under the OECD)[36] statements confirming the OECD Common Approaches.[37] Canada is taking an even stronger approach where companies that do not participate in the NCP proceedings or have a "negative statement" may lose all economic diplomacy support (all subsidies and trade missions, etc.).[38] He also cautioned:

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[35] Nieuwenkamp, *supra* note 19.

[36] Governments adhering to the Guidelines are required to set up a National Contact Point (NCP) whose main role is to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that may arise from the alleged non-observance of the guidelines in specific instances. NCPs assist enterprises and their stakeholders to take appropriate measures to further the observance of the Guidelines. They provide a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the Guidelines.

*National Contact Points for the OECD Guidelines for Multinational Enterprises*, OECD, http://www.oecd.org/investment/mne/ncps.htm [https://perma.cc/K3LL-RC3K] [hereinafter *National Contact Points*].

[37] The Common Approaches, incorporating OECD standards, are a set of recommendations for addressing environmental and social aspects of officially supported export credit, and applies to Export Credit Agencies based in OECD countries. *Common Approaches*, EXP. CREDIT AGENCY WATCH, http://www.eca-watch.org/issues/common-approaches [https://perma.cc/X9EU-CFQZ]; *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence (the "Common Approaches")*, OECD TRADE & AGRIC. DIRECTORATE (Apr. 7, 2016), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/ECG%282016%293&doclanguage=en [https://perma.cc/7WZ7-N2QN].

[38] This is enunciated in the "China Gold case." "On January 28, 2014, the Canada Tibet Committee (hereinafter referred to as "CTC" or "the Notifier"), on behalf of a group of affected communities, submitted to the National Contact Point (NCP) the Request for Review regarding the mining activities of China Gold International Resources Corp. Ltd. (hereinafter referred to as "China Gold" or "the Company") in the Gyama Valley of China's Autonomous Region of Tibet." The Company refused to participate with the NCP. The Final Statement was issued which effectively removed the economic diplomacy services of the Canadian Government due to its refusal.

On November 14th, 2014, the Government of Canada launched its enhanced CSR Strategy Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility

"Legislation on responsible business conduct must reinforce the wheel, not reinvent it . . ."[39] That is to say, the laws should supplement, not displace the due diligence standards.

On February 21, 2017, France passed specific due diligence legislation that adopted a much-anticipated law establishing a duty of "vigilance" (due diligence) for parent and ordering companies, effective March 27, 2017.[40] In its original form, it provided civil and monetary remedies for violations;[41]

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(CSR) in Canada's Extractive Sector Abroad (Annex 4) which included new measures to be applied in case of non-participation in the NCP process. As the Company did not respond to the NCP's offer of its good offices, the Company's non-participation in the NCP process will be taken into consideration in any applications by the Company for enhanced advocacy support from the Trade Commissioner Service and/or Export Development Canada (EDC) financial services, should they be made. As the goal of both the NCP and the CSR Strategy is to encourage improvement in terms of a company's use and integration of CSR standards and best practices, should the Company wish to be able to access future support of this type, it will need to submit a Request for Review to the NCP, or show the Government of Canada it has engaged in good-faith dialogue with the Notifier.

*Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region*, GLOB. AFFAIRS CAN. (Apr. 8, 2015), http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng [https://perma.cc/U8F6-KPEW]; *see also Roel Nieuwenkamp, Evolving Expectations: The Role of Export Credit Agencies in Promoting and Exemplifying Responsible Business Practices*, FRIENDS OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, (Jan. 15, 2016), https://friendsoftheoecdguidelines.wordpress.com/tag/export-credit-agencies/ [https://perma.cc/Q5AR-94KM].

[39] In 2012 the OECD Council of Ministers, the governing body of the OECD, adopted the Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence ('the OECD Common Approaches'). This instrument provides that "[m]embers should . . . [p]romote awareness of the [the Guidelines] among appropriate parties involved in applications for officially supported export credits as a tool for responsible business conduct in a global context."

Nieuwenkamp, *supra* note 38.

[40] *See supra* note 7; *see also* Charles Dauthier & Sabine Smith-Vidal, *French Companies Must Show Duty of Care for Human and Environmental Rights*, JD SUPRA (Apr. 4, 2017), http://www.jdsupra.com/legalnews/french-companies-must-show-duty-of-care-56981/ [https://perma.cc/K2XZ-NNY8] (noting that members of Parliament and senators then referred the law to the Constitutional Council Court, which rendered its decision on March 23, 2017, and the law became effective March 27, 2017); *see also France Adopts Corporate Duty of Vigilance Law: A First Historic Step Towards Better Human Rights and Environmental Protection*, EUR. COAL. FOR CORP. JUST. (Feb. 21, 2017), http://corporatejustice.org/news/393-france-adopts-corporate-duty-of-vigilance-law-a-first-historic-step-towards-better-human-rights-and-environmental-protection. [https://perma.cc/TVS5-2J8H] [Hereinafter *France Adopts Corporate Duty of Vigilance Law*].

[41] "[T]o ensure the effectiveness of the duty of care, a judge could have imposed a fine up to

however, before it was implemented, the Constitutional Council of France, the highest constitutional authority in France, ruled that while the law itself with civil liabilities was constitutionally enforceable, the obligation to impose fines and criminal penalties for non-compliance was too vague and was therefore struck down.[42] Although the original penalties would have created a stronger incentive for companies to comply with this law, it is argued that their removal does not undermine the architecture and general mechanism of the law. Interested parties - including victims, NGOs and trade unions - are still able to ask judicial authorities to order a company to establish, publish and implement a vigilance plan in order to prevent human rights violations and environmental damage caused by their activities, and those of their subsidiaries, subcontractors and suppliers, in France and abroad. Interested parties can also engage the company's liability through civil action and ask for compensation when a company's violation of its legal obligations has resulted in damages.[43]

According to the law,

> [A]ll companies headquartered in France and employing more than 5,000 employees in France, or headquartered in France or abroad and

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10 million euros if a company did not set up a vigilance plan. This fine could have been multiplied by three, or up to 30 million euros, when damage resulted from the lack of plan." Dauthier & Smith-Vidal, *supra* note 40.

[42] Specifically, the Constitutional Council found that: the terms used by the legislature, such as "reasonable measures of vigilance" and "appropriate action to mitigate risks," are very general; [t]he reference to violations of "human rights" and "fundamental freedoms" is broad and indeterminate; and [t]he scope of the companies and activities falling within the scope of the infringement is very broad.

Penelope Bergkamp, *French Constitutional Council Permits Civil, But Not Criminal Enforcement of Corporate Duty of Vigilance Law*, CORP. FIN. LAB (Mar. 29, 2017), https://corporatefinancelab.org/2017/03/29/a-post-by-guest-blogger-penelope-bergkamp/ [https://perma.cc/GFM4-3W9F].

