International Centre for Criminal Law Reform
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Supply Chains Transparency and Due Diligence Legislation to Prevent Child and Forced Labour

A Guide for Policy Makers and Legislators

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Acronyms

BCCA	British Columbia Court of Appeal
BCSC	Supreme Court of British Columbia
CAD	Canadian dollars
CBA	Canadian Bar Association
CNCA	Canadian Network on Corporate Accountability
CORE	Canadian Ombudsperson for Responsible Enterprise
CSR	Corporate Social Responsibility
CTSCA	California Transparency in Supply Chains Act
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
G20	Group of Twenty
G7	Group of Seven
GRI	Global Reporting Standards
HRDD	Human Rights Due Diligence
ILO	International Labour Organization
IOM	International Organization for Migration
ITUC	International Trade Union Confederation
MNE	Multinational Enterprises
MSA	Modern Slavery Act
NAP	National Action Plan
NCP	National Contact Point for Responsible Business
NGO	Non-Government Association
OECD	Organization for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
ONSC	Ontario Superior Court of Justice
OSCE	Organisation for Security and Cooperation in Europe
RBC	Responsible Business Conduct
SCC	Supreme Court of Canada
TISC	Transparency in Supply Chain
UK	United Kingdom
UNGP	United Nations Guiding Principles on Business and Human Rights
UNHRC	United Nations Human Rights Council
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime

Introduction

The international community is attempting to eliminate forced labour and the worst forms of child labour, including hazardous work likely to harm children's health, safety, or morals. Child and forced labour can be present at various points of a company's supply chains, often out of sight of buyers, labour inspectors, and consumers. Many governments have resorted to legislation to motivate companies to be more transparent about their supply chains and to adopt due diligence measures to prevent child and forced labour.

At present, there is no specific supply chain transparency legislation in Canada. Canadian private companies under applicable securities legislation do not have an obligation to disclose material labour exploitation risks within their supply chains. Given the complex, evolving and often obscure nature of supply chains, too many Canadian companies fail to offer consumers any meaningful environment, social or governance disclosure. As a result, consumers are unaware of whether the products and services at local Canadian retailers have connections to human rights abuses or detrimental environmental practices.

At the same time, companies increasingly feel the pressure from investors, consumers, NGOs, industry associations and others to disclose and address the risks of labour exploitation in their supply chains. To prevent and eliminate child and forced labour, a new statutory framework may be needed to clearly define the transparency and due diligence obligations of enterprises throughout their operations and supply chains.

In their efforts to prevent and combat child and forced labour globally, national and regional governments are increasingly turning to mandated disclosure (transparency) and due diligence regimes as an indirect method of regulating corporate behaviour throughout various supply chains. Recent disclosure laws require companies to provide information on their global supply chains, including due diligence measures that they have taken to prevent human rights violations by third-party suppliers. Some of these laws now extend beyond targeted due diligence in preventing child and forced labour and apply more comprehensively to the prevention of human rights violations and harmful environment practices.

There is also a growing tendency for these laws to impose some specific due diligence or duty of care obligations on the companies they cover. Effective monitoring, investigation and enforcement mechanisms then become necessary to ensure accountability, along with ensuring access to judicial and non-judicial remedies for those whose rights have been violated.

The thematic focus of this Guide on forced labour and child labour is intentional and timely given that 2021 is the International Year for the Elimination of Child Labour – 2021.[1] The Guide was developed to assist policy makers and legislators, in Canada and elsewhere, in making policy choices and designing

[1] United Nations, General Assembly resolution 73/327.

legislation that will achieve an optimum impact on the elimination of child and forced labour. The Guide presents and discusses a range of legislative options and examples that policymakers and legislators may wish to consider in the development of supply chains transparency and due diligence legislation. The goal being to establish a statutory duty of care requiring businesses to take reasonable steps to avoid the use of forced labour, child labour, and human trafficking in their operations abroad, and to report publicly on these due diligence steps and their impact. The Guide fits within the broader international anti-slavery policy developments of the last decade or so, including the *United Nations Guiding Principles on Business and Human Rights*, the global standard for corporate human rights obligations.

The development of effective legislation may be more urgent than ever given the fact that the major supply chain disruptions caused by climate change and the COVID-19 pandemic are not only responsible for slowing down the economic recovery, but also weakening the capacity of enterprises to ensure that their supply chains are not buoyed by child or forced labour. As businesses embark on the journey to recovery, supply-chain leaders are resorting to various strategies to make their supply chains far more flexible and agile, including dual sourcing of raw materials and near-shoring, or regionalizing their supply chains. As business leaders are seeking to deeply and quickly transform their supply chains, new risks emerge that must be managed in order to prevent child labour, forced labour and other human rights violations within their supply chains.

At this time, many businesses are looking to establish and improve their dedicated supply-chain risk-management functions and processes and adopt voluntary standards for environmental, social and governance. They could be persuaded to include due diligence and reporting practices in these processes to manage the risks and potential liability associated with suppliers and partners that are less scrupulous about preventing human rights abuses. Failing to address human rights issues can create significant business risk.[2] There is certainly a lot of interest among businesses in how to measure and report their social impacts and many of them have adopted voluntary standards. However, states must act to ensure that businesses do more than "launder their reputation".[3]

The Guide is divided into two main parts. A first part establishes a context for the guidance offered, including a cursory review of the Canadian legislative landscape and the international policy framework for responsible business conduct. A second part offers a discussion of the various choices a legislator must consider in designing a supply chains transparency and due diligence statute that can hold business enterprises accountable for their efforts to prevent child labour and forced labour. That second part has six main sections:

[2] Canadian Bar Association (2021). *Business and Human Rights Guide*. https://www.cba.org/Publications-Resources/Practice-Tools/Business-and-Human-Rights?lang=en-ca.

[3] Diane Coyle (2022). The revolution will not be privatized: Corporate responsibility and its limits, *Foreign Affairs*, 101(1), 119-127. Doyle explains: "Fixing some of the world's vexing problems will require that businesses dramatically alter their own practices, and it makes little sense to entrust systemic reform to the very institutions that themselves require change", p. 120.

1. The purpose, scope, and application of the legislation
2. The designation of the entities to be covered by the legislation
3. Creating disclosure and reporting obligations
4. Creating specific due diligence and accountability obligations
5. Complaints and grievance mechanisms, and potential remedies
6. Responsibility for the administration and enforcement of the law. The specific due diligence obligations imposed by the legislation

The reader will also find two tables at the end of the Guide, one summarizing existing international standards and policy guidance instruments and one summarizing the main features of various relevant national legislation. For those readers already familiar with the Canadian context and the appliable international legal standards, they may find it easier to start with Part 2 of the Guide.

As the reader will notice, this Guide is not about comprehensive measures to eradicate child labour and forced labour, but about one specific strategic action that should be considered as part of a comprehensive strategy to address these complex problems. It is about developing and implementing specific legislation to create an explicit legal obligation for legal entities to be more transparent about their supply chains and to exercise due diligence throughout these chains to avoid contributing directly or indirectly to forced and child labour.

Companies have several other due diligence obligations, covered to varying extents by national laws, with respect to other human rights violations, the protection of the environment, the prevention of corruption, the prevention of various forms of contraband and trafficking, or their participation in illicit markets. In the context of global trade, these obligations must often extend to other companies in their supply chains and increasingly include a duty of corporate vigilance or due diligence over the relevant supply chains.

It would be misleading to assume that companies necessarily prefer or benefit from state inaction. An argument could convincingly be made in favour of establishing a comprehensive legal regime that clarifies all these obligations and provides the necessary administrative, enforcement, and grievance and redress mechanisms. There is a need in most countries to identify and clarify standards of corporate responsibility and the role of states in enforcing such standards. However, without excluding that possibility, the scope of the Guide is narrowly limited to a law designed specifically for businesses to prevent the risks of forced labour and child labour in global supply chains.

Other measures can also be taken by national governments including prioritizing the prevention of child labour in their international development assistance programs or their own official development plan. Trade and customs legislation can ban the importation of products and materials from producers and businesses that do not prevent child and forced labour or prohibiting the importation of goods produced by child and forced labour. As large consumers of goods and services, governments can also ensure that their own procurement process is informed by adequate vigilance and excludes providers of goods and

services that are not transparent about their supply chains or do not practice robust due diligence throughout those chains.[4] Indeed, consistent with international guidance, states are encouraged to adopt a "smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights".[5] Legislative measures are only one part of that mix.

[4] See, e.g., Anni Lietonen and Natalia Ollus (2021). *Labour Exploitation and Public Procurement. Guide for risk management in national supply chains*. HEUNI. The European Institute for Crime Prevention and Control. Available: https://heuni.fi/-/procurement-guide.

[5] OHCHR (2011). *Guiding Principles on Business and Human Rights*, p. 4.

PART 1 – Context and Background

1. The Canadian Legislative and Policy Landscape

In the past 20 years, the Canadian government, along with the private and voluntary sectors, have led a range of initiatives to strengthen corporate social responsibility, especially for the activities of the Canadian extractive sector abroad. For example, in 2005, the House of Commons Standing Committee on Foreign Affairs and International Trade expressed its concern that Canada did not have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of indigenous peoples.[6] The Committee recommended that clear legal norms be established in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies. It called for strong mechanisms for monitoring the activities of Canadian mining companies in developing countries and for dealing with complaints alleging socially and environmentally irresponsible conduct and human rights violations.[7]

In 2007, the Report of the Advisory Group of the National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries recommended the development of a CSR Framework.[8] The framework would include, *inter alia,* CSR standards and corporate reporting obligations in line with those of the Global Reporting Initiative (GRI),[9] the creation of an independent Ombuds office to provide advisory, fact-finding and reporting services for complaints about the activities of Canadian extractive companies in developing countries, and the creation of a tripartite Complainant Review Committee to act on the Ombuds office findings and recommend appropriate measures for corporate non-compliance, including the potential withdrawal of government support.

A decade later, in 2018, a report by the *Standing Committee on Foreign Affairs and International Development* made seven recommendations to the Government of Canada to encourage businesses to address child labour and forced labour in their supply chains, including through legislative and policy

[6] Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade: *Mining in Developing Countries and Corporate Social Responsibility*, 2005. Available: https://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14. See also: Government Response to the Fourteenth Report of the Standing Committee on Foreign Affairs and International Trade, 2005. Available: https://www.ourcommons.ca/DocumentViewer/en/38-1/FAAE/report-14/response-8512-381-179.

[7] See also: Catherine Coumans (2019). Minding the "governance gaps": Re-thinking conceptualizations of host state "weak governance" and re-focussing on home state governance to prevent and remedy harm by multinational mining companies and their subsidiaries, *The Extractive Industries and Society* 6, 675-687.

[8] Advisory Group Report, *National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries*, March 29, 2007. Available: https://miningwatch.ca/sites/default/files/RT_Advisory_Group_Report.pdf.

[9] The GRI standards are available: https://www.globalreporting.org/. Canada has endorsed these standards as part of its CSR strategy. See also: Penelope Simons, Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses (2015). *Canadian Business Law Journal*, 56(2), 167.

initiatives.[10] The Committee recommended prioritizing the elimination of child labour and forced labour in Canada's international development assistance by improving access to quality education for children and adults affected by child and forced labour and developing law enforcement and judicial capacity to bring those responsible for forced and child labour to account; discussing child labour and forced labour as part of free trade negotiations and review; and developing strategies, laws and policies to incentivize businesses to eliminate the use of child labour, in particular, in their global supply chains.[11]

National Strategies

Canada's enhanced CSR Strategy, "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" adopted in 2014 built on the experience and best practices gained since the first CSR strategy in 2009, "Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector Abroad."[12] In January 2018, a Multi-Stakeholder Advisory Body (MSAB) on Responsible Business Conduct (RBC) was created to advise the federal government on the effective implementation and further development of its laws, policies and practices addressing business and human rights and responsible business conduct for Canadian companies operations abroad in all sectors, although short-lived becoming defunct in 2019.[13] In July 2020, a Horizontal Evaluation of Canada's Enhanced CSR Strategy found it dated and made several recommendations for its renewal.[14] Global Affairs Canada undertook a review of the Strategy and

[10] M. Levitt and A. Vandenbeld (2018*). A call to action: Ending the use of all forms of child labour in supply chains*. Canada, Parliament, House of Commons, Standing Committee on Foreign Affairs and International Development. Available: https://www.ourcommons.ca/Content/Committee/421/FAAE/Reports/RP10078750/faaerp19/faaerp19-e.pdf.

[11] Ibid, Recommendations 1-7, pp. 23-44.

[12] *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*. Available: https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf. The Government of Canada also published an implementation guide: Industry Canada, *Corporate Social Responsibility (CSR): An Implementation Guide for Canadian Businesses*, 2014. Available: https://www.ic.gc.ca/eic/site/csr-rse.nsf/vwapj/CSRImplementationGuide.pdf/$file/CSRImplementationGuide.pdf and a CSR checklist to assist companies to plan for and mitigate potential environmental, social and ethical challenges they may encounter: Government of Canada, *Corporate Social Responsibility (CSR): Checklist for Canadian Mining Companies Working Abroad*, 2015. Available: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/pdf/Corporate%20Social%20Responsibility%20Checklist_e.pdf. In 2017, the Office of the Extractive Sector Corporate Social Responsibility Counsellor, Global Affairs Canada published a tool to help companies find and understand Government of Canada standards about the social and environmental performance of Canadian extractive companies operating abroad. This includes standards on corporate governance, social, environmental and labour issues: *CSR Standards Navigation Tool for the Extractive Sector*. Available: https://www.international.gc.ca/csr_counsellor-conseiller_rse/assets/pdfs/csr-nav-en.pdf. There are numerous academic and civil society commentaries assessing the limitations of the CSR Strategy. See, e.g., Penelope Simons (2015). Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses. *Canadian Business Law Journal*, 56(2), 167-207.

[13] All civil society and labour union representatives resigned in protest in mid-2019 due to their stated loss of confidence in the Canadian Government's commitment to international corporate accountability when the Government backtracked on its promise to grant more comprehensive investigatory powers to the Canadian Ombudsperson on Corporate Responsibility (CORE). Kairos (11 July 2019). Government of Canada turns back on communities harmed by Canadian mining overseas, loses trust of Canadian civil society. Available: https://www.kairoscanada.org/government-canada-turns-back-communities-harmed-canadian-mining-overseas-loses-trust-canadian-civil-society.

[14] Diplomacy Trade and Corporate Evaluation Division, Global Affairs Canada (July 2020). *Horizontal Evaluation of Canada's Enhanced Corporate Social Responsibility (CSR) Strategy: Final Report*. Available: https://www.international.gc.ca/gac-amc/assets/pdfs/publications/evaluation/2020/csr-evaluation-rce-eng.pdf.

completed a broad consultation process with a diverse range of stakeholders, including a formal public engagement process.[15]

In 2018, Canada and the Governments of Australia, New Zealand, the United Kingdom, and the United States launched the Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains, following their 2017 Call to Action to End Forced Labour, Modern Slavery[16] and Human Trafficking.[17] Canada's "National Strategy to Combat Human Trafficking 2019-2024" recognizes that the Government of Canada should work with its industry partners to encourage ethical conduct and prevent child labour and forced labour in federal procurement supply chains.[18] Still, it has been noted by the OECD that Canada lacks a National Action Plan on Business and Human Rights or for Responsible Business Conduct.[19]

Legislative Attempts

There have been seven unsuccessful legislative attempts,[20] initiated by private members to address the question of corporate social responsibility, including modern slavery.[21] These include:

- In 2009, ***Bill C-300***: *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*[22] was introduced aiming to promote environmental best practices and compliance with international human rights standards by Canadian corporations engaged in the extractive sector (mining, oil or gas activities) in developing countries. The bill contained provisions that would have authorized the Canadian government to receive complaints, including

[15] For the main findings of the consultation, see: Global Affairs Canada (2021). *What we heard report: Canada's strategy for responsible business conduct abroad*. Available: https://www.international.gc.ca/trade-commerce/consultations/responsible_business-conduit_responsable/report-rapport.aspx?lang=eng.

[16] Modern slavery is not a legal term, nor is it defined in international law. It is a colloquial and umbrella term that is used to refer to situations of exploitation, generally encompassing child labour, forced labour, human trafficking, slavery, and forced marriage.

[17] *Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains*: https://www.state.gov/wp-content/uploads/2019/03/286369.pdf.

[18] Government of Canada. *National Strategy to Combat Human Trafficking 2019-2024*, at pp. 8-9. See also pp. 21, 23. Available: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2019-ntnl-strtgy-hmnn-trffc/index-en.aspx.

[19] OECD. (2019). *OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews CANADA*, at p. 20. Available: https://mneguidelines.oecd.org/Canada-NCP-Peer-Review-2019.pdf.

[20] While beyond the scope of this guide, there are several excellent analyses of these failed legislative attempts. See, e.g., Catherine Coumans (2019). Minding the "governance gaps": Re-thinking conceptualizations of host state "weak governance" and re-focussing on home state governance to prevent and remedy harm by multinational mining companies and their subsidiaries. *The Extractive Industries and Society*, 6(3), 675-687; Uwafiokun Ibidudia and Cynthia Kwakyewah (2018). Analysis of the Canadian national corporate social responsibility strategy: Insights and implications, *Corporate Social Responsibility and Environmental Management*, 25, 928–938; Penelope Simons and Audrey Macklin (2014). *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage*. Routledge.

[21] Enacting a Modern Slavery Law, whether a supply chain transparency law and/or a broader due diligence law, is likely to be more complicated in a federal constitutional structure like Canada where there are overlapping spheres of law-making responsibilities between levels of government and where both levels of government potentially might enact laws or other policy instruments regulating certain sectors or industries. Still, the enactment of a Modern Slavery Law arguably falls within Canada's federal government law-making powers on trade and commerce and/or criminal law, respectively sections 91(2) and 91(27) of the *Constitution Act of 1867*. Some of the proposed laws for Canada have been vetted by legal experts to ensure their constitutionality.