As a result of this ruling, the Law remains in place, except that no criminal sanctions can be imposed for breaches. Since the Law imposes binding obligations, however, a company can be exposed to civil liability if it is in breach of its obligations. For instance, a non-governmental organization or injured individual could assert claims under tort law against a non-compliant company. In such a lawsuit, a plaintiff could seek compensation for damages suffered as a result of the breach or a court order to the effect that the company must implement a vigilance plan. *Id.*

[43] *Last Hurdle Overcome for Landmark Legislation: French Corporate Duty of Vigilance Law Gets Green Light from Constitutional Council*, EUR. COAL. FOR CORP. JUST. (Mar. 24, 2017), http://corporatejustice.org/news/435-last-hurdle-overcome-for-landmark-legislation-french-corporate-duty-of-vigilance-law-gets-green-light-from-constitutional-council [https://perma.cc/9YLU-DMMV].

> employing more than 10,000 employees worldwide, must set up vigilance plans. A vigilance plan "includes reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety of persons and environment resulting from the activities of the company and of the companies it controls, either directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established business relationship is maintained."[44]

Due diligence legislation is also being considered in other countries. A bill was introduced in the Netherlands with due diligence obligations focused on child labor and trafficking, and there is a due diligence law being considered in Switzerland.[45]

Some hard laws that require *transparency* in labor chain industries may still fall short of creating a basis for accountability and ultimately civil or criminal liability for failed actions by the MNC.[46] It is argued that,

Government reporting requirements are a first step in linking transparency with accountability. Recent legislative advances asking companies to report on specific issues in their supply chains, such as the UK's

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[44] Dauthier & Smith-Vidal *supra* note 40; *see also* Alexandre Roumieu & Littler Mendelson's Business and Human Rights Practice Group, *Proposed French Law Would Impose New Due Diligence Obligations on Certain Employers and Their Supply Chains*, LITTLER MENDELSON (Dec. 12, 2016), https://www.littler.com/publication-press/publication/proposed-french-law-would-impose-new-due-diligence-obligations-certain [https://perma.cc/HRP6-HL4D].

[45] On February 7, 2017, the Dutch Parliament adopted a bill that, if enacted, would require covered companies to investigate the existence of child labor within their operations or supply chains . . . If a company's investigation reveals that child labor may have contributed to its products or services, the company must develop an action plan to address and remedy these labor violations. The action plan must comport with the principles of the UN Guiding Principles on Business and Human Rights (the "UN Guiding Principles") and the OECD Guidelines for Multinational Enterprises. Further, the company must submit a statement to a "Supervisory Body" within the government declaring that the company undertook the required due diligence. The Supervisory Body will publish these declarations online. The government can fine companies up to 4,100 euros for failing to make the required declarations. Moreover, if a noncompliant company receives a fine but still fails to submit the declaration within five years of the law's effective date, the penalty may include imprisonment of the company's directors for up to six months. Any natural person or corporate entity with a demonstrable interest can file complaints with the Supervisory Body when a covered business fails to make the required declaration or when a stakeholder has proof a business did not, in fact, comply with the required due diligence.

Congiu et al., *supra* note 19; *see also France Adopts Corporate Duty of Vigilance Law*, *supra* note 40.

[46] *See* Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47.1 COLUM. HUM. RTS. L. REV. 1, 59 (2015).

Modern Slavery Act, California's Transparency in Supply Chains Act or s.1502 of the US Dodd-Frank Act, do not guarantee accountability. Rather they aim to utilize corporate reporting as a tool that has the power to advance accountability by increasing transparency around corporate operations which may then trigger pressure to improve corporate human rights performance.[47]

## III. "DUE DILIGENCE" STANDARD

While due diligence is often associated with human rights in the workplace, it is also applicable to labor rights. The two often overlap, but each may also be free-standing, though international guidelines may emphasize either or both (e.g., the ILO emphasizes labor; the UN Guiding Principles on Business and Human Rights emphasizes human rights; and the Universal Declaration of Human Rights, and International Covenant on Civil

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[47] Professor Nolan continues:

> On a parallel track over the last four decades, a number of governments have adopted laws and regulations aimed at holding companies accountability as part of their broader efforts to combat global *corruption*. . . . Ultimately, laws – whether national or international – are only as strong as their enforcement capacity. While these American and British legislative developments mandate disclosure, they do not directly impose civil or criminal liability on lead firms for the downstream acts of other companies in their supply chain. However, transparency legislation can also be crafted to expressly attach legal liability up and down a supply chain for particular wrongdoings occurring anywhere in that chain. This type of legislation emphasizes the link between leverage and responsibility. If a firm at the top end of the supply chain can control the size, design, quantity, and quality of a product, and possess potential leverage to influence the working conditions of those producing the goods, it is then both fair and effective to align that power with legal accountability. Chain liability, as used selectively in Australia's homeworker industry or the EU's construction sector, can shift the overarching legal responsibility to the firms at top of the supply chain making them liable for harms occurring in their supply chain. If companies can demonstrate that they have exercised due diligence in such circumstance, this could be a defense to liability. Regulations that incorporate penalties – for failing to report or conducting inadequate due diligence - are more likely to be an effective deterrent than those that do not. Due diligence and reporting provisions can be a useful tool to utilize the leverage of lead firms to improve supply chain working conditions but such laws should be crafted in a way that utilizes the leverage of these global companies to improve working conditions and penalizes them if they do not. An approach focused on blending (and protecting) private interests and public intervention seems to offer a viable way forward.

Justine Nolan, *Legalizing Responsibility for Human Rights in Global Supply Chains*, NYU STERN CTR. FOR BUS. & HUM. RTS. (June 2, 2016), http://bhr.stern.nyu.edu/blogs/legalizing-responsibility-humanrights-gscs [https://perma.cc/AXX3-BDTQ] (emphasis added).

and Political Rights International Covenant on Economic, Social and Cultural Rights emphasize both). The OECD and the ILO, in particular, promote the due diligence standard to apply to all global supply chains, not just limited to sectors such as apparel or conflict minerals.[48] The ILO's training programs state the responsibility as follows.

> Companies are under increasing pressure, stemming from stakeholder expectations, reporting requirements, conditions for tendering, etc., to conduct due diligence on human rights issues in their own operations and with business partners in their supply chains. Labour rights have become a critical component and basic pillar in any due diligence process. However, proper due diligence on labour issues starts with a good understanding of what is expected of companies concerning respect for workers' rights, . . . *including due diligence related to labour rights* and how these principles can be most effectively implemented in company operations along their supply chains.[49]

The UN, ILO, and OECD approaches to "due diligence" standards are discussed below.

### *A. United Nations (UN)*

The UN has addressed "human rights due diligence" regarding labor supply chains. In 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights.[50] The foundation of these Guiding Principles is the International Bill of Human Rights and the work of the ILO.[51] The Guiding Principles are based on three pillars:

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[48] *See* Cullen, *supra* note 16, at 763.

[49] *International Labour Standards and Corporate Social Responsibility: Understanding workers' rights in the framework of due diligence*, INT'L LABOUR ORG., http://www.ilo.org/empent/Eventsandmeetings/WCMS_537797/lang--en/index.htm [https://perma.cc/37VN-XDRH] (emphasis added); *see also* Jernej Letnar Černič, *Corporate Human Rights Obligations at the International Level*, 16 WILLAMETTE J. INT'L L. & DIS. RES. 130 (2008).