[22] On the text and legislative history (2009-2010) of this bill, see: https://openparliament.ca/bills/40-3/C-300/.

from non-Canadian citizens in developing countries, and to publicly report on its investigation of these complaints. It would also have authorized the Canadian government to issue sector-specific guidance on corporate accountability standards.

- In 2009, ***Bill C-354*** *An Act to amend the Federal Courts Act (international promotion and protection of human rights),*[23] inspired by the *Alien Tort Statute* in the USA, proposed to amend to *Federal Courts Act* to permit a person who is not a Canadian citizen to initiate tort claims for alleged violations of international law (customary and treaty) for acts occurring outside Canada.

- In 2013, ***Bill C-486***: *An Act respecting corporate practices relating to the extraction, processing, purchase, trade and use of conflict minerals from the Great Lakes Region of Africa* (the *Conflict Minerals Act)*[24] sought to require applicable Canadian companies to exercise due diligence in their supply chains, largely following the OECD five-step framework for responsible supply chains of minerals from conflict-affected and high-risk areas, and to report annually on these due diligence measures. The proposed legislation would have required the Government of Canada to publicly report on the due diligence reports.

- In 2014, ***Bill C-584***: *An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries*[25] would have created an Ombuds office mandated to receive obligatory reports from applicable Canadian corporations engaged in extractive activities in developing countries; to issue guidelines on best practices for those extractive activities and to monitor corporate compliance with the guidelines; to receive and inquire into complaints concerning extractive activities in developing countries; and to annually report to parliament with a view to promoting and protecting Canada's international human rights commitments and environmental best practices.

- In 2018, ***Bill C-423****: An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff*, proposed the first of three iterations of a *Modern Slavery Act* focusing on the elimination of child labour and forced labour in global supply chains.[26] This bill lapsed and was followed in early 2020 by an almost-identical Senate-introduced **Bill S-211**: *An Act to enact the Modern Slavery Act and to amend the Customs Tariff,* which also lapsed.[27] The third iteration, **Bill S-216**: *An Act to enact the Modern Slavery Act*

[23] On the text and legislative history (2009-2010) of this bill, see: https://www.parl.ca/LegisInfo/en/bill/40-2/c-354.
[24] On the text and legislative history (2013-2014) of this bill, see: https://www.parl.ca/LegisInfo/en/bill/41-1/c-486.
[25] On the text and legislative history (2014) of this bill, see: https://www.parl.ca/LegisInfo/en/bill/41-2/C-584.
[26] On the text and legislative history (2018) of this bill, see: https://www.parl.ca/legisinfo/en/bill/42-1/c-423.
[27] On the text and legislative history (2020) of this bill, see: https://www.parl.ca/legisinfo/en/bill/43-1/s-211.

and to amend the Customs Tariff [28] also lapsed in 2021.[29] In November 2021, it was succeeded by **Bill S-211**, An Act to enact the *Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff* (2021).

The Bill S-216 proposed *Modern Slavery Act,* had it been enacted, would have created a mandatory regular reporting requirement for applicable companies on the measures they took to prevent and reduce the risk of forced labour or child labour in their supply chains. It would have created a government inspections regime via the Minister of Public Safety and Emergency Preparedness to monitor and enforce this reporting obligation. And it would have amended the *Customs Tariff* to enable the prohibition of imported goods manufactured, wholly or partly, by forced or child labour. The proposed legislation adopted a comprehensive rather than sector-specific approach applying to business entities broadly defined.[30] The bill did not reference global supply chains but proposed measures that would have applied to companies that produce or sell goods in Canada or elsewhere, that import goods produced outside of Canada into Canada, or that control an entity engaged in one of these activities.[31]

Other Proposals and Initiatives

In addition to the bills mentioned above, the academic, voluntary, and professional sectors have proposed model regulatory frameworks. In 2019, the International Justice and Human Rights Clinic at the UBC Allard School of Law proposed a model bill for transparency in supply chains calling on the federal Government to establish "…an Ombudsperson for Transparency in Supply Chains, a supply chain human rights reporting requirement, and a statutory duty of care requiring Canadian businesses [over a certain threshold to] take reasonable steps to avoid the use of forced labour, child labour, and human trafficking in their operations abroad."[32] In May 2021, the Canadian Network on Corporate Accountability (CNCA) and its 39 member

[28] On the text and legislative history (2020-2021) of this bill, see: https://www.parl.ca/legisinfo/en/bill/43-2/S-216.

[29] Since completing the research for this Guide, a fourth iteration in the form of another Private Members' Bill, *Bill S-211 (An Act to enact the Fighting against Forced Labour in Supply Chains Act and to amend the Customs Tariff)*, was introduced in the Senate on 24 November 2021. While similar to previous iterations, especially Bill S-216, the new Bill represents a shift in nomenclature (no longer using the frame of a Modern Slavery Act) and aims to impose reporting obligations on Government institutions comparable to, and in addition to, those that will be imposed on private business entities to prevent and reduce forced labour and child labour in supply chains. The bill is available: https://www.parl.ca/legisinfo/en/bill/44-1/s-211. For a succinct summary of the S-211 enhancements (a more detailed definition of child labour, application to government institutions, application to distributors, and changes to reporting obligations), see: Stephen A. Pike (8 December 2021). Bill S-211: Canada gets ready to join the fight against forced labour and child labour in supply chains. Gowling WG. Available: https://www.lexology.com/library/detail.aspx?g=2dacee5f-6dd7-4459-8a66-be93a5d899c7.

[30] It was noted that, in Canada, pursuant to section 91 of the Constitution Act, 1867, the federal government is responsible for regulating trade and commerce, but section 92 states that the provinces have the power to adopt laws regarding property and civil rights in the province. The obligation for large businesses to be accountable in Bill S-211 would clearly have implications for provincial jurisdictions.

[31] For a discussion of the perceived limitations of Bill S-216, see, e.g., CNCA (11 May 2021). Top 3 Reasons Why Canada's Proposed Modern Slavery (Reporting) Act Misses the Mark. Available: https://cnca-rcrce.ca/2021/06/29/pdf-top-three-reasons-why-bill-s-216-canadas-modern-slavery-reporting-act-misses-the-mark/; Above Ground (2021). Creating Consequences: Canada's Moment to Act on Slavery in Global Supply Chains. Available: https://aboveground.ngo/creatingconsequences/.

[32] International Justice and Human Rights Clinic (2019). *Transparency in Supply Chains Act: A proposed model Bill*, p. 2. Available: https://allard.ubc.ca/sites/default/files/2021-03/TSCA_proposed_model_bill_with_cover-FINAL.pdf.

organizations published a model mandatory human rights due diligence law."[33] The aim of the model law "… is to prevent, address, and remedy adverse human rights impacts connected to the overseas business activities of Canadian-linked companies" while obliging these companies "… to prevent harm and to implement human rights due diligence procedures." The model law also provides for "… liability – and access to remedy – if a company fails to fulfill those obligations".[34] In late 2021, the Canadian Bar Association launched its guide for lawyers on Business and Human Rights, identifying business and human rights as an emerging national and international legal practice area.[35]

Other Relevant Legislation and Regulations

In addition to these legislative efforts and proposed regulatory frameworks, Canada criminalizes trafficking in persons, which includes trafficking for the purpose of labour exploitation.[36] Other initiatives relating to corporate social responsibility in global supply chains include the *Extractive Sector Transparency Measures Act,* enacted in 2014 and brought into force in July 2015, which aimed to increase transparency and deter corruption in the extractive sector by requiring extractive entities active in Canada to publicly disclose, on an annual basis, specific payments made to all governments in Canada and abroad.[37]

The *Canada-United States-Mexico Agreement,* which came into force in July 2020, has a labour chapter encompassing various protections.[38] To comply with the agreement, Canada amended its *Customs Tariff Act*, enforced by the Canada Border Services Agency, to prohibit the importation of goods produced wholly or in part by forced or compulsory labour.[39]

Moreover, in view of the human rights violations reported in the Xinjiang Uyghur Autonomous Region, Global Affairs Canada has issued a business advisory and requires businesses whose supply chains are

[33] Canadian Network on Corporate Accountability (2021). *Corporate Respect for Human Rights and the Environment Abroad Act*. Available: https://cnca-rcrce.ca/site/wp-content/uploads/2021/05/Executive-Summary-Corporate-Respect-for-Human-Rights-and-the-Environment-Act.pdf.

[34] Ibid, Executive Summary, p. 1.

[35] Available: https://www.cba.org/Publications-Resources/Practice-Tools/Business-and-Human-Rights?lang=en-ca. The CBA previously endorsed *Model Business Principles on Forced Labour, Labour Trafficking, and Illegal or Harmful Child Labour*, Resolution 16-03-M in 2016, available: https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2016/Model-Business-Principles-on-Forced-Labour,-Labour/Model-Business-Principles-on-Forced-Labour,-Labour-Trafficking,-and-Illegal-or-Harmful-Child-Labour.pdf. Internationally, see also: *IBA Practical Guide on Business and Human Rights for Business Lawyers* (2016). Adopted by a resolution of the IBA Council 28 May 2016 International Bar Association. Available: https://www.ibanet.org/MediaHandler?id=d6306c84-e2f8-4c82-a86f-93940d6736c4.

[36] Sections 279.01-.04 of the *Canadian Criminal Code* criminalize both domestic and transnational trafficking in persons, while s. 118 of the *Immigration and Refugee Protection Act* criminalizes transnational trafficking in persons.

[37] Enacted in 2014 and coming into force June 2015. Available: https://laws-lois.justice.gc.ca/eng/acts/e-22.7/page-1.html. For an analysis of this law, see International Justice and Human Rights Clinic. (2017). *In the Dark: Bringing Transparency to Canadian Supply Chains* (Vancouver: Allard School of Law) at p. 30. Quebec has a similar law: *Act Respecting Transparency Measures in the Mining, Oil and Gas Industries.*

[38] Available: https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/labour-travail.aspx?lang=eng.

[39] Available: http://www.canadaregulatoryreview.com/canada-prohibits-goods-made-from-forced-labour-with-additional-modern-slavery-legislation-in-the-works/.

possibly implicated with Xinjiang-related entities to sign an Integrity Declaration attesting to knowledge of Canadian laws and international commitments prohibiting forced labour, committing to the exercise of due diligence, and affirming they are not sourcing products directly or indirectly from Xinjiang suppliers involved with forced labour or other human rights violations.[40] In March 2021, using the *Special Economic Measures Act*, the Government of Canada passed a regulation imposing economic sanctions on specific Chinese officials as part of a multilateral initiative together with the European Union, the UK, and the United States.

Caselaw

Precedent-setting cross-border civil lawsuits involving years of costly litigation by individual plaintiffs against parent Canadian companies for alleged human rights violations committed by their foreign subsidiaries abroad have also significantly shaped the Canadian policy landscape. While appreciating the limitations of these cases (they involved preliminary matters and were not decided on their merits; they involved individual rather than class-action lawsuits limiting the remedy to the individual plaintiffs involved; and, some involved private settlements where the details were not made public), taken together, three lawsuits in particular—*Choc v. Hudbay Minerals Inc*.; *Garcia v. Tahoe Resources Inc*; *Nevsun Resources Ltd. v. Araya*—suggest that Canadian courts are willing to "pierce the corporate veil" by granting foreign plaintiffs extraterritorial access to Canadian courts and by questioning the principle of separate legal personality between parent companies and their subsidiaries.

In 2013 in *Choc v. Hudbay Minerals Inc.,* 13 Indigenous Mayan Q'eqchi' plaintiffs alleged in three related claims that security personnel employed by *Hudbay's* subsidiaries in Guatemala committed serious human rights abuses against them in 2007 and 2009, including killing, gang rapes, and permanent injury.[41] The Ontario Superior Court of Justice rejected *Hudbay's* motions to dismiss the plaintiffs' claims, with *Hudbay* arguing there was no cause of action.[42] Much of the court's judgment rested on its analysis of the tort of direct negligence and whether *Hudbay* owed a novel duty of care, as a parent corporation, for the activities of its foreign subsidiaries in Guatemala. The court found that a *prima facie* duty of care existed allowing for a merits-based trial against *Hudbay* to proceed.[43] While not establishing a precedent for other jurisdictions, like the other two cases that follow, public statements made by *Hudbay* about its voluntary corporate responsibility commitments and efforts by the Canadian Government to ensure "high standards of voluntary social responsibility" were important considerations in this case.[44]

[40] Available: https://www.international.gc.ca/global-affairs-affaires-mondiales/news-nouvelles/2021/2021-01-12-xinjiang-declaration.aspx?lang=eng.

[41] *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414, paras 1-7.

[42] Ibid, paras 14-23, 86-87.

[43] Ibid, paras 70-75.

[44] Ibid, paras 68, 73. For a more detailed case analysis, see, e.g., Shin Imai, Bernadette Maheandiran, and Valerie Crystal (2014). Access to Justice and Corporate Accountability: A Legal Case Study of HudBay in Guatemala. *Canadian Journal of Development Studies* 35(2), 285-303;

In 2017 in *Garcia v. Tahoe Resources Inc.,* the BC Court of Appeal (BCCA) overturned the British Columbia Supreme Court's (BCSC) decision to grant a *forum non conveniens* application by Tahoe Resources.[45] In 2014 the seven Guatemalan plaintiffs commenced a civil suit in the BCSC against *Tahoe Resources*, a Canadian parent company, seeking damages for the actions of its wholly-owned subsidiaries in Guatemala.[46] It was alleged that in 2013 the *Tahoe* subsidiaries hired private security personnel to protect the Escobal mine who then shot and injured the seven plaintiffs protesting the mine construction. The plaintiffs brought three causes of action against *Tahoe Resources* for negligence, direct battery, and vicarious liability for battery for the excessive force used by the security personnel.[47] While *Tahoe Resources* conceded the BCSC had jurisdiction to hear the plaintiffs' claims, it successfully applied to have the court decline its jurisdiction on the ground the Guatemalan courts were a more appropriate forum.[48] The BCCA disagreed, reversing the earlier decision. In allowing the civil action to proceed on its merits, the BCCA considered the introduction of new evidence effectively delaying if not barring the plaintiff's access to compensation through the Guatemalan courts, along with other findings including the risk of unfairness in the Guatemalan justice system.[49] In 2019, the plaintiffs settled privately out of court with the new owner, Pan American Silver, who publicly acknowledged the protestors' human rights were violated and apologized to the victims and community on behalf of *Tahoe Resources*.[50] The BCCA decision is important because it effectively signals that Canadian courts may be a more appropriate forum, in certain circumstances, to hear civil claims by foreign plaintiffs against a parent Canadian company for the actions of its foreign subsidiaries in another country.[51]

In 2020, in *Nevsun Resources Ltd v Araya*, Canada's highest court, the Supreme Court of Canada (SCC) found that customary international law automatically forms part of Canadian law and that Canadian courts could, in the right cases, find Canadian companies responsible for violating customary international law.[52] In *Nevsun*, three Eritrean plaintiffs alleged there were forced as part of their military conscription to work at the Bisha mine construction from 2008 to 2012 where they were subject to harsh and dangerous working conditions, torture, and confinement, among other alleged abuses.[53] *Nevsun*, a

Chilenye Nwapi (2014). Resource Extraction in the Courtroom: The Significance of Choc v. Hudbay Minerals Inc for the Future of Transnational Justice in Canada*, Asper Review of International Business and Trade Law*, 14, 121-160; Susana C. Mijares Peña (2014). Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc. *University of Western Ontario Journal of Legal Studies*, 5(1) Online.

[45] *Garcia v. Tahoe Resources Inc*. 2017 BCCA 39, para 1.

[46] Ibid, paras 6-12.

[47] *Garcia v. Tahoe Resources Inc*., 2015 BCSC 2045, paras 28, 67, 76, 78, 94.

[48] Ibid, para 105.

[49] *Garcia v. Tahoe Resources Inc*. 2017 BCCA 39, paras 46, 58, 68-71, 127-130.

[50] Business and Human Rights Resource Centre. (30 July 2019). Pan American Silver Announces Resolution of Garcia v. Tahoe Case, para 5. Available: https://www.business-humanrights.org/en/latest-news/pan-american-silver-announces-resolution-of-garcia-v-tahoe-case/.

[51] See, e.g., the United Nations. (2011). *Guiding Principles on Business and Human Rights*: *Implementing the United Nations "Protect, Respect and Remedy" framework*. Commentary to Principle 26, pp. 28-30 identifying the many legal, practical, and other challenges foreign plaintiffs may face in seeking a remedy in the jurisdiction in which alleged corporate abuses occur. Available: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[52] *Nevsun Resources Ltd v Araya*, SCC 2020 5, para 132.

[53] Ibid, paras 7-15.

Vancouver-based company and majority owner of the mine, was alleged to be complicit with the Eritrean government and military in these abuses.[54] The plaintiffs sought damages in the BCSC against *Nevsun* for breaches of domestic torts and for breaches of customary international human rights law including slavery, forced labour, torture, and crimes against humanity, which they argued to be part of Canadian law.[55] In pretrial applications originating before the BSCS and then on appeal to the BCCA, *Nevsun* unsuccessfully sought to have the plaintiffs' claims dismissed.[56] On final appeal to the SCC, *Nevsun* again sought dismissal of the claims, arguing that Canadian courts were precluded "from assessing the sovereign acts of a foreign government" and contesting the applicability of the novel tort claims being asserted under customary international law.[57] In a split decision on both issues, the SCC narrowly dismissed the *Nevsun* appeal ruling the claims could proceed and remitting the case to trial.[58] Following the SCC decision, the plaintiffs settled privately with *Nevsun* out-of-court.[59] The *Nevsun* decision is considered a landmark case for Canada, and potentially for other common law countries, in relation to being able to sue corporations domestically for alleged breaches of customary international law committed abroad.[60]

In contrast to the cross-border cases above involving parent companies and their subsidiaries, a proposed class action in *Das v. George Weston Ltd.* brought on behalf of those killed and injured in the 2013 collapse of the Rana Plaza factory in Bangladesh against Loblaws and its auditing firm (Bureau Veritas) sought to impose a duty of care for a contractual supply relationship. However, in 2017 the motions court in Ontario dismissed the plaintiffs' action finding that Bangladeshi law applied and "there was no reasonable cause of action" and the Court of Appeal upheld the dismissal,[61] with the Supreme Court of Canada refusing leave to appeal. Still, as Judy Fudge describes: "Corporate liability for the harmful actions of subsidiaries and contractors is an emerging area of case law that is developing in Canada and elsewhere (UK, Germany). While the contours of the duty and the type of remedies are uncertain, it puts added pressure on business to consider their due diligence obligations".[62] Indeed, these cases highlight the tremendous importance of corporate *prevention* to avoid human rights violations in the first place and the subsequent costly and time-consuming human rights litigation that may follow[63] and the potential role that a Modern

[54] Ibid, paras 7, 17.

[55] Ibid, para 4.

[56] Ibid, paras 16-25.

[57] Ibid, para 5.

[58] Ibid, para 132.

[59] See B. Carolino, 5 November 2020, 'Nevsun settles with Eritrean plaintiffs in relation to landmark Supreme Court of Canada case', *Canadian Lawyer Magazine*, available: https://www.canadianlawyermag.com/practice-areas/litigation/nevsun-settles-with-eritrean-plaintiffs-in-relation-to-landmark-supreme-court-of-canada-case/334916.

[60] There are numerous legal commentaries. See, e.g., B. A. Walton. (2021). "International Decisions: Nevsun Resources Ltd. v. Araya. Case No. 37919". *The American Journal of International Law*, 115(1), 107-114.

[61] *Das v. George Weston Limited*, 2017 ONSC 4129 Available: https://www.canlii.org/en/on/onsc/doc/2017/2017onsc4129/2017onsc4129.pdf; *Das v George Weston Limited*, 2018 ONCA 1053 Available: https://www.canlii.org/en/on/onca/doc/2018/2018onca1053/2018onca1053.pdf.

[62] Personal communication 2 November 2021.

[63] Fred Fletcher, Rick Williams, and Ramsay Glass. (23 February 2017). British Columbia Court of Appeal Rules on Corporate Veil Case: Garcia v. Tahoe Resources Inc. Borden Ladner Gervais Insights [para Conclusion]. Available: https://www.blg.com/en/insights/2017/02/british-columbia-court-of-appeal-rules-on-corporate-veil-case-garcia-v-tahoe-resources-inc.

Slavery Law, whether a supply chain transparency law and/or a broader due diligence law, might play in encouraging such prevention.

Non-Judicial Grievance Mechanisms

In addition to existing international human rights monitoring and complaints mechanisms, Canada has two mechanisms for dispute resolution as part of the Government of Canada's approach to responsible business conduct (RBC). These include the NCP and CORE.

As an adherent to the OECD Declaration on International Investment and Multinational Enterprises, Canada has had a National Contact Point (NCP) for Responsible Business Conduct since 2000. Among its functions, the NCP provides a voluntary non-judicial grievance mechanism for "[a]ny individual, organisation, or community (stakeholders) that believes an enterprise's actions or activities are not consistent with the Guidelines may lodge a formal request for review regarding a specific instance with the NCP of the relevant country".[64] It also works to promote awareness of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and assist in implementing the OECD Guidelines by companies, including through preventing and minimizing the negative impacts of their activities on the societies in which they operate. The NCP is an interdepartmental committee composed of officials from across the federal government.[65] In 2018, the NCP underwent its first peer review by the OECD and its efficacy has been assessed by civil society organizations.[66]

In 2018, the federal government established the Canadian Ombudsperson for Responsible Enterprise (CORE),[67] appointing its first Ombudsperson to this position in 2019, with the CORE becoming fully operational to accept complaints in March 2021. Established by Order in Council,[68] the CORE is mandated to review and informally mediate complaints of alleged human rights abuses involving Canadian companies, and the entities they control, operating abroad in the garment, mining, or oil and gas sectors.[69] The complaint may be "submitted by or on behalf of an individual, organization or community" and

[64] Global Affairs Canada (14 August 2020). *Canada's National Contact Point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises*, [para 7]. Available: Canada's National Contact Point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (international.gc.ca).

[65] Global Affairs Canada (GAC), Natural Resources Canada (NRCan), Environment and Climate Change Canada (ECCC), Innovation, Science and Economic Development Canada (ISED), Employment and Social Development Canada (ESDC), Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), Finance Canada, and Public Services and Procurement Canada. The NCP has three non-governmental Social Partners, namely the Canadian Chamber of Commerce, the Canadian Labour Congress, and the Confédération des syndicats nationaux (Québec).

[66] OECD (2019), *OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: Canada* https://mneguidelines.oecd.org/ncppeerreviews.htm. For civil society assessments, see, e.g., Above Ground (2016). "Canada is Back." But Still Far Behind: An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises. Available: https://aboveground.ngo/canada-is-back-but-still-far-behind/.

[67] The mandate of the previous Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor ended in May 2018.

[68] Order in Council P.C. 2019-299. Available: https://orders-in-council.canada.ca/attachment.php?attach=38652&lang=en.

[69] Ibid, Section 2.

importantly in some instances "on the Ombudsperson's own initiative" without a complaint being filed.[70] Specific criteria have been established for Ombuds-initiated reviews that include systemic human rights abuses and the disproportionate impacts on underserved groups and communities, among other criteria.[71] The CORE is also mandated to promote the implementation of the *UNGPs* and to provide advice to Canadian companies on responsible business conduct.[72] It is empowered to advise the Minister for International Trade on issues relating to responsible business conduct for Canadian companies operating abroad.

Internationally, the CORE is considered an innovative practice and is being scrutinized as a potential promising practice by other countries. However, concerns have been expressed within Canada about its weak investigatory powers, restrictive sector-specific mandate, and a lack of transparency in the cases it receives and the outcomes of those cases.[73]

Because some human rights defenders are criminalized, harassed or subject to violations of their human rights in relation to Canadian business activities abroad, it is important to note that Canada also has since 2016, updated in 2020, Guidelines on Supporting Human Rights Defenders.[74] *Inter alia*, these guidelines recognize the need to promote responsible business conduct recognizing both the *UNGP* and the OECD Guidelines for MNE.

Select Chronology of Events: Government-Led Actions to Ensure Corporate Social Responsibility and Combat Modern Slavery in Global Supply Chains	
2000	OECD National Contact Point established.
2005	House of Commons Standing Committee on Foreign Affairs and International Trade Report on Mining in Developing Countries and Corporate Social Responsibility.
2006	Release of Corporate Social Responsibility: An Implementation Guide for Canadian Business.[75]
2007	National Roundtables on Corporate Social Responsibility (CSR) and the Canadian Extractive Industry in Developing Countries Advisory Group Report recommending a Canadian Corporate Social Responsibility (CSR) Framework.

[70] Ibid, Section 4(c) and (d). The CORE has established an online complaints system for the purpose of receiving a complaint. Access to the CORE complaint mechanism: https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng.

[71] Available: https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/news-nouvelles/initiated_reviews-exam-initiative.aspx?lang=eng.

[72] Ibid, Section 4(a) and (b).

[73] There are various Canadian civil society critiques. See, e.g., Karyn Keenan (2020). Canada's New Corporate Responsibility Ombudsperson Falls Short of its Promise, *Business and Human Rights Journal*, 5(1), 137-142. International Justice and Human Rights Clinic (2020). *Empowering the Core: Requirements for an Effective Canadian Ombudsperson for Responsible Enterprise,* available: https://allard.ubc.ca/sites/default/files/2021-02/Empowering-the-CORE-FINAL.pdf.

[74] Government of Canada (2019). *Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders*. Ottawa: Global Affairs Canada. Available: https://www.international.gc.ca/world-monde/assets/pdfs/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders-guide-defenseurs_droits_en.pdf?_ga=2.124877896.351567961.1622564701-1222798453.1622564701.

[75] Available: https://www.tei.or.th/tbcsd/csr/sharing/Guidance_on_CSR_mar2006.pdf.

Select Chronology of Events: Government-Led Actions to Ensure Corporate Social Responsibility and Combat Modern Slavery in Global Supply Chains	
2009	Corporate Social Responsibility Strategy. Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian Extractive Sector Abroad. The strategy included the establishment of a Corporate Responsibility Counsellor.[76] Private Member Bill C-300 (An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries) introduced but did not become law. Private Member Bill C-354 (An Act to amend the Federal Courts Act (international promotion and protection of human rights) introduced but did not become law.
2011	Building the Canadian Advantage: A CSR Strategy for the International Extractive Sector.
2013	Private Member Bill C-486 (An Act respecting corporate practices relating to the extraction, processing, purchase, trade and use of conflict minerals from the Great Lakes Region of Africa (the Conflict Minerals Act)) introduced but did not become law.
2014	Extractive Sector Transparency Measures Act enacted coming into force in 2015. Canada enhanced CSR strategy - Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad. Release of Corporate Social Responsibility: An Implementation Guide for Canadian Business (2014). Private Member Bill C-584 (An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries) introduced but did not become law.
2015	Release of Corporate Social Responsibility (CSR) Checklist for Canadian Mining Companies Working Abroad.
2017	Canada, together with Australia, New Zealand, United Kingdom, and the United States, endorses a Call to Action to End Forced Labour, Modern Slavery and Human Trafficking.
2018	**January**: Government of Canada announces it will create CORE. **April**: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada. **July**: Public Safety Canada launches consultation towards the development of a new national strategy to end human trafficking. Consultation paper: The Way Forward to End Human Trafficking. **September**: Quebec Securities Commission written guidance: Company Public Continuous Disclosure. **September**: Federal government apparel ethical procurement program, Policy on the Ethical Procurement of Apparel. **September**: Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains launched by 5 governments (United Kingdom, the United States, New Zealand, and Canada). **October**: Report of the House of Commons Committee on Foreign Affairs and International Development, A Call To Action: Ending The Use of All Forms of Child Labour in Supply Chains.

[76] Global Affairs Canada (26 June 2018). Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor. Available: https://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx?lang=eng.

Select Chronology of Events: Government-Led Actions to Ensure Corporate Social Responsibility and Combat Modern Slavery in Global Supply Chains	
	December: Government of Canada's response to the report of the Committee on Foreign Affairs and International Development.
	December: Private Member's Bill C-423 (Modern Slavery Act) introduced but did not become law.
2019	**April**: Canadian Ombudsperson for responsible enterprise (CORE) appointed.
	September: National strategy to combat Human Trafficking.
2020	Review of the 2014 CSR Strategy initiated.
	February: Private Member Bill S-211 (Modern Slavery Act) introduced and lapses.
	July: The Canada-United States-Mexico Agreement takes effect.
	July: Canada denounces XUAR & publishes a business advisory: China-specific measures Xinjiang.
	October: Private Member's Bill, Bill S-216 (Modern Slavery Act) introduced and lapses in 2021.
2021	**January**: federal government issues advisory on XUAR.
	March: sanctions against China under the Specific Economic Measures Act imposing sanctions on select Chinese officials.
	March: Canadian Ombudsperson for responsible enterprise (CORE) open to receive complaints.
	June: Parliamentary review of the Mandate of the Canadian Ombudsperson for Responsible Enterprise.[77]
	November: Private Member Bill S-211 (An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff) introduced in the Senate.
	December: CORE announces it will launch a study of child labour in Canadian garment companies supply chains.

2. International Policy Framework for Responsible Business Conduct

In this Guide we refer to various international norms and standards for voluntary corporate social responsibility/responsible business conduct. In addition to binding legal obligations under the *International Bill of Human Rights* and the *ILO Declaration on Fundamental Principles and Rights at Work*,[78] there are several widely recognized international soft law standards and policy guidance instruments, including the 2011 *United Nations Guiding Principles on Business and Human Rights (UNGP)*;[79] the 1976 and 2011 updated *Organisation for Economic Co-operation and Development (OECD)*

[77] See Sven Spengemann (Chair) and Peter Fonseca (Chair) (2021). *Mandate of the Canadian Ombudsperson for Responsible Enterprise, Report of the Standing Committee on Foreign Affairs and International Development*, available: https://www.ourcommons.ca/Content/Committee/432/FAAE/Reports/RP11419917/faaerp08/faaerp08-e.pdf. The Standing Committee recommended that the Government of Canada enact human rights due diligence legislation requiring Canadian companies to evaluate their (supply chain) operations abroad to ensure they do not adversely affect human rights or have other adverse environmental and gendered impacts (Recommendation 1). The Standing Committee also recommended that the Government of Canada consider *legislatively* recreating the CORE as a commissioner "with the power to compel witnesses and documents", a power that was initially promised and then withdrawn when the CORE was created (Considerations 1 and 2, pp. 1-2).

[78] The *International Bill of Human Rights*, the *ILO Declaration on Fundamental Principles and Rights at Work*, the ILO's Conventions relating to child labour and to forced labour, as well as the *ILO MNE Declaration* are foundational to most soft law instruments on business and human rights.

[79] Available: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

Guidelines for Multinational Enterprises (MNE),[80] along with the 2018 *OECD Due Diligence Guidance For Responsible Business Conduct*,[81] and OECD sector-specific guidance, especially for the mineral, garment and footwear, agriculture, and financial sectors;[82] the 2017 *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*;[83] the 2018 *OSCE Model Guidelines on Government Measures to Prevent Trafficking for Labour Exploitation in Global Supply Chains* for OSCE participating states and co-operating partners;[84] and the 2012 *International Finance Corporation's Performance Standards on Environmental and Social Sustainability*, which applies to private sector lending institutions and potentially limit access to international capital.[85]

Of these standards, the *UNGP*, the *OECD Guidelines for MNE*, and the *ILO Tripartite Declaration*, in particular, contain explicit human rights due diligence (HRDD) recommendations for governments and businesses.[86]

While the *UNGP* do not define what HRDD is, the Office of the High Commissioner for Human Rights (OHCHR) offers that:

> "In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights".[87]

In the *OECD Guidelines for MNE*, due diligence is defined as:

[80] Available: https://www.oecd.org/daf/inv/mne/48004323.pdf.

[81] Available: http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

[82] Available: http://mneguidelines.oecd.org/duediligence/.

[83] Available: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

[84] Available: https://www.osce.org/files/f/documents/1/9/371771.pdf. It is specific to human trafficking, applies only to states, and includes human rights due diligence. The *OSCE Model Guidelines'* primary focus areas are: (1) state public procurement policies; (2) guidance for states to apply transparency regulations to companies over a certain threshold applying to the entirety of their supply chain, to adopt legislation requiring companies to have a preventive policy in place and to monitor and measure company compliance with those reporting obligations extending to incentivized compliance and enforcement for non-compliance; and (3) states promoting fair and ethical labour recruitment by bolstering labour administration and inspection, along with monitoring and regulating recruitment agencies and addressing violations. Provides model laws/clauses for public procurement, transparency in supply chains.

[85] Available: https://www.ifc.org/wps/wcm/connect/c02c2e86-e6cd-4b55-95a2-b3395d204279/IFC_Performance_Standards.pdf?MOD=AJPERES&CVID=kTjHBzk. These international benchmarks also recommend that businesses respect human rights and include guidance on social *and* environmental due diligence but are not discussed further since they are specific to private sector financing.

[86] Importantly, there is also a 2018 Zero Draft of a treaty that would formalize the *UNGP* into legally binding treaty with obligations for transnational corporations to respect human rights. The 2019 revised draft is available: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

[87] OHCHR (2012). *The corporate responsibility to Respect Human Rights; An interpretive Guide*, p. 6.

> "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."[88]

The 2011 *UNGP*, implementing the UN "Protect, Respect and Remedy" Framework for Business and Human Rights,[89] articulate the states' responsibility to protect human rights, an independent and pre-emptive corporate responsibility to respect human rights, and the right of access to an effective remedy for those affected by business-related human rights abuses.[90] The *UNGP* apply to all states and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. Among other responsibilities, governments are expected to protect (prevent, investigate, punish, and address) against human rights abuses by businesses that occur on their territory or within their jurisdiction through legislative, regulatory, adjudicatory, and other measures (Principle 1). Governments are also expected to communicate their expectations for business enterprises domiciled in their territory or jurisdiction about human rights across their operations (Principle 2).

Concerning the suggested corporate responsibility to respect human rights by preventing and addressing adverse human rights impacts they are involved with (Principles 11-14), businesses are expected to adopt a policy commitment, a human rights due diligence process, and a remediation process (Principle 15). Operationalizing these commitments, Principle 17 sets out a proactive human rights due diligence responsibility for all businesses to identify, prevent, mitigate, and account for actual and potential adverse human rights impacts that result from their activities or business relationships. Principles 18-21 elaborate the essential components of this responsibility, outlining a four-step process for businesses to identify and assess adverse impacts, integrate those findings across company processes and take appropriate action, track the effectiveness of those measures and processes, and communicate to key stakeholders how impacts are addressed. Principle 22 provides that in situations where a business causes or contributes to adverse human rights impacts, they are expected to provide remediation, interpreted as encompassing a broad range of options from restitution to punitive sanctions to prevention through injunctions or guarantees of non-repetition.[91] In particular, businesses are expected to establish operational-level grievance mechanisms (Principle 29).

Recognizing the many practical and legal obstacles to accessing a remedy, governments are also expected to provide and facilitate access to effective domestic judicial *and* effective and appropriate non-judicial

[88] *OECD MNE guidelines*, p. 23.

[89] Available: https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf.

[90] *Interpretive Guide*: https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf, p. 1.