[50] *See generally* IEH–ETHICAL TRADING INITIATIVE NOR., A GUIDE TO HUMAN RIGHTS DUE DILIGENCE IN GLOBAL SUPPLY CHAINS 4 (2013), http://etiskhandel.no/Artikler/10078.html.

[51] Also, since 2000, the Global Compact provides principles for the working environment. *About the UN Global Compact*, UN GLOBAL COMPACT, https://www.unglobalcompact.org/about [https://perma.cc/G2Jz-6WAW].

The UN Global Compact's Ten Principles are derived from: the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. Human Rights: Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and Principle 2: make sure that they are not complicit in human rights abuses. Labour: Principle 3: Businesses

> [T]he State's duty to protect against human rights abuses; business' responsibility to respect human rights and avoid abuses through their activities; and the State's and businesses' shared responsibility to manage and remedy, via their respective channels, human rights harms committed by the business sector. Flowing from the Principles is human rights due diligence.[52]

Human Rights Watch, in its 2016 report, *Human Rights in Supply Chains: A Call for a Binding Standard on Due Diligence,* further describes the obligations of due diligence under the Principles and calls for a new binding standard.[53] It observes that

> International norms, such as the United Nations Guiding Principles on Business and Human Rights, recognize that companies should

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should uphold the freedom of association and the effective recognition of the right to collective bargaining; Principle 4: the elimination of all forms of forced and compulsory labour; Principle 5: the effective abolition of child labour; and Principle 6: the elimination of discrimination in respect of employment and occupation.

*The Ten Principles of the UN Global Compact*, UN GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/N98H-8V6P].

[52] *Id.* The UN also has issued its Global Compact, which uses ten principles to guide businesses in corporate sustainability, including on human rights and labor issues. *Id.* The UN Global Compact's Ten Principles are derived from: the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption. *Id.* Principle Two, relating to human rights, not labor rights, admonishes businesses to not be complicit in human rights abuses; that is, not "being implicated in a human rights abuse that another company, government, individual or other group is causing." *Principle Two: Human Rights*, UN GLOBAL COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2 [https://perma.cc/3MJV-F38B]. It states that *complicity* generally arises from either an act or omission (failure to act) by a company, or individual representing a company, that "helps" (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse, or, the knowledge by the company that its act or omission could provide such help. It then provides examples of complicity:

**"Direct complicity"**—when a company provides goods or services that it knows will be used to carry out the abuse; "**Beneficial complicity"**—when a company benefits from human rights abuses even if it did not positively assist or cause them; "**Silent complicity"**—when the company is silent or inactive in the face of systematic or continuous human rights abuse (This is the most controversial type of complicity and is least likely to result in legal liability).

*Id.* Though 'complicity' is used regarding human rights, its pertinence to labor rights and obligations of due diligence seem clear.

[53] *See generally* HUMAN RIGHTS WATCH, *supra* note 1.

> undertake "human rights due diligence" measures to ensure their operations respect human rights and do not contribute to human rights abuses. Human rights due diligence includes steps to assess actual and potential human rights risks, take effective measures to mitigate those risks, and act to end abuses and ensure remedy for any that occur in spite of those efforts. Companies should also be fully transparent about these efforts. But the UN Guiding Principles on Business and Human Rights and other international norms for companies are not legally binding.[54]

Human Rights Watch and other NGOs urged adoption of a binding human rights due diligence standard at the June 2016 ILO-hosted international labor conference where due diligence under its Decent Work in Global Supply Chains was on the agenda.[55]

### *B. International Labor Organization (ILO)*[56]

The ILO uses its "Decent Work Agenda" to promote "the aspirations of people in their working lives."[57] In 2016, the ILO Committee on Decent Work

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[54] *Id.* at 2.

[55] It was reported that there was wide support by NGOs to require due diligence. "In the lead up to the annual June 2016 conference of the International Labor Organization (ILO) there has been a flurry of reports and public statements from NGOs and unions on one side and from industry on the other which reflect the polarized nature of the debate about global supply chains. On the one side NGOs and unions are calling for new regulations governing these global supply chains. Human Rights Watch launched its report on "Human Rights in Supply Chains" and called for "a new, international legally binding standard that obliges governments to require businesses to conduct human rights due diligence across the entirety of their global supply chains." The International Corporate Accountability Roundtable (ICAR), in an open letter to the ILO also appealed for a new international standard on human rights due diligence and highlighted the need to ensure transparency in global supply chains. In a report documenting the poor working conditions in global garment production, the Asia Floor Wage Alliance requested the ILO urgently "move towards a binding legal convention regulating GVCs (global value chains)."

Nolan, *supra* note 47.

[56] Since its inception in 1919, the ILO is the specialized agency of the United Nations mandated to adopt and monitor the implementation of International Labour Standards.

[57] It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.

*Decent Work*, ILO, http://www.ilo.org/global/topics/decent-work/lang--en/index.htm [https://perma.cc/EU87-HNKG].

in Global Supply Chains submitted its Report for adoption by the Conference[58] that concluded *governments* should, "[w]here appropriate, require *enterprises owned or controlled by the State* to implement due diligence procedures and to promote decent work in all their operations in their supply chains"[59] and "[s]timulate transparency and encourage, and, where appropriate, require, by various means, that enterprises report on *due diligence* within their supply chains to communicate how they address their human rights impacts."[60]

In 2017 the ILO issued new "Guidance" on "due diligence" as an obligation for *enterprises*.[61] The ILO established the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy that laid out general standards of conduct by governments and MNCs in a number of labor areas, declaring "the revised version responds to new economic realities across international trade and supply chains, addressing decent work issues, forced labor and guidance on 'due diligence' processes, which are consistent with the UN Guiding Principles on Business and Human Rights." [62]

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[58] It cited the UN Guiding Principles that are:

> [G]rounded in recognition of: (a) States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms; (b) the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and (c) the need for rights and obligations to be matched to appropriate and effective remedies when breached. The General Assembly resolution through which the UN Guiding Principles were adopted in 2011 underscored that while the State has the duty to enforce legislation, business enterprises are required to comply with it.

*Report of the Committee on Decent Work in Global Supply Chains*, *supra* note 1, at 3–4.

[59] *Id.* at 4 (emphasis added).

[60] *Id.* at 5 (emphasis added).

[61] The 2017 revision provides guidance on "due diligence" processes – consistent with the UN Guiding Principles on Business and Human Rights – in achieving decent work, sustainable businesses, more inclusive growth and better sharing of the benefits of FDI. ILO revises Tripartite Declaration on multinational enterprises - includes new principles to achieve decent work for all. *See generally Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, *supra* note 3.

[62] *ILO Endorses Revised MNE Declaration*, U.S. COUNCIL FOR INT'L BUS., https://www.uscib.org/ilo-endorses-revised-mne-declaration [https://perma.cc.K3NE-3CX3]. The principles set out in the MNE Declaration are commended to governments, employers' and workers' organizations of home and host countries and to multinational enterprises themselves. The principles thereby reflect the fact that different actors have a specific role to play. In this regard for the purpose of this Declaration:

The ILO's Framework on the Measurement of Decent Work[63] covers 10 substantive elements,[64] which are closely linked to the four strategic pillars of the Decent Work Agenda: (1) international labor standards and fundamental principles and rights at work; (2) employment creation; (3) social protection; and (4) social dialogue and Tripartism.

When the ILO Committee on Decent Work in Global Supply Chains: Resolution and Conclusions submitted its Report for adoption by the Conference[65] in 2016, it cited the UN Guiding Principles. The principles are

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> (a) The Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011) outlines the respective duties and responsibilities of States and enterprises on human rights. These principles are grounded in recognition of: (i) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms ('the State duty to protect human rights'); (ii) the role of enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights ("the corporate responsibility to respect human rights'); and (iii) the need for rights and obligations to be matched to appropriate and effective remedies when breached ('Access to remedy').
>
> (b) The Guiding Principles apply to all States and to all enterprises, both multinational and others, regardless of their size, sector, operational context, ownership and structure.
>
> (c) The corporate responsibility to respect human rights requires that enterprises, including multinational enterprises wherever they operate: (i) avoid causing or contributing to adverse impacts through their own activities, and address such impacts when they occur; and (ii) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
>
> (d) Enterprises, including multinational enterprises, should carry out *due diligence* to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognized human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.

INT'L LABOUR OFF., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY, 10–11 (2017) (emphasis added).

[63] INT'L LABOUR ORG., DECENT WORK INDICATORS: GUIDELINES FOR PRODUCERS AND USERS OF STATISTICAL AND LEGAL FRAMEWORK INDICATORS (2013).

[64] The ten elements are: (i) employment opportunities; (ii) adequate earnings and productive work; (iii) decent working time; (iv) combining work, family and personal life; (v) work that should be abolished; (vi) stability and security of work; (vii) equal opportunity and treatment in employment; (viii) safe work environment; (ix) social security; and (x) social dialogue, employers' and workers' representation. *Id.* at 12.

[65] *Report of the Committee on Decent Work in Global Supply Chains*, *supra* note 1.

> [G]rounded in recognition of: (a) States' existing obligations to respect, protect and fulfill human rights and fundamental freedoms; (b) the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and (c) the need for rights and obligations to be matched to appropriate and effective remedies when breached. The General Assembly resolution through which the UN Guiding Principles were adopted in 2011 underscored that while the State has the duty to enforce legislation, business enterprises are required to comply with it.[66]

### C. *Organization for Economic Co-Operation and Development (OECD)*[67]

#### 1. OECD Guidelines

To guide member countries,[68] the OECD Guidelines for Multinational Enterprises ("Guidelines") were adopted; they are recommendations from governments to MNCs operating in or from adhering countries.[69] The Guidelines provide "voluntary principles and standards for responsible business conduct in areas such as human rights, employment and industrial

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[66] *Id.* at 3–4.

[67] The Convention on the OECD was signed in Paris on 14 December 1960 when the Organisation for European Economic Co-operation (OEEC), formed in 1948 to administer aid under the Marshall Plan for the reconstruction of Europe after World War II, was reconstituted as the Organisation for Economic Co-operation and Development, "in order to strengthen the tradition of co-operation and apply it to new tasks and broader objectives."
*Convention on the OECD*, OECD, https://www.oecd.org/legal/oecd-convention.htm [https://perma.cc/R23B-SSET].

Over the past decade, the OECD has further deepened its engagement with business, trade unions and other representatives of civil society. The U.S. Council for International Business (USCIB) represents the views of America's private sector through its participation in the OECD's Business and Industry Advisory Committee (BIAC). The trade union interests are represented on the OECD's Trade Union Advisory Committee.
*What is the OECD?*, U.S. MISSION OECD, https://usoecd.usmission.gov/our-relationship/about-the-oecd/what-is-the-oecd [https://perma.cc/6FQS-RJGH].

[68] "On 14 December 1960, 20 countries originally signed the Convention on the Organisation for Economic Co-operation and Development. Since then, 15 countries have become members of the Organization." *List of OECD Member Countries - Ratification of the Convention on the OECD*, OECD, http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm [https://perma.cc/23UG-9L99].

[69] *See* ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4.

relations, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation."[70] In 2011, revisions of the Guidelines added "a new and comprehensive approach to due diligence and responsible supply chain management representing significant progress relative to earlier approaches."[71] The revisions also added a chapter on Human Rights aligned with the language of the UN Guiding Principles for Business and Human Rights (UNGPs).[72]

Under the 2011 Guidelines, enterprises should carry out due diligence to not only identify, but also prevent and mitigate actual and potential adverse impacts on human rights arising from employer practices, including those that violate labor standards, etc. Enterprises should also carry out "due diligence" in relation to their suppliers and other business relations, in order to prevent or mitigate adverse impact that is directly linked to their operations, products or services.

For the purposes of the Guidelines, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the Guidelines. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation. The Guidelines concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship, as described in paragraphs A.11 and A.12.[73]

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[70] Org. for Econ. Co-operation and Dev., *Annual Report on the OECD Guidelines for Multinational Enterprises 2013*, at 11, (2013). Begun in 1976, the OECD has developed working relationships with the International Labour Organization, the International Organisation for Standardization, the World Bank, the UN Working Group on Business and Human Rights, the UN Global Compact, UN Finance Initiative, the Global Reporting Initiative, and the International Coordinating Committee of Human Rights Institutions. *Id.*

[71] ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4, at 4.

[72] The Guidelines make reference to relevant provisions of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy as well as the Rio Declaration. *See* Org. for Econ. Co-operation and Dev., *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015*, at 1 (2016), https://mneguidelines.oecd.org/15-Years-of-the-National-Contact-Points-Highlights.pdf.

[73] ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4, at 23. The 2017 Draft Due Diligence Guidance for Responsible Business Conduct ("*Guidance*") read:

Importantly, the Guidelines applies the due diligence standard not only to the MNCs but also to the contractors with whom they are directly linked. In this regard, enterprises should:

> Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products, or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.[74]

The OECD also has specific due diligence guidance for the "minerals, agriculture and garment & footwear supply chains, as well as the extractives and financial sectors."[75] The OECD is currently developing the 2018 Guidance drawing on that experience.[76]

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> Carrying out due diligence is a means to an end; the process is intended to help enterprises meet their responsibilities to prevent and address their adverse RBC [responsible business conduct] impacts under the OECD *Guidelines*, and other international standards, including the UNGPs and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. The *Guidelines* recommend that enterprises conduct due diligence to (i) identify, (ii) prevent or mitigate and (iii) account for how actual and potential adverse RBC impacts are addressed. Due diligence should be carried out in good faith with the purpose of achieving the outcomes identified in the Guidelines.

Org. for Econ. Co-operation and Dev., *OECD Due Diligence Guidance for Responsible Business Conduct (Draft 2.1)*, at 8 (2016), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Responsible-Business-Conduct.pdf (footnote omitted).

[74] ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4, at 20. "Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders." *Id.* at 19.