[91] See also the *Interpretive Guide*, p. 7 on the scope of this responsibility.

grievance mechanisms to address business-related human rights abuses (Principles 26 and 27).[92] Principle 31 outlines the standards for *effective* state-based and non-state-based non-judicial grievance mechanisms including that they should be legitimate, accessible, predictable, equitable, transparent, right-compatible, iterative, and based on stakeholder consultation.[93]

The *OECD Guidelines for MNE* draw on the *UNGP* and provide similar guidance for governments concerning the responsible business conduct of multinational enterprises operating in or from adhering countries (currently 38 OECD and 13 non-OECD countries).[94] The Human Rights chapter (Chapter IV) emphasizes the state responsibility to protect human rights and encourage MNEs to comply with internationally recognized human rights, to avoid causing or contributing to adverse human rights impacts, and to address those they are involved with.[95] The guidelines also suggest that MNE "carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts".[96] More generally, the guidelines establish the National Contact Points (NCPs) for Responsible Business Conduct in adhering countries, including Canada, which among other functions serve as a non-judicial grievance mechanism for adversely impacted individuals and communities for alleged company breaches of the MNE Guidelines.[97] The *OECD Due Diligence Guidance for Responsible Business Conduct* provides additional practical guidance on how governments can support MNE in implementing their due diligence responsibilities, setting out a six-step due diligence process to: (1) embed RBC in policies and management systems; (2) identify and assess actual and potential adverse impacts associated with business operations, products or services; (3) cease, prevent and mitigate adverse impacts; (4) monitor implementation and results; (5) communicate how impacts are addressed; and (6) provide for or cooperate in remediation where appropriate.[98]

Similar to the *UNGP*, the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* applies to all states and enterprises "regardless of their size, sector, operational context,

[92] See note 52 above. Modern slavery laws, encompassing supply chains transparency laws and broader due diligence laws for negative human rights impacts, are designed to remedy these complex practical and legal impediments such as extraterritorial jurisdiction, separate legal personality, and contractual privity.

[93] There are numerous critiques of the *UNGP*, including that: they privatize or download state responsibilities to protect against human rights abuses onto private corporations; they are voluntary and non-binding; there is no permanent international monitoring mechanism; they omit extraterritorial state obligations; they do not explicitly recognize the legal status of corporations as duty bearers; and, they offer victims little access to a remedy especially in the jurisdiction of a parent company. The usefulness of company grievance mechanisms has also been questioned on the basis that the companies are in a conflict-of-interests position when it comes to investigating their own conduct or that of their subsidiaries.

[94] *OECD Guidelines*, p. 3. See: https://www.oecd.org/investment/mne/oecddeclarationanddecisions.htm; https://www.oecd.org/about/members-and-partners/. As of 2020, the OECD embarked on a stocktaking study of the implementation of the guidelines: http://mneguidelines.oecd.org/.

[95] *OECD Guidelines*, Chapter IV Human Rights, p. 31.

[96] Ibid.

[97] *OECD Guidelines*, Chapter 1 Concepts and Principles, para 11, p. 18. See also *Canada CSR Checklist for Canadian Mining Companies Working Abroad*, 2015, p. 59.

[98] *OECD Due Diligence Guidance for Responsible Business Conduct*, p. 5.

ownership and structure."[99] The corporate responsibility to respect human rights includes that enterprises "avoid causing or contributing to adverse impacts through their own activities, and address such impacts when they occur; and 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."[100]

The *Declaration* further suggests that enterprises 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" minimally including the *International Bill of Human Rights* and the *ILO Declaration on Fundamental Principles and Rights at Work*.[101] And in gauging human rights risks, enterprises "should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships", ideally in meaningful consultation with "potentially affected groups and other relevant stakeholders including workers' organizations."[102] In 2016, the ILO also adopted a resolution concerning decent work in global supply chains, recommending *inter alia* that governments establish due diligence procedures for state owned or controlled enterprises across their supply chains.[103] The resolution further suggests that governments help enterprises "to identify sector-specific risks and implement due diligence procedures in their management systems", in addition to requiring them to report on due diligence in their supply chains including how they addressed human rights impacts, as well as establishing grievance mechanisms for workers.[104]

Canada has ratified the eight fundamental International Labour Conventions, including those for the elimination of all forms of forced or compulsory labour and the effective abolition of child labour.

International Labour Organization

MNE Declaration and Relevant International Standards

The Governing Body of the International Labour Organization approved the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy at its 204th Session (November 1977) and subsequently amended it at its 279th Session (November 2000), 295th Session (March 2006), and 329th Session (March 2017).

The principles laid down in the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) offer guidelines to multinational enterprises, governments, and

[99] *ILO Tripartite Declaration of Principles*, p. 5.

[100] Ibid.

[101] Ibid.

[102] Ibid.

[103] Available: https://www.ilo.org/ilc/ILCSessions/previous-sessions/105/texts-adopted/WCMS_497555/lang--en/index.htm, para 16(d), p. 4.

[104] Ibid, paras 16(e-f), and 18. The resolution recommends that "Governments should also clearly communicate on what they expect from enterprises with respect to responsible business conduct and could consider whether further measures, including regulation, are needed if these expectations are not met" (para 16e).

International Labour Organization MNE Declaration and Relevant International Standards
employers' and workers' organizations in such areas as employment, training, conditions of work and life, and industrial relations. This guidance is founded on principles contained in international labour conventions and recommendations. Convention No. 29 - Forced Labour Convention, 1930 and 2014 protocol - Protocol of 2014 to the Forced Labour Convention, 1930; and Recommendation No. 35 - Forced Labour (Indirect Compulsion) Recommendation, 1930 Convention No. 105 - Abolition of Forced Labour Convention, 1957 Recommendation No. 203 - Forced Labour (Supplementary Measures) Recommendation, 2014 Convention No. 138 - Minimum Age Convention, 1973, and Recommendation No. 146 - Minimum Age Recommendation, 1973 Convention No. 182 - Worst Forms of Child Labour Convention, 1999, and Recommendation No. 190 - Worst Forms of Child Labour Recommendation, 1999

In 2013, the Committee on the Rights of the Child released its General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights.[105] It sought to provide states with a framework for implementing the *Convention on the Rights of the Child* as a whole with regard to the business sector whilst focusing on specific contexts where the impact of business activities on children's rights can be most significant. The Committee explained that duties and responsibilities to respect the rights of children extend beyond the State and apply to private actors and business enterprises. Therefore, it stressed that "all businesses must meet their responsibilities regarding children's rights and States must ensure they do so".[106] It also mentioned "value chains" and global supply chains and recommended that states should "encourage larger companies to use their influence over small and medium-sized enterprises to strengthen children's rights throughout their value chains".[107] It recommended that states cooperate with investigations and enforcement of proceedings in other states and "enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned".[108]

The 2012 Children's Rights and Business Principles[109] are also relevant to business due diligence obligations in relation to children's rights and child labour. The Principles developed by UNICEF, the UN Global Compact, and Save the Children endorse the *UNGP* and aspire to be a key reference point for

[105] Available: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f25&Lang=en.

[106] Ibid, para 8.

[107] Ibid, para 74.

[108] Ibid, para 44.

[109] Available: https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FCRBP%2FChildrens_Rights_and_Business_Principles.pdf.

existing and future voluntary and other initiatives on business and children, and to promote multi-stakeholder collaboration. The Principles identify a range of actions that all businesses should take to prevent and address any adverse impact on children's human rights and to help advance children's rights.

Similarly, the FAO Framework on Ending Child Labour in Agriculture stresses that "(…) every actor along the agricultural supply chain, from farmers, to traders, investors and consumers, has a critical role to play. Eliminating child labour should be an integral part of how business is conducted and how crops and other products are produced."[110]

There are also some relevant regional standards, such as the *EU Non-Financial Reporting Directive*,[111] the *EU Timber Regulation*,[112] and the *EU Conflict Minerals Regulation*.[113]

Canada also actively takes part in various UN human rights monitoring processes, including the 2012 Committee on the Rights of the Child;[114] the 2015 Human Rights Committee;[115] the 2016 Committee on Economic, Social and Cultural Rights;[116] the 2017 UN Working Group on Business and Human Rights;[117] and the 2018 UN Human Rights Council periodic review process[118] each of which has separately recommended that Canada adopt legislative and other regulatory measures to strengthen corporate responsibility for human rights abuses committed abroad especially in relation to the extractive sector, and to provide extraterritorial victims of such abuses with access to a remedy in Canada.

[110] Food and Agriculture Organization of the United Nations (2020). FAO Framework on Ending Child Labour in Agriculture. Available: http://www.fao.org/3/ca9502en/ca9502en.pdf.

[111] Available: https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en.

[112] Available: https://ec.europa.eu/environment/forests/timber_regulation.htm.

[113] Available: https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/.

[114] Available: https://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-CAN-CO-3-4_en.pdf, paras 28-29, *inter alia* recommending that Canada establish a clear regulatory framework for the extractive sector operating abroad to prevent adverse environmental and human rights impacts and to ensure there are appropriate sanctions and remedies when violations occur, especially in relation to children's rights.

[115] Available: https://www.ohchr.org/en/countries/lacregion/pages/caindex.aspx, para 6, recommending that Canada strengthen its existing mechanisms, consider establishing an independent mechanism to investigate business-related human rights abuses committed abroad, and develop a legal framework that provides access to remedies for the victims of business-related human rights related abuses committed abroad.

[116] Available: http://socialrightscura.ca/documents/international/CESCR%20COs%202016.pdf, paras 15-16, recommending *inter alia* that Canada strengthen its legislative regulation of Canadian corporations operating abroad requiring them to conduct human rights impact assessments, introduce an effective complaints mechanism, and adopt legislative measures to facilitate access to a remedy via Canadian courts.

[117] Available: https://www.ohchr.org/en/countries/lacregion/pages/caindex.aspx, paras 74-86, offering recommendations to the government, business and NGOs, including that the government adequately resource the Office of the Canadian Ombudsperson for Responsible Enterprise; ensure the independence of its multi-stakeholder advisory body; enhance the effectiveness of the NCPs to provide a remedy; clarify the respective roles of the CORE and the NCPs; ensure that future trade and investment agreements include environmental, human rights, and labour safeguards; work with provincial/territorial governments to strengthen access to judicial and non-judicial remedies; encourage businesses to adopt operational-level grievance mechanisms; address barriers for victims of business-related human rights abuses abroad to seek a remedy in Canada; and, develop a gender-sensitive action plan to address all three *UNGP* pillars.

[118] Report of the Working Group, Available: https://www.ohchr.org/EN/HRBodies/UPR/Pages/CAindex.aspx, para 142.93, recommending among other things that Canada adopt additional measures to ensure the accountability of transnational corporations for human rights abuses in their supply chains committed abroad; strengthen measures to ensure access to justice and remedies for those whose rights are violated by transnational corporations (para 142.94); and, develop a national action plan for business and human rights (paras 142.98-100).

PART 2 – Corporate Transparency and Due Diligence Legislation to Prevent Child Labour and Forced Labour

Early corporate social responsibility laws appeared in the 2010s and focused on creating disclosure obligations for corporations without specific due diligence obligations. Some of these laws were issue specific (e.g., child labour, or modern slavery) while others were sector specific (e.g., mining or resource extraction). Due diligence laws impose an affirmative obligation and require companies to take reasonable steps and/or exercise a duty of care to *identify and prevent* human rights violations, adverse environmental impacts in their operations, or corruption. In recent years, there seems to be a growing interest in adopting more encompassing legislation creating specific due diligence obligations (a duty of vigilance) that would also apply to all sectors. The due diligence obligations in question are defined in relation to human rights risks, environmental risks, and governance/corruption risks. Child and forced labour are covered in these laws as a form of human rights violation to be prevented in all instances, throughout the businesses' supply/value chain.

There is unfortunately very little data on the effectiveness of any of these approaches. In fact, the enactment of legislation with explicit due diligence obligations (e.g., France) are very recent and their impact cannot yet be assessed. Therefore, the present Guide does not make any assumption about which type of legislation may be most effective in preventing child and forced labour.

The present guide focuses on one set of issues, child and forced labour, and the various legislative options discussed therein are considered from that particular perspective. We understand, however, that an argument can be made in favour of broader corporate due diligence laws.

This second part of the Guide covers six areas to be addressed in a corporate transparency and due diligence legislation with respect to the prevention of child labour and forced labour:

- The purpose, scope and application of the legislation
- The designation of the entities to be covered by the legislation
- Creating disclosure and reporting obligations
- Creating specific due diligence and accountability obligations
- Complaints and grievance mechanisms, and potential remedies
- Responsibility for the administration and enforcement of the law. The specific due diligence obligations imposed by the legislation

1. Purpose, Scope and Application of the Legislation

Internationally, supply chains transparency and due diligence laws state their objectives either in terms specifically combatting child and forced labour or more broadly in terms of ensuring that business entities

fulfil their duty to respect human rights.[119] All laws aim to create an obligation on certain business entities to report on their activities, throughout their supply chain, to prevent and respond to certain human rights abuses. All of them aim, implicitly or explicitly, to encourage or compel a certain class of business entities to undertake some due diligence measures. In some instances, such as the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability,[120] the purpose of the law extends beyond the protection of various human rights to the protection of the environment and the prevention of corruption.

> "This Directive is aimed at ensuring that undertakings under its scope operating in the internal market fulfil their duty to respect human rights, the environment and good governance and do not cause or contribute to potential or actual adverse impacts on human rights, the environment and good governance through their own activities or those directly linked to their operations, products or services by a business relationship or in their value chains, and that they prevent and mitigate those adverse impacts." (Article 1(1), Proposed Directive on Corporate Due Diligence and Corporate Accountability, European Parliament resolution of 10 March 2021).

In addition to specifying the due diligence and reporting duties of certain business entities, some legislation also aims to ensure that business entities can be held accountable and liable for their actions and that victims have access to legal remedies.

> "This Directive further aims to ensure that undertakings can be held accountable and liable in accordance with national law for the adverse impacts on human rights, the environment and good governance that they cause or to which they contribute in their value chain, and aims to ensure that victims have access to legal remedies." (Article 1(3), Proposed Directive on Corporate Due Diligence and Corporate Accountability, European Parliament resolution of 10 March 2021).

Bill S-216 defined the purpose of the proposed legislation in terms of Canada's fight against modern slavery, but did not define "modern slavery":

> "The purpose of this Act is to implement Canada's international commitment to contribute to the fight against modern slavery through the imposition of reporting obligations on entities involved in the production of goods in Canada or elsewhere or in the importation of goods produced outside Canada."

[119] Our focus in this Guide is on global supply chains, while we recognize that child and forced labour and other human rights and environmental abuses can occur in the context of local supply chains within a country. See, e.g., Anni Lietonen Anniina Jokinen Natalia Ollus (2020). *Navigating through your supply chain Toolkit for prevention of labour exploitation and trafficking*. HEUNI. Available: https://heuni.fi/documents/47074104/0/ENG-Toolkit-for-Responsible-Businesses_Web_04062020.pdf/5a171fa6-9d3a-4ec6-f03e-b8fa21bdb0e0/ENG-Toolkit-for-Responsible-Businesses_Web_04062020.pdf?t=1607952949690.

[120] European Parliament, 'Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability' (2020/2129(INL)). Available: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf.

The main stated objective of the legislation is to impose a reporting obligation on certain entities but implies in so doing that these entities must practice some due diligence throughout their supply chain to prevent forced labour and child labour. The specific focus of the reporting is on how entities prevent the risk that forced labour or child labour is used at any step of the production of goods in Canada or elsewhere by the entity or of goods imported into Canada by the entity. Child labour and forced labour are defined by specific reference respectively to the 1999 *Worst Forms of Child Labour Convention*, and the 1930 *Forced Labour Convention*.

Like other modern slavery transparency in supply chain laws, Bill S-216, focuses narrowly on forced labour and child labour. A Canadian law that would more comprehensively address adverse human rights and environmental impacts would be more consistent with previously proposed (failed attempts to enact) Canadian legislation concerning corporate accountability in the extractive sector for internationally protected human rights, especially serious human rights abuses, and environmental best practices. Additionally, in keeping with emerging legislative practices for Europe, Canada may wish to expressly recognize its international human rights commitments, including customary international law, in the framing of its proposed law, especially instruments protecting the rights of Indigenous persons and other persons and groups in vulnerable situations.[121]

Defining the Subject Matter of the Legislation

A first step is for the policy maker or legislator to delineate the subject matter of the proposed law. This usually entails three considerations relating to whether the law will only address forced labour and child labour or cover potential abuses of other human rights, whether the law will apply only to the most serious business-related violations, and whether the law will explicitly recognize persons or groups in vulnerable situations.[122] In terms of the scope of human rights covered, the *UNGP* use the vague but intentionally broad language of "adverse human rights impacts". Specifically, *UNGP* Principle 12 takes a non-exhaustive approach specifying that the business responsibility to respect human rights

The UNGP Principle 13

The responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) 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.

[121] See, for example, the CNCA model due diligence law for Canada (*The Corporate Respect for Human Rights and the Environment Abroad Act*) which gives preambular recognition to the *UNGP* and explicitly recognizes as part of its general provisions adverse human rights impacts on the rights set out in the nine core international human rights treaties, the *United Nations Declaration on the Rights of Indigenous Peoples* and the *ILO Indigenous and Tribal Peoples Convention*, the *Declaration for the Protection of Human Rights Defenders*, the *OECD Convention on Combatting Bribery of Foreign Officials*, and the eight-core *ILO* conventions.

[122] Markus Krajewski, Beata Faracik, Claire Methven O'Brien, Olga Martin-Ortega, 2020, *Human Rights Due Diligence Legislation - Options for the EU, Briefings*. Available: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603495/EXPO_BRI(2020)603495_EN.pdf.

minimally encompasses those rights addressed by the *International Bill of Human Rights* and the *International Labour Organization's Declaration on Fundamental Principles and Rights at Work*. The Commentary to Principle 12 recognizes that businesses may need to consider additional international human rights and international humanitarian law standards, depending on the circumstances, especially in relation to operating in conflict situations. Additionally, the 2018 *Framework Principles on Human Rights and the Environment*[123] emphasize the importance and indivisibility of environmental protection, which is consistent with OECD guidance that human rights due diligence laws should cover *all* business-related adverse human rights and environmental impacts.

One can discern three distinct legislative approaches with respect to the breadth of a law's human rights coverage. These approaches encompass laws that protect against a narrow range of business-related adverse human rights impacts and laws that protect against all business-related adverse human rights impacts. Some of the enacted or proposed laws may include references to specific treaties. Many laws are issue-specific and apply to a narrow range of human rights concerns, especially child labour, forced labour, and human trafficking. Conversely, some of the more recently enacted and/or proposed laws apply broadly to all human rights and environmental impacts, which is sometimes recommended in order to "avoid legal uncertainties and the artificial separation of human rights".[124] Still, the relative effectiveness of laws that cover a narrow range of adverse business-related human rights risks compared with those that apply more broadly likely should be empirically assessed, especially as more recently enacted broadly framed laws come into force.