[75] *Nieuwenkamp, supra note 16. See generally* OECD, *supra* note 16; *OECD Due Diligence Guidance for Responsible Business Conduct (Draft 2.1)*, *supra* note 73.

[76] *See generally id.*; Org. for Econ. Co-operation and Dev., OECD, *Due Diligence Companion (Draft)*, (2016), http://mneguidelines.oecd.org/OECD-Due-Diligence-Companion.pdf. The Due Diligence Guidance for Responsible Business Conduct ("Guidance") is based on the recommendations contained in the OECD Guidelines for Multinational Enterprises (the "Guidelines").

In relation to human rights impacts, including impacts on the human rights of workers, it seeks to align with the *UN Guiding Principles on Business and Human Rights* (UNGPs), the *ILO Declaration on Fundamental Principles and Rights at Work*, relevant ILO Conventions and Recommendations, and the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*.

*OECD Due Diligence Guidance for Responsible Business Conduct (Draft 2.1)*, *supra* note 73, at 1 (footnotes omitted).

In 2018, a draft is nearing final publication to provide practical support to companies on the implementation of the OECD Due Diligence *Guidance* for Responsible Business Conduct of the OECD Guidelines for Multinational Enterprises.[77] The Draft Guidance contains plain language explanations of the due diligence recommendations and associated provisions in the Guidelines and can be used by companies in any sector of the economy.[78]

2. National Contact Points (NCPs)

The Guidelines provide that members of the OECD "shall set up National Contact Points to further the effectiveness of the *Guidelines* by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances, taking account of the attached procedural guidance."[79] "The [OECD] Guidelines are the only international instrument for responsible business conduct with a built-in implementation mechanism—the National Contact Points (NCPs)" and that have legally enforceable standards, though notably lack remedies for violations.[80] "NCPs are the only governmental, non-judicial grievance mechanism providing access to remedy to stakeholders wishing to raise issues related to operations of companies operating in or from

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[77] *See generally OECD Due Diligence Guidance for Responsible Business Conduct (Draft 2.1)*, *supra* note 73. Comments received will be taken into account when finalizing the Guidance which is scheduled for completion in 2018. Human Rights Watch urged that due diligence be made binding. "*Recommendation: The OECD Due Diligence Guidance for Responsible Business Conduct and OECD Guidelines for Multinational Enterprises should become a binding standard.*" Human Rights Watch, *Submission to the Organisation for Economic Co-operation and Development (OECD),* (Feb. 8, 2017), https://www.hrw.org/sites/default/files/supporting_resources/2.8.17_human_rights_watch_submission_oecd_ddguidance_-_february_2017.pdf.

[78] *See supra* note 76.

[79] ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4, at 68. Today, 47 governments have a legally binding obligation to promote due diligence and to set up an NCP that handles due diligence complaints. Roel Nieuwenkamp, *OECD's Business & Human Rights Grievance Mechanism*, OECD (May 3, 2017), http://www.europarl.europa.eu/cmsdata/118520/presentation-nieuwenkamp-oecd.pdf. These guidelines are binding on the government members, and in that sense are enforceable "hard law." *2016 Annual Report on the OECD Guidelines for Multinational Enterprises*, US DEP'T STATE, https://www.state.gov/e/eb/oecd/usncp/links/rls/2016/index.htm [https://perma.cc/QL4Q-SGZV].

[80] *Implementing the OECD Guidelines for Multinational Enterprises*, *supra* note 72; *see also National Contact Points*, *supra* note 36.

adhering countries."[81]

The NCPs assist enterprises and their stakeholders to take appropriate measures to further the implementation of the Guidelines. They also provide a mediation and conciliation platform for resolving practical issues that may arise.[82] The Guidelines make reference to ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and therefore, it is posited, "NCPs also function as a grievance mechanism for widely recognized expectations with regard to business and human rights, labour issues and the environment."[83] At a minimum, it at least provides a forum for discussion.[84]

A recent illustrative case dealing with due diligence is the decision by the Danish NCP in Clean Clothes Campaign Danmark and Aktive Forbrugere (Active Consumers) v. pwt Group A/S (*Danish NPC case*).[85] It involved the NCP assessing whether an MNC met its due diligence standards in the Rana Plaza disaster in Bangladesh, where more than 1,000 workers died due to sub-standard working conditions and a building collapse.[86] The MNC's

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[81] *Implementing the OECD Guidelines for Multinational Enterprises*, *supra* note 72.

[82] *See* ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4.

[83] *Implementing the OECD Guidelines for Multinational Enterprises*, *supra* note 72.

[84] Over 360 specific instances have been handled by NCPs, addressing impacts from business operations in over 100 countries and territories. . . . NGOs have historically been the main group using the specific instance mechanism, accounting for 80 specific instances or 48% of all specific instances since 2011, followed by trade unions which account for 41 specific instances or a quarter of all specific instances since 2011. Individuals have filed 33 specific instances since 2011 accounting for 19% of all specific instances in this time period. Specific instances treated to date have covered all chapters of the Guidelines with the majority focusing on the chapters on employment and industrial relations (55%), human rights (24%) and environment (21%). Approximately a third of all closed specific instances were not accepted for further consideration at the initial assessment stage. A non-acceptance rate of between 30-40% has been relatively stable since 2000.

*Implementing the OECD Guidelines for Multinational Enterprises*, *supra* note 72, at 2.

[85] OECD National Contact Point, Denmark, Clean Clothes Campaign Danmark and Aktive Forbrugere (Active Consumers) v. PWT Group A/S, Specific Instance Notified by Clean Clothes Campaign Denmark and Active Consumers regarding the activities of PWT Group, Final Statement, 17 October 2016 [hereinafter *Danish NCP case*], http://businessconduct.dk/file/631421/mki-final-statement.pdf. *See* Ronald C. Brown, Commentary, *Danish NCP Advances Due Diligence Obligations of OECD Guidelines in Rana Plaza Case*, *3 INT'L LAB. RTS. CASE L. J. 245 (2017); see also* Karin Buhmann, *Lost in Translation or Learning to Walk? On CSR and Risk-Based Due Diligence in Ship Recycling and Textile Sector Supply Chain Management*, BUS. SOC'Y BLOG (Oct. 28, 2016), https://www.oecdwatch.org/cases/Case_467/1588 [https://perma.cc/W9W3-FSTN]. Professor Buhmann has served as a member of the Danish NCP.

[86] *Danish NCP case*, *supra* note 85, at 1, 4 (*"The NCP can solely assess and comment on the*

contractors produced MNC products in the collapsed building.[87] The case illustrates the apparent weaknesses of OECD guidelines and its obligations without meaningfully enforceable remedies for their violations:

> The statement by the Danish National Contact Point (NCP) advances the OECD due diligence obligations. Despite a failure of proof, the NCP applied the duty to inspect the safety of suppliers' worksite building when the inspection is incorporated in company policy or is an industry practice as integral to the risk-based due diligence obligation. It also held the OECD Guidelines for Multinational Enterprises to a high standard by requiring strict documentation of adherence to its policies and their implementation, and confirmed *the OECD Guidelines' stipulation that the NCP cannot impose liabilities or sanctions on companies*. The NCP determined that due diligence required the respondent to seek to prevent or mitigate an adverse impact when they have not contributed to that impact but the impact is nevertheless directly linked to their operations, and held that companies must require their suppliers to establish human rights policies.

The NCP found that the respondent violated OECD Guidelines on due diligence by not using risk and decision-making systems, such as checklists, in connection with inspections and visits to the supplier and by failing to demand that supplier ensure its employees' basic human and labor rights, including taking adequate steps to ensure occupational health and safety. Regarding the inspection of the supplier's work site, the NCP found no violation of due diligence in that there was no incorporated or established practice at the time of the accident. The NCP recommended that PWT Group revise its management and risk assessment systems to meet due diligence requirements, revise its CSR policy to ensure compliance, and continue its efforts to systematically incorporate the company's code of conduct into these systems. Because inspections by local authorities may not be reliable and employees may not be properly trained, using properly qualified sources and following up on the results of these inspections are critical.[88]

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*extent to which there is a violation of the OECD Guidelines and how the company can remedy any adverse impact. The NCP cannot impose liability or sanctions on companies. On this basis, the NCP rejected the part of the complaint regarding the issue of compensation. . . ."); see also* Brown, *supra* note 85.

[87] *Danish NCP case*, *supra* note 85, at 5.

[88] *See id. (emphasis added).*

*D. NCP Process and Remedies*

NCPs are created by domestic law under the guidance of OECD standards.[89] Under the NCP law of Denmark in the case above, the NCP, pursuant to its procedures, took the complaint and first encouraged the parties to resolve the matter themselves but they declined.[90] The NCP then undertook an initial assessment and concluded it could offer the parties mediation. "As part of the initial assessment, the NCP conducted an assessment of whether the aspects of the complaint [were] within the scope of the OECD Guidelines for Multinational Enterprises, and whether there [were] objective grounds and reasonable documentation of the alleged violations of the OECD Guidelines."[91] Mediation was unsuccessful and the NCP decided to conduct an actual investigation of the case in accordance with section 7(4) of the NCP Act.[92] Concluding it had proper documentation to proceed, the NCP next considered the question of whether the respondent acted in accordance with the OECD Guidelines for Multinational Enterprises by neglecting to carry out due diligence in relation to its supplier, New Wave Style, in the form of demands that the supplier take adequate steps to ensure occupational health and safety in their operations.[93]

The NCP concluded there was a violation of the OECD standard of due diligence and for its *remedy* it made the following "*recommendations*." Note, again, the lack of responsible liability for violations of the OECD due diligence standard:

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[89] *See* ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4, at 68.

[90] "This was done in accordance with section 7(2) of Act no. 546 of 18 June 2012 on the Mediation and Complaints-Handling Institution for Responsible Business Conduct (the NCP Act).)." *Final Statement: Specific Instance Notified by Clean Clothes Campaign Denmark and Active Consumers Regarding the Activities of PWT Group,* DANISH NAT'L CONTACT POINT OECD (Jan. 17, 2018), http://businessconduct.dk/file/631421/mki-final-statement.pdf [https://perma.cc/LK8B-XF39] [hereinafter *Final Statement*]; *see* Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct (Act No. 546 of 18 June 2012) (Den.). Lov nr. 546 af 18.06.2012 Lov om mæglings- og klageinstitutionen for ansvarlig virksomhedsadfærd., *translated in* THE MEDIATION AND COMPLAINTS-HANDLING INSTITUTION FOR RESPONSIBLE BUSINESS CONDUCT, UNOFFICIAL ENGLISH VERSION OF ACT NO. 546 OF 18/06/2012 (June 19, 2012), https://businessconduct.dk/file/298159/act-on-mediation.pdf [https://perma.cc/YDG4-VL9].

[91] "The submission of a complaint does not require proof of the alleged violation, but rather a degree of specificity regarding how the respondent could have acted in violation of the OECD Guidelines (ref section 4 of the NCP Act)." *Final Statement*, *supra* note 90.

[92] *Id.*

[93] *Id.*

> The NCP recommends that the respondent, PWT Group, revise its management and risk assessment systems in order to implement processes by which the company can meet the requirement of due diligence in relation to its suppliers, in accordance with chapter II of the OECD Guidelines. PWT Group should also ensure that the company's CSR policy complies with the OECD Guidelines for Multinational Enterprises, particularly with regard to fundamental human and labour rights. PWT Group is recommended to review its suppliers' self-assessments in conjunction with an analysis of industry and country risks and, on this basis, select which circumstances are to be inspected. The NCP recommends that PWT Group report and communicate about these efforts and about the measures carried out by the supplier to prevent potential risks, see the OECD Guidelines, chapter II, paragraph 10 and chapter IV, paragraph 5 and associated comment no. 45. The NCP recommends that PWT Group continues its efforts to systematically incorporate the company's Code of Conduct into management and risk systems. . .. Pursuant to section 7 of the NCP Act, the NCP is obliged to follow up on this statement after one year to assess whether the company has complied with the NCP's recommendations. [94]

In sum, in its proffered remedy, the NCP confirmed the OECD Guidelines' stipulation that the NCP cannot impose liabilities or sanctions on companies and made recommendations on what should be done to minimize or eliminate due diligence violations in the future. The OECD offers the following about their conclusions under NCP decisions:

Specific instances are not legal cases and NCPs are not judicial bodies. As such NCPs cannot impose sanctions, directly provide compensation nor compel parties to participate in a conciliation or mediation process. Nevertheless the NCP system can generate important consequences. For example, some NCPs issue final statements upon concluding specific instance processes which include recommendations to companies based on the particular circumstances of the case. Certain NCPs also make determinations, setting out their views on whether a company observed the Guidelines or not. Such practice can have reputational impacts for companies and can encourage engagement of companies in the process. Furthermore, in some contexts governments consider NCP statements with regard to economic decisions, e.g., in the context of public procurement decisions or in providing diplomatic support.[95]

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[94] *Id.*

[95] *Implementing the OECD Guidelines for Multinational Enterprises*, *supra* note 72, at 5.

However, many complaints are resolved short of a decision-with-recommendations.

Between 2011 and 2015, approximately half of all specific instances which were accepted for further examination by NCPs resulted in an agreement between the parties. Agreements reached through NCP processes were often paired with other types of outcomes such as follow-up plans and have led to significant results, including changes to company policies, remediation of adverse impacts, and strengthened relationships between parties. Of all specific instances accepted for further examination between 2011-2015, approximately 36% resulted in an internal policy change by the company in question, contributing to potential prevention of adverse impacts in the future.[96]

## IV. ANALYSIS

### *A. Due Diligence with Liabilities and Remedies for Failure*

Bringing international standards to bear on sovereign nations and private companies usually involves standards, goals, and consent, with pressures shaped by economic realities and self-interest. With MNCs, this is in nature a *social contract*, unenforceable, but not necessarily without consequences, versus a *legal contract,* enforceable, with liabilities and remedies. It is the difference between soft law and hard law. Certainly, the dialogue surrounding the social contract is useful and frequently results in progressive changes in policies, but it does not result in tangible remedies for the failed policies that may have harmed the victims. Neither does it remedy the absence of enforced labor protections of domestic law.