The following are examples of enacted and proposed supply chain laws that are issue-specific:

> **Australia** (*Commonwealth Modern Slavery Act*): specific to modern slavery, including forced labour, trafficking in persons, child labour (s. 4).
>
> **Austria** (proposed *Social Responsibility Law*): specific to forced and child labour in the garment sector (production of clothing, including shoes and textiles) (s. 2 and s. 3).
>
> **California** (*Transparency in Supply Chains Act*): specific to slavery and human trafficking (s. 2(a) and s. 3(a)).
>
> **Canada** (proposed *Modern Slavery Act – Bill S- 216*): specific to child labour and forced labour (s. 2).
>
> **Hong Kong** (proposed *Modern Slavery Ordinance*): specific to slavery and human trafficking (s. 189(12) of the amended *Crimes Ordinance*. See all the offences falling

[123] Available: https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx.
[124] Ibid, p. 5.

under 'slavery and human trafficking' in ss. 162, 163 and 165 of the amended *Crimes Ordinance*. These are based on the offences in the UK *Modern Slavery Act 2015*).

Netherlands (*Child Labour Duty of Care Act*): specific to child labour (art. 2).

New South Wales (*Modern Slavery Act*): specific to modern slavery, including any form of slavery, servitude or forced labour to exploit children, sexual servitude, trading in tissue, forced labour, forced marriage, debt bondage, trafficking, and more (s. 5 and Schedule 2).

Tasmania (proposed *Supply Chain Modern Slavery Bill*): specific to modern slavery, forced labour, child labour (s. 5(1)).

UK (*Modern Slavery Act*): specific to the prohibition of slavery, servitude, forced or compulsory labour and human trafficking (s. 54(12) and s. 2 – 3.) Aiding, abetting, counselling, or procuring any of these is also included (s. 54(12) and s. 4).

Examples of enacted and proposed supply chain laws with comprehensive human rights coverage imposing broad due diligence obligations include:

France (*Duty of Vigilance Law*): concerning serious violations of human rights and fundamental freedoms, the health and safety of persons, and the environment (art. 1). The harms covered are very broad, encompassing France's international human rights obligations and the human rights covered in the *UNGP.*

Germany (proposed *Due Diligence Act*): concerning forced labour, child labour, discrimination, violation of freedom of association, violation of occupational health and safety, problematic employment and work conditions, violation of land rights, harms to health or shelter from pollution, environmental damage, and corruption (draft point 1(b)).

Norway (proposed *Transparency Law*): is expected to cover internationally recognized human rights by referring to specific treaties, including the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, and the ILO's fundamental conventions on fundamental rights and principles at work. It will also impose special duties concerning forced labour, child labour and other collective labour rights.

Switzerland (proposed *Responsible Business Initiative*): has separate reporting and due diligence requirements, with its reporting requirement covering environmental issues (particularly CO2 targets), social issues, personnel issues, human rights, corruption (art. 964ter 1) while its due diligence requirement applies to ores and metals from conflict areas, and child labour (art. 964quinquies 1).

Scope and Application of the Legislation

A related subject matter consideration is whether a supply chain reporting and/or due diligence law should apply only to the most serious human rights impacts or violations. The *UNGP* apply to both actual and potential business-related adverse impacts (Principle 17), even though the *UNGP* recognize that businesses may need to prioritize their actions focusing first on preventing and addressing the most severe violations (Principles 14 and 24). France's *Duty of Vigilance Law* requires business entities to develop and implement a plan to identify risks and prevent severe violations and abuses of fundamental human rights and liberties and serious damage against personal health and safety or against the environment. It remains to be seen how the courts will interpret these "severe impacts" (*atteintes graves*). This concept is not defined in the French law, but the notion of "severity" from the *UNGP* may provide a basis for interpretation.[125]

Additionally, a law may include special measures to address the needs and protect the rights of persons and groups in vulnerable situations, such as Indigenous persons, national, ethnic, religious or linguistic minorities, women, children, persons with disabilities, and migrant workers (*UNGP* Commentary to Principles 3 and 12). For example, the due diligence obligations specified in a law may require entities to consult with stakeholders and identify certain groups as stakeholders. The concept of stakeholder means persons whose rights and interests may be affected by the activities of a business entity. Stakeholders include workers, local communities, children, indigenous peoples, citizens' associations and shareholders, and organisations whose statutory purpose is to ensure that human and social rights, climate, environmental and good governance standards are respected, such as trade unions and civil society organisations.[126]

Relatedly, since women experience the adverse human rights impacts of businesses differently and disproportionately, transparency and due diligence laws can be informed by the *Gender Dimensions of the Guiding Principles on Business and Human Rights* endorsed by the UN Human Rights Council and adopted by the UN General Assembly.[127]

Following the guidance of the *UNGP*, which recognize the need to protect the members of marginalized and vulnerable groups, one would expect the determination of the scope and application of a proposed law to be:

[125] Elsa Savourey and Stéphane Brabant (2021). The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption. *Business and Human Rights Journal*, 6 (1), pp. 141–152.

[126] See e.g.: Article 3(1), *Proposed Directive Corporate Due Diligence and Corporate Accountability*, European Parliament resolution of 10 March 2021 on Corporate Due Diligence and Corporate Accountability.

[127] UN Working Group on the issue of human rights and transnational corporations and other business enterprises. (2019). *Gender dimensions of the Guiding Principles on Business and Human Rights*. (41st session of the Human Rights Council: Reports; No. A/HRC/41/43). United Nations Human Rights Council. Available: A/HRC/41/43 - E - A/HRC/41/43 -Desktop (undocs.org).

- Made through multi-stakeholder consultations between governments, industries, and the voluntary sector.

- Influenced by the country context, the businesses and sectors involved, and location of the business activities (e.g., potentially in a conflict zone), all of which have different potential adverse human rights and environmental impacts (*UNGP* Principle 14).

- Informed by evidence, drawing on company records, audits, and impact assessments of known and potential risks (*UNGP* Principle 18), the results of civil litigation, as well as other sources of data related to known and potential business-related adverse human rights and/or environmental impacts.

2. The Designation of Entities to be Covered by the Legislation

A second major substantive legislative design consideration concerns the designation or listing of businesses upon which a transparency and due diligence duty is imposed; in other words, which companies or entities the law will cover. In this regard, three considerations deserve attention: (1) the nature and size of businesses the law will apply to; (2) whether the law will be sector or non-sector specific (usually in relation to some assessment of the risk of human rights violations in a specific sector or industry); and (3) which business activities the law will cover, including whether the requirement applies only to the activities of a parent company or extends to its subsidiaries and other partners across its supply/value chains.

The UNGP Principle 14

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

As the *UNGP* Principle 14 makes clear, existing international standards for businesses to respect human rights apply fully and equally to *all* transnational and other business entities regardless of their "size, sector, operational context, ownership and structure", but the means through which entities meet their reporting and due diligence responsibilities may vary and should be proportional to these factors as well as the severity of their adverse impacts. While recognizing differing capacities, a main reason for including all enterprises is that even small and medium size entities can cause or contribute to severe human rights impacts (*UNGP* Commentary to Principle 14).

Definitions of Covered Entities

The covered entities defined in the law are typically the business enterprises required to report and exercise due diligence. The definitions of covered entities may be based on various factors, including: the

type of organization and its legal form; whether the entities are private or publicly controlled/owned; the size of the business; the connection of the entities with the jurisdiction enacting the law; and the entities' supply or value chains.

With respect to due diligence obligations, the "duty-bearer" is the entity to which the regulation is targeted, and on which the main burden of compliance will fall. The "duty-bearer" will be subject to sanctions or required to make reparations of some kind in the event of non-compliance. The primary duty-bearers under regimes of this kind are corporate entities. However, the regime may be bolstered by further provisions imposing obligations (and also legal sanctions) on natural persons, such as directors.

The legislation does not need to confine its application to enterprises incorporated within their jurisdictions. It may base its transparency and due diligence regime on a range of connecting factors, including companies "doing business in" its jurisdiction, potentially giving the regime a very broad reach, with implications for the scope of due diligence obligations that potentially extend to foreign-owned groups (e.g., the 2019 Dutch *Child Labour Due Diligence Act* which provides for criminal liability and imposition of criminal penalties (up to 5 years imprisonment) for directors of companies that violate a non-compliance finding by the supervisory authority two times in 5 years). The regime may also take an "enterprise" approach in which a "controlling" or "organizing" corporate entity (e.g., a parent company of a corporate group, or a company at the top of a supply chain) is made responsible for designing and implementing a human rights due diligence system that covers the entire group. Where subsidiaries, suppliers or contractors are located in other countries, the regime has extraterritorial implications (e.g., France's *Duty of Vigilance Law)*.[128]

Type of enterprises: The type or legal form of the entity covered by the law is usually specified. For example, corporations, partnerships, unincorporated organizations, publicly owner or traded companies, and/or government or other bodies that carry out business (sell or supply goods or services, manufacture, trade, import) in the jurisdiction.

Private or public enterprises: The law may cover only private enterprises or extend to state-controlled/owned enterprises. Importantly, the *UNGP* apply to both private and state owned, controlled and substantially supported enterprises (*UNGP* Principle 4), although the type of transparency and due diligence obligations required of both private and state enterprises may be slightly different.[129]

Size of enterprises: The law may stipulate the size of the business to which it will apply and whether the same obligations will be imposed on enterprises of different sizes. Mindful of the potential regulatory and

[128] See: OHCHR, *UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies*, June 2020. Available: https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

[129] See, e.g., the newly proposed Senate Bill S-211 for Canada, which if enacted will apply to both government institutions and private businesses. Available: https://www.parl.ca/legisinfo/en/bill/44-1/s-211.

cost burdens on smaller and medium-sized companies, the legislator may confine the application of the law to only the largest of companies and corporate groups. Small and medium size enterprises may lack the capacity or face an undue burden of regulatory and other costs to fulfil their obligations under a supply chain law.[130] In this regard, the definition of a covered entity usually includes a monetary threshold stipulating a minimum annual revenue or similar figure or another threshold requirement like the number of employees. Despite the *UNGP* Principle 14 guidance, in practice, most enacted and proposed supply chain laws avoid application to very small companies, by stipulating monetary and/or employee thresholds. As noted, laws that set a lower threshold encompass more entities.

Examples of Definition of Covered Entities – Compliance Threshold

Examples of laws with a monetary threshold ranging from low to high include **New South Wales**: AUD$50 million total annual turnover; the **United Kingdom**: £36 million total annual turnover; **Australia**: AUD$100 million consolidated revenue; and **California**: US$100 million in gross receipts.

Some laws also establish a threshold on the basis of the number of individuals employed by the enterprise, at a specified time. For example, **France's** *Duty of Vigilance Law* (Article 1) includes entities employing at least 5,000 persons whose head office is located in France or any company employing at least 10,000 employees whose head office is located abroad. **Germany's** proposed law covers companies' resident in Germany with more than 500 employees, including in all affiliated companies of a parent company.

The European Parliament's Proposed Directive on Corporate Due Diligence and Corporate Accountability espouses a very broad definition of covered entities which covers large businesses, and all publicly listed small and medium-sized enterprises, as well as *high-risk* small and medium-sized undertakings. It also proposes to cover similar foreign enterprises when they operate in the Union internal market selling goods or providing services.

> Article 2
>
> 1. This Directive shall apply to large undertakings governed by the law of a Member State or established in the territory of the Union.
> 2. This Directive shall also apply to all publicly listed small and medium-sized undertakings, as well as high-risk small and medium-sized undertakings.
> 3. This Directive shall also apply to large undertakings, to publicly listed small and medium-sized undertakings and to small and medium-sized undertakings operating in high-risk sectors, which are governed by the law of a third country and are not established in the territory of the Union when they operate in the

[130] See, for example, the OHCHR (2020). *UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies*, pp. 10-11.

> internal market selling goods or providing services. Those undertakings shall fulfil the due diligence requirements established in this Directive as transposed into the legislation of the Member State in which they operate and be subject to the sanctions and liability regimes established by this Directive as transposed into the legislation of the Member State in which they operate.[131]

A 2020 OHCHR Issue Paper on legislative proposals for mandatory human rights due diligence by companies observed there are two main rationales for limiting the application of due diligence laws to larger companies:

> "The first is that these larger companies are the ones that typically present the most significant human rights-related risks, and the second is that imposing measures designed for large scale businesses on smaller enterprises is disproportionate and, where these measures may threaten the economic viability of enterprises, self-defeating. A legitimate counter argument, however, it that the business activities of privately-owned enterprises and small and medium-sized enterprises are also capable of generating serious human rights impacts and thus, if the ultimate aim of the legislation is to protect people from harm, there is no justification in limiting the scope of mandatory human rights due diligence regimes in this way."[132]

Connection with the jurisdiction: Another factor considered in defining the entities that will be covered by the law is the nature of their business' connection to the jurisdiction enacting it, such as being legally established, domiciled, or registered there, or doing business, operating, selling goods or providing services there. These connections are usually some combination of the following: (a) headquartered in the jurisdiction; (b) registered in the jurisdiction; (c) listed on a stock exchange in the jurisdiction; (d) engaged in business activities in the jurisdiction (e.g., supplies goods or services); and/or (e) has employees in the jurisdiction.

Importantly, to avoid a duplication of efforts by business entities some supply chain laws allow for exceptions exempting entities that meet their definitional criteria but are covered in the report/due diligence process of another entity or another law (as in the case of Australia where there are both state-level and national-level laws). Examples include Switzerland where an entity's report extends to any other Swiss or foreign entities that it controls (964*ter* 4). An entity is therefore exempt from reporting if it is controlled by another covered entity, or by an entity that must make an equivalent report under foreign law (art. 964*bis* 2); Tasmania where an entity does not have to prepare a statement if it is subject to

[131] *Proposed Directive on Corporate Due Diligence and Corporate Accountability*, European Parliament resolution of 10 March 2021 on Corporate Due Diligence and Corporate Accountability, Article 2.

[132] OHCHR, *UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies*, p. 11.

obligations under a law of Australia or another state (s. 24(6)); and Australia where an entity may submit a 'joint statement' for multiple entities that the entity directly or indirectly influences or controls (s. 14).[133]

Other laws introduce some flexibility in the designation of the covered entities by allowing certain changes, through regulation, in the definition of the legal identities covered, potentially exempting some (e.g., smaller or medium sized) enterprises or expanding the definition of covered entities.

Examples of enacted or proposed laws that provide expansive (applies to more parent entities) definitions of covered entities include:

> **Canada** (Bill S-216 proposed *Modern Slavery Law*): Covered entities are defined as: "A corporation or a trust, partnership or other unincorporated organization that (a) is listed on a stock exchange in Canada; (b) has a place of business in Canada, does business in Canada or has assets in Canada and that, based on its consolidated financial statements, meets at least two of the following conditions for at least one of its two most recent financial years: (i) it has at least $20 million in assets, (ii) it has generated at least $40 million in revenue, (iii) it employs an average of at least 250 employees; or (c) is prescribed by regulations." (s. 2). The Act applies to any 'entity' that (a) produces or sells goods in Canada or elsewhere; (b) imports goods into Canada that are produced outside of Canada; or (c) controls an entity engaged in any activity described in (a) or (b) (s. 5).
>
> **Netherlands** (*Child Labour Duty of Care Act*): Covered entities include a company, registered in the Netherlands or elsewhere, that sells or supplies goods or services to Dutch 'end users' (natural persons or legal entities that use/consume/purchase the good or service) (art. 4(1)). A 'company' is a company within the meaning of art. 5 of the *Trade Register Act* 2007 or *any* entity engaged in an economic activity, regardless of its legal form and how it is financed (art. 1).
>
> **United Kingdom** (*Modern Slavery Act*): Covered entities are either a body corporate (wherever incorporated) or a partnership (wherever formed) that carries on a business or part of a business in any part of the United Kingdom (s. 54(12)), if it supplies goods or services and has a total turnover no less than an amount prescribed by regulation (s. 54(2)). The current amount is £36 million.[134] The Government estimates that 9,000 – 11,000 entities are covered.[135]

[133] Canada's newly proposed Bill S-211, s. 11(2) will also allow for this option if the bill is enacted.

[134] The *Modern Slavery Act (Transparency in Supply Chains) Regulations* 2015, SI 2015/1833, s. 2, https://www.legislation.gov.uk/uksi/2015/1833/pdfs/uksi_20151833_en.pdf.

[135] Business and Human Rights Resource Centre 'Modern Slavery Registry', available at: https://www.modernslaveryregistry.org/pages/numbers_explained.

Examples of enacted and proposed laws using restrictive definitions of covered entities (applying to fewer parent entities) include:

> **France** (*Duty of Vigilance Law*) covered entities include any company which employs, at the end of two consecutive financial years, at least 5000 employees (within itself and direct or indirect subsidiaries) whose head office is located in France (art. 1). Or any company that employs at least 10,000 employees (within itself and direct or indirect subsidiaries) whose head office is located abroad (art. 1).
>
> **Germany** (proposed *Due Diligence Act*) covered entities include companies' resident in Germany with more than 500 employees (employees in all affiliated companies are included to reach the number of 500 employees for the parent company). 'Residency' means that the entity has a strong domestic connection and that management decisions are made in Germany. Merely having commercial activities in Germany is insufficient (draft point 1(a)). We note that the first sentence is not very restrictive, but the residency requirement is restrictive and vague.

It is possible for a jurisdiction to set different thresholds for covered enterprises for the purpose of defining their transparency versus their due diligence obligations; a different definition of "covered entity" for each obligation by means of a 'two definitions option". For example, Switzerland's proposed legislation would cover, for the purpose of reporting, a public interest company with an annual workforce of 500 full-time jobs and exceeds either a balance sheet total of 20 million francs, or a turnover of 40 million francs (art. 964*bis* 1). An entity's report extends to any other Swiss or foreign entities that it controls (964*ter* 4). For the purpose of setting a due diligence obligation, a covered entity includes an entity that has its headquarters, central administration, or a principal place of business in Switzerland and puts into circulation or processes in Switzerland ores/metals containing tin, tantalum, tungsten or gold that originate from conflict zones, or offers goods or services for which there is a valid suspicion of the use of child labour (art. 964*quinquies* 1).

Coverage of Business Activities

Covered entities can be 'parent' entities, meaning they have other subsidiaries and partners forming their supply/value chain. In this regard, the definition of covered entities will usually address the 'business activities' and/or 'business relationships' that are covered, especially whether extending to a parent company's foreign subsidiaries across an entire supply chain. Most disclosure and due diligence laws apply broadly throughout an entity's operations or supply chains, including in other jurisdictions, which is consistent with international guidance to both states and businesses. For instance, the *UNGP* use the language "throughout their operations" (Principles 2, 3(c), 16(e)). The *UNGP* Commentary and Interpretive Guide similarly recommends adopting broad definitions of "business activities" and "business relationships".

At the same time, the *UNGP* recognize that supply chains (or value chains) can be highly complex and frequently involve many entities, making it difficult for a parent company to report on or conduct due diligence for all entities (*UNGP* Commentary to Principle 17). In this regard, the *UNGP* recommend that businesses identify those areas significantly at risk of adverse human rights impacts and seek expertise in identifying risks throughout their operations (*UNGP* Principle 18 and Commentary to Principles 16, 17, 19, 23).

When imposing a due diligence and a reporting requirement on various entities, *UNGP* Principle 17 stipulates that they "should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be *directly* linked to its operations, products or services by its business relationships (emphasis added)". The interpretive guidance to the *UNGP* further provides that: "[b]usiness relationships refer to those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services. They include *indirect* business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures" (emphasis added).[136]

The term "supply chain" is not always explicitly defined in existing laws, but it is often described in the details of the entities' reporting or due diligence obligations. How the law defines "supply chain" determines which subsidiary entities are included in a covered entity's report and due diligence duties. Bill S-216, in Canada, proposed a relatively broad definition of the supply chain: "entities must report on any step of the production of their goods, including manufacturing, growing, extraction and processing" (s. 7), presumably including all subcontractors and suppliers. France has an even broader and more explicit definition referring to the operations of an entity, the companies it controls, its subcontractors, and its suppliers (art. 1). The European Parliament proposed Directive on Corporate Due Diligence and Corporate Accountability (2021) includes a very expansive definition of "value chain":

> "(5) 'value chain' means all activities, operations, business relationships and investment chains of an undertaking and includes entities with which the undertaking has a direct or indirect business relationship, upstream and downstream, and which either: (a) supply products, parts of products or services that contribute to the undertaking's own products or services, or (b) receive products or services from the undertaking".[137]

[136] OHCHR (2012). *The Corporate Responsibility to Respect Human Rights. An Interpretive Guide*, available: https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf, p. 5.

[137] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), Proposed Directive, Article 3(5).

It also provides broad definitions of "business relationships", "supplier", and "sub-contractor":

> "(2) 'business relationships' means subsidiaries and commercial relationships of an undertaking throughout its value chain, including suppliers and sub-contractors, which are directly linked to the undertaking's business operations, products or services;
>
> (3) 'supplier' means any undertaking that provides a product, part of a product, or service to another undertaking, either directly or indirectly, in the context of a business relationship;
>
> (4) 'sub-contractor' means all business relationships that perform a service or an activity that contributes to the completion of an undertaking's operations;"

The Principle of Proportionality

Most applicable in the European legal context, the principle of proportionality likely intervenes in both the designation of the entities covered by the law and the nature of the transparency and due diligence obligations imposed upon them. For example, preambular paragraph 18 of the European Parliament Proposed Directive Corporate Due Diligence and Corporate Accountability (European Parliament resolution of 10 March 2021) recognizes that proportionality must be built into the due diligence process,

> "(…) as this process is contingent on the severity and likelihood of adverse impacts that an undertaking might cause, contribute to or be directly linked to, its sector of activity, the size of the undertaking, the nature and context of its operations including geographic, its business model, its position in the value chain and the nature of its products and services. A large undertaking whose direct business relationships are all domiciled within the Union or a small or medium-sized undertaking that, after carrying out a risk assessment, concludes that it has not identified any potential or actual adverse impacts in its business relationships, could publish a statement to that effect, including its risk assessment containing the relevant data, information and methodology, which should in any case be reviewed in the event of changes to the undertakings' operations, business relationships or operating context."

The proposed directive (Article 14) also includes provisions for the development of guidelines to provide practical guidance on how proportionality and prioritization, in terms of impacts, sectors and geographical areas, may be applied to due diligence obligations depending on the size and sector of the undertaking.

Sector Versus Non-Sector Specific Laws

Another legislative decision relates to whether the law will be sector-specific covering only certain industries, like mining, and then whether only in specific operational contexts like conflict zones, or whether the law will be multisectoral applying to all industries. To date, most proposed and enacted legislation, including Bill S-216, adopt a multisectoral approach, applying to all enterprises, regardless of their sector or operational context, as suggested by *UNGP* Principle 14. These include: California (*Transparency in Supply Chains Act*), the United Kingdom (*Modern Slavery Act*); Australia (*Commonwealth Modern Slavery Act*); New South Wales (*Modern Slavery Act*); Tasmania (proposed *Supply Chain Modern Slavery Bill*); France (*Duty of Vigilance Law*); the Netherlands (*Child Labour Duty of Care Act*).[138] Examples of sector-specific laws include conflict minerals laws in the USA (Dodd-Frank Act Section 1502) and the European Union (*Conflict Mineral Regulation*), as well as a draft Austrian *Social Responsibility Law* requiring business due diligence for the garment sector.

The UNGP Principle 17

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

While applying in all operational contexts, the *UNGP* highlight the importance of governments supporting business respect for human rights in conflict-affected areas, where international humanitarian law standards also apply.

Merits of Different Options for Designating Covered Entities

There is limited empirical assessment of the impact of transparency and due diligence laws on entities of different sizes, other than monitoring how many business enterprises actually comply with their reporting and/or due diligence obligation and the quality of those reports. As a matter of comparative state practice, two factors impact how many entities will be covered by the law; in other words, the entities obligated to report or perform due diligence. Firstly, lower financial thresholds encompass more entities. Secondly,

[138] See Appendix 2: *A Select Comparison of Transparency and Due Diligence Laws*.

laws that allow 'looser' ties to the jurisdiction will encompass more entities. For example, a law that requires entities to be headquartered in the jurisdiction includes less entities than one that requires entities to be *either* headquartered in the jurisdiction *or* listed on a stock exchange *or* engaged in business in the jurisdiction. As an example, the Netherlands *Child Labor Duty of Care Act* captures entities very broadly. It covers an entity registered anywhere that supplies to Dutch consumers (art. 4(1)). Further, some laws are clearer on how far into the supply chain entities must report on or exercise due diligence over. For example, in Canada, entities under the proposed Bill S-216, would have to report on forced or child labour *at any step* in the manufacturing, growing, extraction or processing of the entity's goods (s. 2 and s. 7(1)). This presumably includes all subcontractors and suppliers. France also has a broadly worded definition of the supply chain. The *Duty of Vigilance Law* covers human rights violations directly or indirectly resulting from the operations of the entity, the companies it controls, its subcontractors, and its suppliers (art. 1).

Human rights advocates and other key stakeholders usually want many business entities to be covered by a supply chain law, especially entities that have complex supply chains and overseas operations/subsidiaries. Still, the more entities a law covers the greater the complexity of business compliance with reporting and/or due diligence obligations and government monitoring and enforcement of those efforts. For example, the UK *Modern Slavery Act*, which has a relatively high financial threshold for its definition of covered entities, reporting requirements are estimated to apply to 9,000-11,000 entities.[139] Likewise, the Australian *Commonwealth Modern Slavery Act*, which has an even higher income threshold for covered entities, is estimated to apply to 3,000 companies.[140]

Setting different obligations or requirements for different types of business enterprises may confer certain strategic advantages for both governments and businesses, for example by requiring smaller entities to report but imposing more stringent due diligence requirements on larger enterprises. Another option for reducing the cost burden on small and medium enterprises is to take a graduated approach to covered entities.[141] Conversely, as the CNCA have proposed in their model law for Canada, one might require all entities no matter their size to exercise due diligence and prevent harm in their supply chains, while excluding or exempting small businesses in low-risk sectors from reporting. Arguably, a key criterion should be (an evidentiary approach to assessing) the risk of the nature and severity of the anticipated human rights violations associated with the business and its supply chains, rather than the size of the enterprise involved, which is consistent with the *UNGP*.

At the same time, a key criticism of the implementation of transparency and due diligence laws is the failure by governments to list the entities covered by the law, contributing to inconsistent and/or low

[139] Business and Human Rights Resource Centre 'Modern Slavery Registry', available at: https://www.modernslaveryregistry.org/pages/numbers_explained.

[140] Jamie Fellows & Mark Chong, "Australia's Modern Slavery Act: Challenges for a post-COVID world?" (2020) 45:3 Alternative Law J 209 at 209.

[141] OHCHR (2020). *UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies*, p. 11.

rates of corporate compliance. Accordingly, notwithstanding the complexities that it may involve, it has sometimes been recommended that governments should create a list of the entities that fall within the scope of their law and/or actively check (in other words, properly monitor and enforce, ideally by means of a central registry for submitting reports) whether entities are covered by and are complying with the law cross the entirety of their supply chain.[142]

3. Creating Disclosure and Reporting Obligations

Business entities must regularly comply with various reporting obligations, including financial reporting, health and safety measures, and many others. In some cases, the reporting obligations extend to an entity's whole supply chains. This is the case, for example, of laws creating transparency and due diligence obligations with respect to certain transactions relating to conflict minerals (e.g., the *U. S. Dodd-Frank Act*, Section 1502: Conflict Minerals, 2010, or the *Conflict Mineral Regulation* (EU) 2017/821). Supply chain laws are part of a growing body of disclosure regulations that have become ubiquitous in a variety of areas.

In this section, we consider the question of the disclosure and reporting obligations that a due transparency and due diligence law relating to forced or child labour may impose on business enterprises. We also review the specific offences that a law may create relating to a failure to report or false or inaccurate reporting. Matters relating to the monitoring and enforcement of these obligations are considered in a different section of this Guide.

In terms of the general transparency provisions of the law, *UNGP* Principle 3 and its accompanying commentary refers to the duty of states "to encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts". This in practice may include

The UNGP Principle 21

Principle 21 provides: "In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;

(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;

(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality (emphasis added)".

[142] Secretary of State for the Home Department, *Independent Review of the Modern Slavery Act 2015: Final Report* (2019). Available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803554/Independent_review_of_the_Modern_Slavery_Act_-_final_report__print_.pdf, p. 39.

disclosing information about their supply chains.

Principle 21, offers guidance to business enterprises on communicating how they address their human rights impacts.[143]

Because the *UNGP* do not specify what form a state-imposed human rights due diligence obligation should take, several states have opted to legislate only the transparency component of the obligation requiring businesses to report on their known and potential human rights impacts.[144] In other words, businesses are imposed a transparency obligation to disclose the risks of human rights and/or environmental harms in their own activities and supply chains, and report on the steps they have taken to prevent and mitigate such risks. Examples of this approach include the well-known 2010 *California Transparency in Supply Chains Act (CTSCA)* and the 2015 Transparency in Supply Chains section 54 clause of the UK *Modern Slavery Act*. The objective of these laws is to increase transparency in the applicable entities' supply chains. Specifically, the transparency provisions are meant to increase the reputational risks of business enterprises which do not exercise due diligence and empower consumers and investors to access this information and, if necessary, alter their purchasing or investment decisions accordingly.[145] The logic behind the approach is that transparency obligations, when complied with, can play in favour of enterprises which exercise due diligence and against those that do not.

The implementation and efficacy of an approach that relies, like some early laws, on creating an obligation for business enterprises to report on due diligence measures they may have taken without creating an obligation for them to take some specific due diligence measures has now been assessed, especially the California[146] and the UK[147] laws, and has been found wanting. The main critiques of the California and UK

[143] See also the UN Guiding Principles Reporting Framework developed for the Human Rights Reporting and Assurance Frameworks Initiative (RAFI), available https://www.ungpreporting.org/wp-content/uploads/UNGPReportingFramework_2017.pdf providing a 31-question framework to assist businesses with preparing disclosure statements. NGOs have also developed guidance on effective reporting practices for businesses. See, e.g., Beyond Compliance: Effective Reporting Under the Modern Slavery Act: A civil society guide for commercial organisations on the transparency in supply chains clause, available: https://corporatejusticecoalition.org/wp-content/uploads/2016/03/CSO_TISC_guidance_final_digitalversion_16.03.16.pdf.

[144] Notwithstanding that the *UNGP* and subsequent interpretive guidance articulate human rights due diligence includes identifying, preventing, ceasing, mitigating and accounting for the risks/measures taken to address them.

[145] Adam S. Chilton & Galit Sarfaty (2016). *The Limitations of Supply Chain Disclosure Regimes*, Coase-Sandor Working Paper Series in Law and Economics, No. 766, at p. 5. Available: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2445&context=law_and_economics.

[146] In a 2016 study of 204 apparel entities, approximately half did not comply with the Act and post their disclosure reports (Yoon Ma, Hyun-Mwa Lee & Kylie Goerlitz (2016). Transparency of Global Apparel Supply Chains: Qualitative Analysis of Corporate Disclosures, *Corporate Social Responsibility and Environmental Management*, 23, 308 at 313). A 2018 study of 105 covered entities found a relatively high compliance rate for creating disclosures but found the quality of responses was "more symbolic than substantive" (Rachel Birkey et al (2018). Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010, *Journal of Business Ethics*, 152, 827 at 837). A 2017 assessment of the Act found a lack of evidence available on whether consumers had altered their purchasing habits (Marieke Koekkoek, Axel Marx & Jan Wouters (2017). Monitoring Forced Labour and Slavery in Supply Chains: The Case of the California Act on Transparency in Supply Chains, *Global Policy*, 8(4), 522 at 525).

[147] In the U.K., the Secretary of State for the Home Department conducted an independent review of the Act, presented to Parliament in May 2019 (Secretary of State for the Home Department (2019). *Independent Review of the Modern Slavery Act 2015: Final Report*. Available here: https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report at pages 39-47). The Home Department found that the Act "has contributed to raising awareness of slavery and human trafficking in supply chains and has encouraged many companies to start considering and addressing the issue" (at 39). Beyond awareness, however, "the impact of the section [s. 54] has been

laws highlight corporate confusion about reporting obligations along with uneven compliance and poor quality of reports. To date, the available evidence suggests these laws are more useful for increasing corporate awareness about human rights risks in their supply chains than for achieving other broad aims such as changing consumer, investor, or corporate behaviour or increasing corporate accountability for human rights abuses.[148]

All supply chain transparency and due diligence laws include some reporting requirements that different classes of business enterprises must comply with. The main differences between various approaches lie in the contents of the reports required, the compliance monitoring mechanisms in place, and the sanctions imposed for non-compliance. This section of the Guide will consider four main sets of considerations that are relevant when a law intends to create a transparency and reporting requirement: scope and contents of the reporting; certification of report; periodicity; publication of report; and consequences or sanctions for noncompliance.

Scope and Contents of the Reporting

A first and most crucial consideration is that of specifying what the law will require business enterprises to report and whether the law will delineate the specific contents to be reported. When a law imposes specific due diligence obligations to covered business entities, it tends to create stronger and more precise reporting obligations around the implementation of due diligence measures and their impact.

Several laws or proposed laws also include specific provisions for either the government or a regulatory body to modify or add to the reporting obligations of business entities and to prescribe the format to be used for reporting (by regulation or decree). Another possibility is for the legislator to leave it entirely to the body responsible for administering the law to adopt regulations concerning the scope, contents, periodicity, and format of the report that must be prepared by business enterprises, including how and to whom they must be submitted.

Based on assessments of early reporting laws, especially the *CTSCA* and the *UK Modern Slavery Act*, it appears that reporting requirements that delineate the exact information required from entities are more likely to elicit substantive responses. In other words, the information to be included in the report should not be optional, as this has been found in the United Kingdom to produce confusion and vague general statements.[149] Permissive language such as "the report *may* include information on…" should be avoided.

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limited to date. Evidence gathered by our Expert Advisers shows that there is a general agreement between businesses and civil society that a lack of enforcement and penalties, as well as confusion surrounding reporting obligations, are core reasons for poor-quality statements and the estimated lack of compliance from over a third of eligible firms" (at 39). The Home Department highlighted the need for more research on how consumer attitudes are influenced (at 47).

[148] Adam S. Chilton & Galit Sarfaty (2016). *The Limitations of Supply Chain Disclosure Regimes*, Coase-Sandor Working Paper Series in Law and Economics, No. 766.

[149] Secretary of State for the Home Department (2019). *Independent Review of the Modern Slavery Act 2015: Final Report*. Available: https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report.

Based on the UK experience, few entities go beyond the mandatory reporting requirement to provide the discretionary information.

The following list provides examples of the types of information reporting laws may require businesses to disclose. A jurisdiction enacting a reporting law will need to determine which types of information are crucial or relevant for the businesses within their jurisdiction. Once legislatively required, if a business does not perform the itemized reporting requirement, it would still need to report that it has taken no action for that reporting obligation. The contents of the disclosure reports, in addition to information on the business itself and its supply chain, are dictated by the nature of the due diligence requirements imposed by the law. The most commonly stipulated reporting obligations include whether a covered entity has identified and assessed the risks of the prescribed harm, and whether it has taken steps to ensure the prescribed harm is not taking place. Some laws now also require that businesses report on how they assess the effectiveness of the due diligence steps taken (e.g., France's *Duty of Vigilance Law*). Such reflexivity is consistent with the guidance provided by *UNGP* Principle 18 and is a good design practice if governments are serious about businesses adopting measures that are actually proven, or at least appear promising, to prevent and address known and potential adverse human rights impacts.