The due diligence obligation is the new emerging tool to bring needed changes to the MNCs' workplaces. Though the concept has been around for some years, there is a new energy promoting and expanding it into more sectors of the global economy and affecting the labor supply chains. In the digital age, global imbalances and injustices are more transparent. With increased awareness come increased calls for ending the disparities at opposite ends of the global labor chain. These calls include demands for more binding international and domestic regulation. The ILO's international standards are limited by the need for consent by ratification of ILO conventions and usually require implementing domestic legislation, whereas the OECD standards (applicable in member countries) only result in non-binding recommendations

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[96] *Id.* at 3.

when violated.[97]

Will promulgation of *binding* due diligence standards be helpful in remedying the plight of the labor chain workers? Probably. But what is the remedy for due diligence violations of *binding* standards? And where is the remedy for the victims? The suggestion is not new, but maybe it is time for governments themselves to stand up through domestic law and protect against labor law violations in low-enforcement countries. Perhaps these laws may be bolstered by internal, "soft law" standards. It is time for developing countries to stop providing "havens" for MNCs for their offshore violations. Instead, they should follow the example of France, providing domestic law remedies to bring about corporate responsibility. The cautionary words of OECD official Roel Nieuwenkamp should also be taken into consideration: Commenting on the newly enacted due diligence legislation in France, he suggested domestic law should be supportive of and supplemental to current due diligence approaches.[98]

### *B. Violations, Liabilities, and Remedies*

There is every reason to continue to utilize the current "soft law" approaches of the ILO and OECD Guidelines and the *Guidance*; however, statistics confirm that MNCs will certainly fail to meet due diligence standards in their global labor chains. This paper proposes that the best approach to alleviate the burdens on victims of labor protection violations is to place liability on the beneficiaries and initiators of the global labor chains–the MNCs–and that such liability should include a remedy enforceable by domestic hard law.

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[97] *See* Nat'l Contact Point of Switz., Initial Assessment: Specific Instance Regarding the Fédération Internationale de Football Association (FIFA) Submitted by the Building and Wood Workers' International (BWI) (2015), https://www.wiltonpark.org.uk/wp-content/uploads/WP1428-Swiss-National-Contact-Point-Initial-Assessment-FIFA.pdf [https://perma.cc/6LW3-EBCY] (with regard to alleged human rights violations against migrant workers in the construction of facilities for the FIFA 2022 World Cup in Qatar) ("The initial assessment of the Swiss NCP results in the conclusion that the issues raised in this submission merit further consideration and the Swiss NCP therefore accepts the specific instance."). *See also* Roel Nieuwenkamp, *Landmark Human Rights Cases Show Value of OECD Grievance Mechanism for Responsible Business*, OECD Insights (Nov. 11, 2016), http://oecdinsights.org/2016/11/11/human-rights-cases-value-oecd-grievance-mechanism-responsible-business/ [https://perma.cc/46RA-A6D4].

[98] Roel Nieuwenkamp, *Legislation on Responsible Business Conduct Must Reinforce the Wheel, Not Reinvent It,* OECD INSIGHTS (Apr. 15, 2015), http://oecdinsights.org/2015/04/15/legislation-on-responsible-business-conduct-must-reinforce-the-wheel-not-reinvent-it/ [https://perma.cc/A4EC-LWH4]

The implication of connecting liability with remedy may not be as apparent as one might think. Just as "fissurization" is used by the MNC to limit liability and push it onto contractors and subcontractors, it is foreseeable the same could be done with these new laws. That is, the MNC will increase its inspections and protect itself against liability by more diligently requiring that labor standards be met. It will also, as part of its internal systems, require that contractors and subcontractors insure compliance by having performance bonds and surety devices for violations, such as failure to pay wages and worker injuries.[99] If the MNC meets its due diligence obligations, it is more likely that there would be fewer labor violations.

1. Legislative Due Diligence

Legislation creating civil liabilities and remedies for workers in labor chains was recently enacted in France. It is said this "law mandates companies to practice human rights due diligence, seen by the UNGPs as the main operational principle to put companies' responsibility to respect human rights into practice."[100]

The law applies to large companies and requires a vigilance plan that

> [I]ncludes reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety of persons and environment resulting from the activities of the company and of the companies it controls, either directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established business relationship is maintained.[101]

The law applies to "subcontractors and suppliers with whom it maintains an 'established business relationship'"; thus, it would appear to cover value chains and global labor supply chains.[102]

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[99] *See* Brown, *supra* note 14.

[100] [T]he Constitutional Council found that the terms used by the legislature, such as 'reasonable measures of vigilance' and 'appropriate action to mitigate risks,' are very general; [t]he reference to violations of 'human rights' and 'fundamental freedoms' is broad and indeterminate; and [t]he scope of the companies and activities falling within the scope of the infringement is very broad.

Bergkamp, *supra* note 42.

[101] Dauthier & Smith-Vidal, *supra* note 40; *see also France Adopts Corporate Duty of Vigilance Law*, *supra* note 40.

[102] Of course, arguments can always be anticipated as to who properly fits into an employment and contractual relationship with MNCs.

According to the most recent information available at the time of publishing, estimated 100 -

The difficulties of this law, from the point of view of providing remedies to victims, are that without fines and criminal sanctions, the burden of enforcement under tort law[103] will fall upon victims who are least equipped to meet it and the available legal defenses may prove formidable obstacles.[104] Under French law, there is a due diligence defense; that is, if there is no violation, there is no liability. Yet it may be the case that the labor chain worker remains unpaid or his/her injury uncompensated. Also, where a due diligence (vigilance) violation is found, the victim must find a willing lawyer, litigate, and overcome the legal issues and obstacles of proving duty, causation, assumption of risk, contributory negligence, and the fellow-servant rule.

Perhaps the ultimate solution for victims is two-fold: first, expand the definitions of due diligence under legislation (and the Guidelines and

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150 large companies meet the [statutory] . . . conditions. . . . . [It also applies to ] [s]ubcontractors and suppliers with whom it maintains an "established business relationship." Under French law, the concept of established business relationship covers all types of relations between professionals, defined as stable, regular relationships, with or without contract, with a certain volume of business, creating a reasonable expectation that such relation will last. Article L. 442-6, I, 5 of the French Commercial Code applies equally to the purchase and sale of products and to the performance of services. The recitals of the law specify that the establishment and implementation of the vigilance plan corresponds to the concept of human rights due diligence outlined in the UN Guiding Principles on Business and Human Rights (UNGPs). The scope of due diligence is determined in the UNGPs based on 'whether [the activity] causes or contributes to an adverse impact, or its operations, products or services are directly linked to adverse impact through a business relationship,' and by the severity or salience of these actual and potential impacts. According to the UNGPs, business relationships are understood to include business partners, entities in the value chain, and any other non-State or State entity directly linked to a company's business operations, products or services.

*French Corporate Duty of Vigilance Law: Frequently Asked Questions*, *supra* note 7, at 3.

[103] *See generally* Madeleine Conway, *A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains*, 40 QUEEN'S L.J. 741 (2015).

[104] Article 2 of the law – which incorporates an article of the French Commercial Code (Art. L. 225-102-5) – sends a strong signal to judges. Article 2 refers to the provisions of the French Civil Code (1240 and 1241) and states that in the event of a breach of the obligations laid down in Article 1 (i.e. Art. L. 225102-4), when harm occurs, the company can be held liable, and will have to compensate for the harm that proper fulfillment of the obligations – publishing an adequate vigilance plan – would have avoided. . . . . The burden of proof still falls on the claimants, meaning victims will still need to prove a fault by the company and a causal link between the fault and the damage they have suffered. And the fault has to result out of violations of the obligations stipulated by Article 1. Hence, if a company implements a vigilance plan, respecting the binding content and quality of the plan, it will not be held liable, even if damages occur.

*French Corporate Duty of Vigilance Law: Frequently Asked Questions*, *supra* note 7, at 5.

Guidance) which would broaden and enhance the obligations of the MNCs to provide increased labor protections; and secondly, consider due diligence legislation that fixes strict liability on the MNC for the labor law violations of its chain operators. As stated earlier, just as "fissurization" dissipates liability, this "responsibility" will inevitably result in the liability portion of the responsibility being pushed down the chain through increased vigilance, performance bonds, a funded victims' fund, and other "make-the-other-guy-liable means" as a cost of business expense. If this suggestion is too harsh on MNCs, the law could be drafted to exculpate the MNC through a due diligence defense, where in fact they bring into being these aforementioned available remedies.

2. Expanding MNC Due Diligence Responsibility

NGOs' calls for governments to require businesses to conduct human rights due diligence across their entire global supply chains,[105] along with the continuing leadership of ILO and OECD soft law initiatives, are prompting increased awareness that MNCs and its labor supply chains operate as a single organism, although usually without hard law accountability. Traditional legal frameworks and approaches permit pushing liability outside the MNC and down the line until workers suffer labor law violations at the hands of their immediate foreign contracting employer.

Arguably it is time for a new legal direction bringing accountability and liability for corporate enterprises responsible for the activity taking place in global value chains, forcing them to take responsibility for the failures of labor enforcement. Extending liability to include indirect adverse impacts along the chain in which the MNC is *complicit*, as violations, can extend corporate liability down the global supply chain.[106] It is reasonable to conclude that corporate responsibility "applies across an enterprise's activities and through its relationships with other parties, business partners, and entities in its value chain, other non-state actors and state agents."[107] Thus, establishing corporate

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[105] *See* Human Rights Watch, *supra* note 1.

[106] Complicity is defined as "an act or omission (failure to act) by a company, or individual representing a company, that 'helps' (facilitates, legitimizes, assists, encourages, etc.) another, in some way, to carry out a human rights abuse, and [t]he knowledge by the company that its act or omission could provide such help.'" *Principle Two: Human Rights*, *supra* note 52. While a determination of complicity by corporations does not necessarily amount to criminal complicity, extending the "obligation to respect human rights and conduct appropriate due diligence" all the way to the prevention of mere knowing silence is progressive and hopeful for future legal enforcement. Narine, *supra* note 46, at 17.

[107] THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS IN SUPPLY CHAINS, 10TH

liability at the top of the supply chain should require a very low threshold of complicity with violations of labor rights at the bottom of the supply chain.

OECD Guidance standards, as delineated by the NCP and discussed above in the *Danish case*, explore the due diligence obligations of direct and indirect activities of the MNCs. A distinction is made between how due diligence is implemented within a company versus how it is implemented in relation to suppliers. The OECD Guidelines provide that *within* a company,[108] the company should carry out "risk-based due diligence."[109] As to OECD requirements of due diligence in relation to the company's suppliers under the OECD Guidelines, the company should "[s]eek to prevent or mitigate adverse human rights impacts that are directly *linked* to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[110] Significantly, the OECD Guidelines further state that "this is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship."[111]

## CONCLUSION

Making due diligence standards mandatory and binding is not by itself the ultimate panacea for ameliorating labor protection violations in MNC global labor supply chains, nor will it necessarily result in remedies for workers in the chain. Domestic legislation for binding due diligence must be adopted, including remedies for violations. In the home countries where the MNCs reside, laws and legal doctrines, created under a pre-global era, permit MNCs to evade liability for violations against their overseas workers in the global labor supply chain. Soft law is voluntary and unenforceable; contract law is used by MNCs whose handbooks and codes of conduct are based on

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OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY DISCUSSION PAPER 1 (2010),http://www.oecd.org/investment/mne/45535896.pdf

[108] *See* ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4, at 20.

[109] For example, the company could incorporate risk-based due diligence into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. *Final Statement*, *supra* note 90. Also, the company should avoid "causing or contributing to adverse impacts on matters covered by the *Guidelines*, through their own activities, and address such impacts when they occur." ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4, at 20.

[110] U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK 14 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [https://perma.cc/6Z7A-US5X] (emphasis added).

[111] ORG. FOR ECON. CO-OPERATION AND DEV., *supra* note 4, at 20.

illusory promises. These promises are not binding, and workers are often determined not to be either "employees" or the intended beneficiaries.[112]

Some inroads on the lack of responsibility have been made under the emerging doctrines of joint employment and joint employers, reporting and transparency laws – usually relating to trafficking or corruption,[113] and by legislation in some sectors such as in construction in Australia. The latest attempt to provide hard law to mandate due diligence and provide remedies for corporate failure to meet due diligence requirements is in the new French law, discussed above. But it too has its practical problems, having its penalties and criminal sanctions removed by judicial edict and requiring lawsuits by victims to prove causation and damage.

This Article proposes that while all the current approaches, such as soft law, dialogue, transparency laws, reforms to improve labor protection laws and enforcement, should proceed at a fast clip. The most effective remedy is for governments to legislatively mandate an expanded due diligence requirement, but with MNC responsibility and remedies for failure to achieve it. In addition, as in recent French legislation, laws should provide liability with enforceable remedies for violations. Consideration might be given to a strict liability standard to get the attention of the MNCs who, at any rate, will very likely try to pass their liabilities and costs down the line of the global labor supply chain. As an incentive, the law could remove liability when MNCs can show that a sure remedy for labor supply chain victims has in fact been put into place (for example, a surety fund, performance bonds, or other equivalent resources).

The time has come to protect the workers in the global labor supply chains and replace legal fictions with realities of the global workforce. The legal and business means are available to provide equity and workplace decency; it only takes the will of all stakeholders. *The proposal of this paper is to require due diligence, but with MNC responsibility and remedies for failure to achieve it.*

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[112] *See generally* Katherine E. Kenny, Comment, *Code or Conduct: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of its Foreign Suppliers*, 27 NW. J. INT'L L. & BUS. 453 (2007); Brown, *supra* note 18.

[113] Narine, *supra* note 46, at 5.