The most comprehensive reporting obligations are those that would be imposed under the due diligence regime that EU member states will be required to impose on various enterprises if the European Parliament's proposed Directive on Corporate Due Diligence and Corporate Accountability is adopted.[150] Under that proposed scheme, an enterprise, unless it has established and formally stated and reported that it is not directly linked to any potential or actual adverse impact on human rights, the environment or good governance, would be required to:

> "(i) specify the potential or actual adverse impacts on human rights, the environment and good governance identified and assessed in conformity with paragraph 2, that are likely to be present in its operations and business relationships, and the level of their severity, likelihood and urgency and the relevant data, information and methodology that led to these conclusions;
>
> (ii) map their value chain and, with due regard for commercial confidentiality, publicly disclose relevant information about the undertaking's value chain, which may include names, locations, types of products and services supplied, and other relevant information concerning subsidiaries, suppliers and business partners in its value chain;
>
> (iii) adopt and indicate all proportionate and commensurate policies and measures with a view to ceasing, preventing or mitigating potential or actual adverse impacts on human rights, the environment or good governance;

[150] European Parliament, 'Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability' (2020/2129(INL)). Available: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf.

(iv) set up a prioritisation strategy on the basis of Principle 17 of the UN Guiding Principles on Business and Human Rights in the event that they are not in a position to deal with all the potential or actual adverse impacts at the same time. Undertakings shall consider the level of severity, likelihood and urgency of the different potential or actual adverse impacts on human rights, the environment or good governance, the nature and context of their operations, including geographic, the scope of the risks, their scale and how irremediable they might be, and if necessary, use the prioritisation policy in dealing with them" (Article 4(4)).

List of Potential Reporting Requirements for Businesses

- Identified/assessed risks of the prescribed harm (child labour, for instance) in the entity's operations and supply chains.
- Steps the entity has taken in the previous year to ensure that the prescribed harm is not taking place in any of its supply chains and any part of its own business (including steps to assess and manage the risk), or a statement that it has not taken any action. Other laws have a similar but less detailed provision.
- The entity's due diligence processes. This is like the above, and it is preferable to delineate exactly what is meant by 'due diligence'.
- How the effectiveness of the above steps/actions to address the prescribed harm will be assessed, such as performance indicators.
- The entity's structure/supply chains/business model (these may be interchangeable terms) and goods.
- Company policies on the prescribed harm.
- Measures to remediate the prescribed harm.
- Employee training on the prescribed harm.
- Consultation process with the entity/any entity it owns or controls.
- Details of the report's approval by a governing body (example: Australia).
- Audits of suppliers for compliance with the entity's standards on the prescribed harm (example: California).
- Requirement for suppliers to certify that materials comply with laws in the countries in which the supplier is doing business (example: California).
- Internal accountability procedures for employees/contractors who failed to meet the entity's standards (example: California).

Official Certification

Another consideration is whether the law will require company officials to approve and verify a company's disclosure statement or report, and if so, which officials. It is sometimes assumed that the quality and credibility of disclosure reports will improve if company officials can be held accountable and are legally

required to approve and sign a disclosure report, ideally attesting to the veracity, accuracy, and completeness of the information.[151]

Periodicity of Reporting

Another consideration is how frequently a business must report. Most laws impose a periodic, usually an annual, reporting obligation, while some laws more controversially impose a one-time reporting obligation (for example, the 2019 *Dutch Child Labour Duty of Care Act* discussed in the due diligence obligation section).

Publication and Communication of Reports

A third consideration is who publishes the disclosure statements and where it must be published, especially whether such reports are decentralized where a business entity publishes the report on their website, or whether an entity must also provide its report to the government by means of a centralized electronic registry or repository. In the latter instance, the legislative reporting obligation may also require a designated government body or functionary to publicly summarize the reports. Given that a main aim of the supply chain reporting obligation is to educate consumers and investors about corporate behaviour in preventing modern slavery risks and sometimes also other harms in their supply chains, and consistent with *UNGP* 21 above, ease of public access to such reports is imperative.

Most supply chains transparency and due diligence laws require applicable entities to publish their disclosure statements in a conspicuous place on the entity's website or make it available by request if the entity does not have a website (the laws of California, UK, and New South Wales require the statement to be made publicly available). France's *Duty of Vigilance Law* requires a covered entity's vigilance plan to be made public.

Several national laws establish a publicly accessible centralized register or repository where disclosure statements and due diligence reports can be consulted by the public and achieve the broad transparency objectives of the law (e.g., Australia, New South Wales, and the proposed Bill S-216 in Canada). Laws creating a centralized, public database of all covered entities' reports, managed by the administrator of the act, whether an executive or independent body, are thought to be more effective, at least in providing ease of consumer, investor, and civil society access to information, while recognizing the need for more research assessing the impacts of reporting laws in changing consumer and corporate behaviour.[152]

[151] For example, s. 11(4) and (5) of Canada's newly proposed Bill S-211 (2021) would require both the approval by a governing body of the business entity and attestation of the report including a manual signature of one or more members of the governing body.

[152] The Home Department made the following recommendations to UK Government: (1) Create an internal database of entities that could fall into the scope of s. 54, and actively check with the entities if they are covered; (2) Improve the quality of statements. This can be done by removing the option to report that an entity has taken no steps at all to address modern slavery, making the optional information in s. 54(5) mandatory, and amending the legislation so entities must consider the entirety of their supply chains; (3) Embed modern slavery reporting into business culture by designating a member of the entity to be personally accountable for the statement, and by creating an offence (under the

However, some countries (e.g., California, the United Kingdom and France) have been criticized for not establishing a central database because this limits the public's ability to use the information or compare between companies.[153]

Existing laws typically do not go beyond requiring covered entities to submit their disclosure report to a designated authority and make their report generally available on their website or, for free, upon request. However, the European Parliament's Proposed Directive on Corporate Due Diligence and Corporate Accountability,[154] provides more detailed requirements concerning the communication of the due diligence reports. It suggests that E.U. member states should also require legal entities to communicate their due diligence strategy to their workers' representatives, trade unions, business relationships (Article 6 (2)) and to "potentially affected stakeholders upon request and in a manner appropriate to those stakeholders' context, for example by taking into account the official language of the country of the stakeholders" (Article 6 (3)).

A potentially sensitive area involved in creating reporting and publication obligations for covered entities, including a disclosure of their operations and value chains, is the matter of commercial confidentiality and the impact of this level of transparency on an entity's business competitiveness. Most laws assume that the covered entities can comply with the reporting obligations while protecting their own business confidentiality. However, Article 6(1) of the European Parliament's Proposed Directive on Corporate Due Diligence and Corporate Accountability recommends that states have "due regard for commercial confidentiality" as they create obligations for covered entities to publish and communicate their due diligence strategy.

Simplified formats for reporting, as prescribed by regulation or a designated authority, can also enhance the accessibility and readability of information by consumers and other stakeholders, while recognizing that more detailed reports may be beneficial for other audiences like civil society or investors.[155]

Company Directors Disqualification Act 1986) for failing to report or for failing to act when instances of slavery are found; (4) Create a central repository for all entities' statements (online); (5) Enforce compliance. The Anti-Slavery Commissioner should monitor entities' compliance and the Government should amend the Act for stronger enforcement measures following a graduated scheme of penalties: initial warning, fine, court summons, and directors' disqualification (as opposed to the current discretionary injunction). There should also be an independent enforcement body to impose the sanction; (6) Extend s. 54 to the public sector. The Government should ensure that non-compliant entities are not eligible for contracts in public procurement. Secretary of State for the Home Department (2019). *Independent Review of the Modern Slavery Act 2015: Final Report,* pp. 14-15,23, 41-42. Available: https://www.gov.uk/government/publications/independent-review-of-the-modern-slavery-act-final-report.

[153] Marieke Koekkoek, Axel Marx & Jan Wouters (2017). Monitoring Forced Labour and Slavery in Supply Chains: The Case of the California Act on Transparency in Supply Chains, *Global Policy* 8(4), 522 at 522; Secretary of State for the Home Department (2019). *Independent Review of the Modern Slavery Act 2015: Final Report*. Available: https://www.gov.uk/government/publications/independent-review-of-the-modern slavery-act-final-report; French NGOs have gathered a database of covered entities and whether they have published a vigilance plan, available here: https://vigilance-plan.org/search/.

[154] European Parliament, 'Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability' (2020/2129(INL)). Available: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf.

[155] See, especially, Adam S. Chilton & Galit Sarfaty (2016). *The Limitations of Supply Chain Disclosure Regimes*, Coase-Sandor Working Paper Series in Law and Economics, No. 766, at 6-7, 16-29.

Additionally, enacted and proposed laws sometimes also require a Minister or a designated government body or functionary to annually report to the government/parliament on entities' compliance with the law (examples: Australia, Canada – Bill S-216), which is likely important in raising political and broad public awareness about the risks of prescribed human and environmental harms in business activities and global supply chains.

In situations where there is no central government registry or repository, civil society has filled the gap by collecting statements in an online location.[156]

Examples of Legislation or Proposed Legislation

There are varying practices with respect to each of the above considerations. Presented in chronological order since more recently enacted or proposed laws tend to draw on earlier models and then seek to improve the reporting requirements of the earlier laws, examples of supply chain laws that impose a reporting obligation on businesses include:

California, *California Transparency in Supply Chains Act 2010*:

- Every covered entity must make an annual disclosure of its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale. The disclosure must include whether the entity: engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery and whether the verification was conducted by a third party; conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains (and specify if the verification was not an independent, unannounced audit); requires suppliers to certify that materials comply with human trafficking and slavery laws in the countries in which the supplier is doing business; maintains internal accountability procedures for employees/contractors who failed to meet company standards; and, provides employees and management with training on mitigating risks of human trafficking and slavery in the supply chain (s. 3).
- The entity must post the disclosure on its website with a conspicuous link on the homepage (s. 3).

United Kingdom, *Modern Slavery Act 2015*:

[156] Civil society is also monitoring the effectiveness of the *Modern Slavery Act* 2015. In the absence of a central repository for statements, the Business and Human Rights Resource Centre (BHRRC) created the 'Modern Slavery' Registry' (available here: https://www.modernslaveryregistry.org/). The registry contains over 16,000 statements. The BHRRC has found that only 30% of covered entities comply with all minimum requirements for reporting in s. 54 of the Act.

- Every covered entity must prepare an annual slavery and human trafficking statement to report on the steps it has taken in the financial year to ensure that slavery and human trafficking are not taking place in any of its supply chains and any part of its own business, or a statement that it has not taken any steps (s. 54(4)). The statement *may* include information listed in s. 54(5), including: (a) the organisation's structure, its business and its supply chains; (b) its policies in relation to slavery and human trafficking; (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains; (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and (f) the training about slavery and human trafficking available to its staff. The law also provide that the Secretary of State for the Home Department may issue guidance about the kind of information which may be included in a slavery and human trafficking statement.
- The entity must publish the report on its website with a prominent link on its homepage (s. 54(7)). If the entity does not have a website, it must provide the report to anyone who makes a written request (s. 54(8)).

Australia (Commonwealth) *Modern Slavery Act 2018*:

- Every covered entity must prepare an annual statement covering: a description of the structure, operations and supply chains of the reporting entity; a description of the risks of modern slavery in its operations/supply chains or supply chains of any entity it owns or controls; actions taken by the entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes; a description of how the entity will assess the effectiveness of these actions; a description of the consultation process between the entity and any entity it owns or controls; and any other information that the entity considers relevant; and, the details of approval by the principal governing body of the reporting entity (s. 16).
- The annual statements must be submitted to the Minister (Department of Home Affairs) within six months of the end of the annual reporting period (s. 13, s. 14). The Minister will publish all statements on the Modern Slavery Statements Register (online: https://modernslaveryregister.gov.au/) (s. 18).

New South Wales, *Modern Slavery Act 2018*:[157]

[157] The company reporting requirements of the proposed Tasmania Supply Chain (Modern Slavery) Bill 2020 are virtually identical.

- A covered commercial organization must prepare a modern slavery statement for each financial year of the organization in accordance with the regulations and within such period after the end of the financial year as is provided for by the regulations (s. 24(3)). The statement must contain such information as may be required by or under the regulations with respect to steps taken by the commercial organization during the financial year to ensure that its goods and services are not a product of supply chains in which modern slavery is taking place, including the organization's structure, its business and its supply chains, its due diligence processes in relation to modern slavery in its business and supply chains, the parts of its business and supply chains where there is a risk of modern slavery taking place, and the steps it has taken to assess and manage that risk, and the training about modern slavery available to its employees. The commercial organization must also make its modern slavery statement public in accordance with the regulations. Entities must make the statements publicly available.

When the law requires covered entities to take specific due diligence measures, this is reflected in the reporting obligations imposed on these entities. For example, the French *Duty of Vigilance Law* requires covered entities to establish and implement an effective vigilance plan, which together with an annual report on its effective implementation, must be publicly disclosed and included in the report on financial and extra-financial risks that such entities are required to produce and make public under the dispositions of the *Code de Commerce*. In the Netherlands, under the *Child Labour Duty of Care Act*, covered entities must declare that they exercise due diligence (as defined in art. 5) to prevent goods/services from being produced using child labour (art. 4(1)). The declaration must be registered with the trade register and sent to the 'superintendent' (the 'toezichthouder', established by art. 3(1) to supervise compliance with the act) (art. 4(2)). The superintendent will publish the declarations in a public register on its website (art. 4(5)).

In Canada, Bill S-216 **(***Modern Slavery Act*) was proposing to impose on all covered entities a duty to annually report on their business activities and supply chains and the steps they took in the previous financial year to prevent and reduce the risk of forced/child labour at any stage in the production of the entities' goods (in Canada or elsewhere), or of goods they import into Canada (s. 7(1)). The proposed legislation also included an obligation to make that report publicly available on the entity's website (s. 8). The reports in question were to be kept on an electronic registry to be established by the Department of Public Safety and Emergency Preparedness and made available on its website (s. 9). Additionally, the Minister would have been required to table an annual report in each House of Parliament, summarizing activities of reporting entities that carry risks of forced/child labour, steps taken to assess/manage the risk, and measures taken to remediate forced/child labour (s. 19(1)). The Minister would have been required to publish this report on the Department of Public Safety and Emergency Preparedness' website (s. 19(2)).

Consequences or Sanctions for Non-Compliance

Several transparency and due diligence laws include mechanisms for monitoring the covered entities' compliance with their obligations. In most instances this task is assigned to an entity (Commission, Ministry, or other body) responsible for the administration of the law (see also Section 5 of the Guide).

In Australia, under the *Modern Slavery Act 2018,* when the Minister (Department of Home Affairs) is reasonably satisfied that an entity has failed to comply with the reporting requirements set by the law, the Minister may give a written request to the entity to provide an explanation for the failure to report and/or undertake specified remedial action in relation to the reporting requirement. If after reasonable delays the entity still refuses to comply with the Minister's request, the Minister may publish information on the register, or in other ways, about the entity, the request to comply, and the reasons why the Minister is satisfied that the entity has failed to comply with the request (and therefore with the requirements of the law). The Minister's decision is appealable before the Administrative Appeals Tribunal (s. 16a). The Minister must table an annual report in Parliament with an overview of corporate compliance with the Act and best reporting practices (s. 23A). The Act does not create a specific offence of failure to produce a transparency and due diligence report, but resorts instead to a public denunciation process with potential reputational consequences for non-compliant entities.

In California, under the *California Transparency in Supply Chains Act of 2010*, and in the U.K., under the *Modern Slavery Act* 2015, the exclusive remedy for a violation of the requirement to produce and publish a disclosure statement is an action for injunctive relief brought by the Attorney General for injunctive relief (s. 3d) in California, and by the Secretary of State for the Home Department (s. 54(11)) in the U.K. In France, an injunctive relief is also available to the jurisdiction informed that a covered entity is not complying with its reporting obligations. However, since the reporting obligations can only be satisfied when a vigilance plan is developed and implemented, much larger fines can be imposed when a covered entity does not satisfy the due diligence and associated reporting obligations under the *Code de Commerce*.

In New South Wales, the *Modern Slavery Act 2018 No 30 [NSW]* creates three offences with respect to the disclosure obligations of a business entity: (1) failure to prepare a modern slavery statement for each financial year of the organization; (2) failure to make its modern slavery statement public in accordance with the regulations; and, (3) providing information related to the modern slavery statement which is false or misleading in a material way. In each case, the offence carries a maximum penalty of 10,000 penalty units. (ss. 24 (2)(6)(7)). In addition, the Anti-Slavery Commissioner (established by Part 2, Division 1 – 3 of the Act) must keep a publicly available electronic register that identifies entities that have reported their goods/services are or may be a product of supply chains in which modern slavery takes place and any steps the entity has taken to address the concern (s. 26).

The laws typically hold both persons and legal entities responsible and potentially liable for failing to comply with their reporting requirements or providing false or misleading information.

In Canada, Bill S-216 was proposing to create new offences for persons or legal entities who fail to produce an annual disclosure report or who knowingly make a false or misleading statement as part of the reporting process. Both offences would have been punishable on summary conviction and liable to a fine of up to $250,000.00 (CAD). The liability would have been extended to officers, agents and mandatory of the person or legal entity "who directed, authorized, assented to, acquiesced in, or participated in the offence" (s. 17).

Laws that are limited to requiring covered identities to report on their general due diligence practices, without prescribing some explicit due diligence actions, are inherently limited. For example, in some regimes, a covered entity can, strictly speaking, comply with the law by adopting minimal due diligence precautions or even by accurately reporting that it took no steps to reduce human rights and/or environmental risks in its own operations or supply chains. In other words, companies must report on any due diligence they undertake but they are under no obligation to take specific or effective measures. Furthermore, in the absence of an effective compliance monitoring and enforcement mechanism, covered entities can often disregard their reporting obligations with impunity. A 2019 study of non-financial disclosures on 'corporate social responsibility' (CSR) from 24 countries found that mandatory CSR reporting does not, in itself, lead to lower levels of corporate irresponsibility.[158]

4. Creating Specific Due Diligence and Accountability Obligations

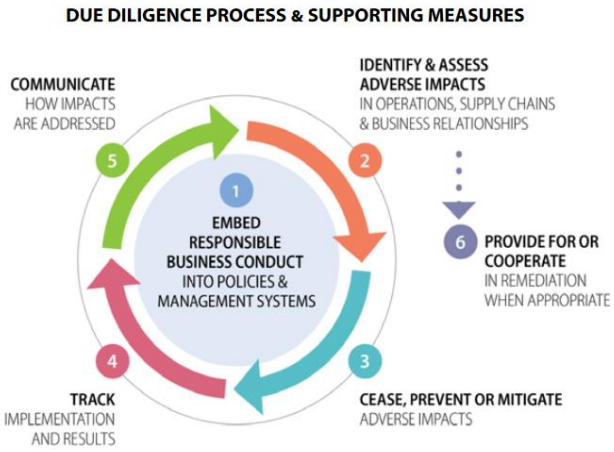
In this section, we consider the nature, extent, and specificity of the due diligence and corporate accountability obligations a legislation may impose on covered entities with respect to child or forced labour and, possibly, other human rights violations. Entities may be compelled to identify, assess and mitigate foreseeable risks in their own operations and supply chains, and be exposed to sanctions when they do not. Entities are not expected to guarantee that child or forced labour or other human rights violations will not occur, but they must be able to demonstrate that they have exercised sufficient due diligence, in a prescribed manner, to prevent such problems. It is assumed that "by taking action to assess and address modern slavery risks, businesses can help create fairer and safer supply chains that are free from exploitation."[159]

[158] See Gregory Jackson et al. (2019). Mandatory Non-financial Disclosure and Its Influence on CSR: An International Comparison, *Journal of Business Ethics*. 162, 323.

[159] The *National Action Plan to Combat Modern Slavery 2020–25*, Australia, p. 22. Available: https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/combat-modern-slavery-2020-25.

Applicable International Standards

As previously noted, the *UNGP* operationalize the UN's three-pillar protect, respect and remedy framework. States are expected to provide guidance to businesses, including appropriate methods for exercising human rights due diligence, which is the essence of the business responsibility to respect human rights (*UNGP* Principle 3 Commentary, Principles 11-15). While not specifying what form a government-imposed human rights due diligence obligation should take, Principle 17 sets out the main parameters for an ongoing business due diligence responsibility to prevent and mitigate adverse human rights impacts in their supply chain. Principles 18-21 expand on this responsibility recommending that businesses: (1) identify human rights risks by drawing on relevant expertise and engaging in meaningful consultations with affected groups and other stakeholders; (2) integrate their human rights impact assessment findings into relevant business processes and take appropriate action to address the adverse impacts; (3) track the effectiveness of their response; and, (4) externally communicate how they have addressed adverse human rights impacts. Principle 22 further recommends that, in situations where a business causes or contributes to adverse human rights impacts, they should provide or cooperate in a legitimate remediation process, with remediation interpreted as encompassing a broad range of options from restitution to punitive sanctions to prevention through injunctions or guarantees of non-repetition.[160] In particular, there is an expectation that businesses will establish operational-level grievance/complaints mechanisms (Principle 29).



Additionally, the OECD guidance outlines a five-step due diligence framework for responsible business supply chains encompassing: (1) establishing strong company management systems, including a policy for responsible supply chains; (2) identifying and assessing actual and potential risks in a supply chain; (3) designing and implementing a strategy to respond to (in other words, cease, prevent, mitigate) identified risks; (4) monitoring implementation and results by carrying out third party audits of due diligence practices; and (5) annually and publicly reporting on supply chain due diligence.[161] Some of the due diligence obligation compliance (or vigilance) plans described below adopt this OECD five-step framework

[160] See also the *Interpretive Guide*, p. 7 on the scope of this responsibility. Available: https://www.ohchr.org/documents/publications/hr.pub.12.2_en.pdf.

[161] OECD Due Diligence Guidance for Responsible Business Conduct, pp. 20-35. See also Anni Lietonen Anniina Jokinen Natalia Ollus (2020). *Navigating through your supply chain Toolkit for prevention of labour exploitation and trafficking*. HEUNI. Available: https://heuni.fi/documents/47074104/0/ENG-Toolkit-for-Responsible-Businesses_Web_04062020.pdf/5a171fa6-9d3a-4ec6-f03e-b8fa21bdb0e0/ENG-Toolkit-for-Responsible-Businesses_Web_04062020.pdf?t=1607952949690.

in whole or in part. Like the *UNGP*, the OECD guidance further proposes that businesses provide or cooperate in remediation where appropriate.[162]

Due Diligence Obligation Legislative Design Options

As was mentioned earlier, several laws have created an obligation on various business entities to report on the due diligence measures they have taken to prevent child and force labour, and in some instances, other human rights violations, but have not specifically created an obligation for these entities to take specific due diligence measures or exercise a duty of care to identify forced labour, child labour, or other prescribed human rights risks in their supply chains and report on those efforts.[163] Enacted and proposed supply chains due diligence laws identify three components of the due diligence obligation: (1) the legislative requirements for a due diligence or vigilance plan detailing the processes and actions a company must take to identify and mitigate prescribed risks in their supply chain, an assessment of the efficacy of those measures, and in some instances consultations with relevant stakeholders; (2) requirements for reporting on the implementation of a due diligence or vigilance plan; and, (3) obligations that result once potential risks are identified, which can be tied to a grievance/alert mechanism, a public enforcement mechanism, or civil liability obligations.

Presently, the 2017 French *Duty of Vigilance Law* and the Dutch *Child Labour Duty of Care Act* are the only two laws that create a duty of care, or specific due diligence obligation that covers child labour or forced labour. France's *Duty of Vigilance Law* introduces an accountability element by explicitly pairing a due diligence obligation with remediation obligations, potential victim access to an effective remedy, and possible corporate (civil) liability. In other words, the law requires covered business entities companies to take affirmative steps to address and mitigate risk of human rights abuses.

At the same time, there appears to be considerable momentum, especially in Europe, for the creation of mandatory human rights due diligence laws, signalling a possible paradigm shift away from reporting/transparency-only laws. Several countries have recently proposed due diligence legislation that are at various stages of development, including the European Union, Norway, Denmark, Sweden, Belgium, Finland, Luxembourg, and the UK.[164]

[162] See also: OECD (2017). *Practical actions for companies to identify and address the worst forms of child labour in mineral supply chains*. https://mneguidelines.oecd.org/Practical-actions-for-worst-forms-of-child-labour-mining-sector.pdf.

[163] In this section, we draw on the work of Michael R. Littenberg, Anne-Marie L. Beliveau, and Nellie V. Binder. (2020*). Corporate Social Responsibility Legislation A Summary of Selected Instruments Prepared for AIM-PROGRESS*. Ropes & Gray LLP. Available: https://aim-progress.com/storage/resources/R&G_AIM-PROGRESS%20CSR%20Legislation%20Summary%20(Fall%202020).pdf, at pp. ii-iii; 53, 60, 65.

[164] Other laws, especially trade-based legislation, may impose a duty of care/due diligence obligation including the following United States enacted and/or proposed laws: Section 307 of the *US Tariff Act*; Section 321 of the *Countering America's Adversaries Through Sanctions Act*; the Uyghur Forced Labor Prevention Act (Proposed); the *Federal Acquisition Regulation*; and thlawse *Anti-Human Trafficking Rule*. See Littenberg, Beliveau, and Binder, 2020.

The European Parliament's proposed directive on corporate due diligence and corporate accountability,[165] if adopted, would require EU member states to implement a due diligence strategy and "lay down rules to ensure that undertakings carry out effective due diligence with respect to potential or actual adverse impacts on human rights, the environment and good governance in their operations and business relationships" (Article 4(1)). The main elements of this strategy would consist of requiring enterprises ("undertakings") to:

- Make all efforts within their means and in an ongoing manner to identify and assess, by means of a risk based monitoring methodology that takes into account the likelihood, severity and urgency of potential or actual impacts on human rights, the environment or good governance, the nature and context of their operations, including geographic, and whether their operations and business relationships cause or contribute to or are directly linked to any of those potential or actual adverse impact. (Article 4(2)).
- Implement a comprehensive and proportionate due diligence strategy, unless they can establish and formally report that they do not cause or contribute to, or that they are not directly linked to any potential or actual adverse impact on human rights, the environment or good governance (Article 4(3-4)).
- Ensure that their business strategy and their policies are in line with their due diligence strategy (Article 4(6)).
- Carry out value chain due diligence which is proportionate and commensurate to the likelihood and severity of their potential or actual adverse impacts and their specific circumstances, particularly their sector of activity, the size and length of their value chain, the size of the undertaking, its capacity, resources and leverage (Article 4(7)).
- Ensure that their business relationships put in place and carry out human rights, environmental and good governance policies that are in line with their due diligence strategy, including for instance by means of framework agreements, contractual clauses, the adoption of codes of conduct or by means of certified and independent audits (Article 4(8)).
- Ensure that their purchase polices do not cause or contribute to potential or actual adverse impacts on human rights, the environment or good governance (Article 4(8)).
- Verify regularly that subcontractors and suppliers comply with their due diligence obligations and commitments (Article 4(9)).

[165] European Parliament, 'Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability' (2020/2129(INL)). Available: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf.

Examples of Legislation

France, *Duty of Vigilance Law* 2017:

- Covered entities must create and implement a 'vigilance plan' (art. 1). The plan must include reasonable vigilance measures (also known as due diligence) to identify risks and prevent serious violations to human rights, fundamental freedoms, health, safety and the environment resulting directly or indirectly from the operations of the covered entity, the companies it controls (within the meaning of the *Commercial Code* L.233-16, II), and the subcontractors or suppliers with whom the covered entity maintains an established commercial relationship.

- The plan must include:

    1. Mapping to identify risks (to human rights, fundamental freedoms, health, safety and the environment);
    2. Procedures to assess subsidiaries, subcontractors and suppliers;
    3. Appropriate action to mitigate risks, or to prevent serious violations;
    4. An alert mechanism that collects reports of existing or materializing risks, developed with trade union representatives;
    5. A monitoring scheme to follow up on the measures implemented and assess their efficiency.

- The plan must be drafted in consultation with the covered entity's stakeholders and, where appropriate, with multiparty initiatives in the subsidiaries/at the territorial level (art. 1).

- The plan, and a report on its implementation, must be publicly disclosed (art. 1).

Netherlands, *Child Labour Duty of Care Act* 2019 (Article 5):

- This law imposes an obligation of due diligence on covered entities. Due diligence can be exercised in each of the following ways:
    - A company investigates whether there is reasonable suspicion that its goods/services have been produced using child labour. In the event of reasonable suspicion, the company adopts and implements a plan of action. The investigation is oriented toward sources that are reasonably known and accessible to the company.
    - Or, a company that receives goods/services from companies that issued a declaration is exercising due diligence with regards to those goods/services.

- Or, a company that receives *only* goods/services from companies that issued a declaration is also exercising due diligence and shall not be required to issue its own declaration.

- The Minister for Foreign Trade and Development Cooperation may also approve a joint action plan for affiliated companies.

Many observers regard the French law as a superior legislative model because it explicitly pairs a corporate failure to create or implement a compliance plan with corporate civil liability to compensate for any damage that fulfilling the due diligence obligations would have avoided (art. 2). The law enables any person with a legitimate interest to bring an action to the competent court to establish the civil liability of the entity, which is judicially enforceable by way of a penalty (art. 2). Several interested parties have begun to bring civil actions under the *Act*. On the other hand, there is uncertainty over the conditions to be satisfied before bringing claims, a difficult burden of proof for claimants to overcome, and high costs for extraterritorial claimants. As well, the *Duty of Vigilance Law* has a narrow remit focusing exclusively on *severe* violations, covers a small number of entities (only the largest companies), and does not create a central repository for entities' vigilance plans.

The Netherlands *Child Labour Duty of Care Act*, which is not yet in force, innovatively provides for escalating penalties for corporate non-compliance with due diligence and reporting obligations and a public repository for compliance plans but, conversely, has a narrow remit on child labour. Concerns have been expressed about the law's lack of defined criteria for the 'action plans',[166] but some of these details are meant to be covered through decrees or regulations, with some commentators noting the effectiveness of the law will depend on how the Dutch government elaborates on the elements of the action plans.[167]

There currently is some academic and civil society support, including some trade unions, for Canada to enact a mandatory human rights due diligence law.[168]

Assurances and Audits

One way for a covered entity to circumscribe and discharge its due diligence obligations is to rely on official declarations or assurances from other entities that are part of its supply chains. The terms "assurance"

[166] Anya Marcelis (17 May 2019). Dutch Take the Lead on Child Labour with New Due Diligence Law. Centre for Business and Human Rights. Available: https://www.business-humanrights.org/fr/derni%C3%A8res-actualit%C3%A9s/netherlands-analysis-of-new-child-labour-due-diligence-law-outlines-key-features-and-potential-shortcomings/.

[167] Anneloes Hoff (2019). Dutch Child Labour Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence. Available: https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/.

[168] See, e.g., CNCA (2021). *The Corporate Respect for Human Rights and the Environment Abroad Act*. Available: https://cnca-rcrce.ca/campaigns/business-human-rights-legislation-hrdd/.

and "audit" are often referred to under the umbrella term "assurance". The primary difference between human rights "assurances" and "audits" is that an audit is geared towards confirming that a certain facility/asset meets a certain standard at a certain time, while assurance is geared towards confirming that an entity's processes imply that all of its assets and activities are likely to converge towards an acceptable standard.

Few reporting mechanisms incorporate mandatory assurances/audits because it might deter participation among companies unwilling to accept the cost and scrutiny of involving a third party. Given the importance of the accuracy, completeness and above all materiality of the contents of transparency and due diligence reports and the fact that the contents of many corporate reports are still skewed towards conveying those areas in which the reporting entity has done well, requiring assurances and independent audits can play an important role in ensuring the integrity and accuracy of the reporting process. As verifiable due diligence obligations are imposed on various enterprises, there is a growing need for them to ascertain and verify whether and to what extent they are managing risks to human rights effectively across their operations and value chains, and to ensure that they disclose these efforts and their results adequately and accurately. As enterprises improve their own due diligence processes, they need ways to assure themselves that these processes are producing their intended effects. They also need ways to provide assurances to regulators, investors and other stakeholders that the information they disclose as part of their reporting obligations fairly reflects their practices and the impact of these practices.

The Human Rights Reporting and Assurance Frameworks Initiative (RAFI) proposed a standardized framework to assist companies and assurors in their efforts to adhere to the UN Guiding Principles on Business and Human Rights.[169] The *UNGP* Reporting Framework provides the first comprehensive framework for companies to report on how they respect human rights in practice. The framework asks companies to report on the impact of their operations, not just their processes for conducting due diligence and assessing risk.

Under due diligence strategies that enterprises would be required to implement in accordance with European Parliament's Proposed Directive on corporate due diligence and corporate accountability, enterprises would have to ensure their business relationships also put in place and carry out their own due diligence measures "including by means of framework agreements, contractual clauses, the adoption of codes of conduct or by means of certified and independent audits" (Article 4(8)).

[169] RAFI, *UN Guiding Principles on Business and Human Rights. Guidance Part II: Assurance of Human Rights Performance and Reporting*. Available: https://www.ungpreporting.org/wp-content/uploads/UNGPRF_AssuranceGuidance.pdf.

Stakeholder Engagement and Consultations

When requiring business entities to develop an effective due diligence strategy, the law may specify how such a strategy should be developed and who should be engaged in the process. For example, the European Parliament proposed directive on corporate due diligence and corporate accountability[170] would not only impose an obligation on enterprises to develop an effective due diligence strategy but also require them to engage various stakeholders in the process.

> "Member States shall ensure that undertakings carry out in good faith effective, meaningful and informed discussions with relevant stakeholders when establishing and implementing their due diligence strategy. Member States shall guarantee, in particular, the right for trade unions at the relevant level, including sectoral, national, European and global levels, and for workers' representatives to be involved in the establishment and implementation of the due diligence strategy in good faith with their undertaking. Undertakings may prioritise discussions with the most impacted stakeholders. Undertakings shall conduct discussions and involve trade unions and workers' representatives in a manner that is appropriate to their size and to the nature and context of their operations." (Article 5(1)).

The proposed Directive also contains provisions that would ensure that: stakeholders are entitled to request from the enterprises that they discuss potential or actual adverse impacts on human rights, the environment or good governance that are relevant to them; stakeholders are not put at risk, due to participating in the discussions; that collective bargaining rights are not respected; and that labour representatives are informed and involved in the discussions.

Consequences and Sanctions for Non-Compliance

As was discussed in the previous section of the Guide, supply chain transparency and due diligence laws have sometimes imposed sanctions for failure to produce a report, a due diligence statement, or a vigilance plan. Other sanctions may be imposed in relation to a business entities' specific due diligence obligations.

The UNGP Principle 3

In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; (…).

[170] European Parliament, 'Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability' (2020/2129(INL)). Available: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf.

The European Parliament's proposed Directive on Corporate Due Diligence and Corporate Accountability (2021), Article 18, would require European Union member states to provide for proportionate sanctions applicable to infringements of the national provisions adopted in accordance with the Directive and to take all necessary measures to ensure that those sanctions are enforced. It adds that:

> "1. (…) The sanctions provided for shall be effective, proportionate and dissuasive and shall take into account the severity of the infringements committed and whether or not the infringement has taken place repeatedly."
>
> 2. The competent national authorities may in particular impose proportionate fines calculated on the basis of an undertaking's turnover, temporarily or indefinitely exclude undertakings from public procurement, from state aid, from public support schemes including schemes relying on Export Credit Agencies and loans, resort to the seizure of commodities and other appropriate administrative sanctions."

Some laws have an escalating scheme of sanctions for repeat violations or for failing to comply with an order issued under the due diligence law (i.e., France, and the Netherlands; in Canada, Bill S-216 is proposing that approach as well). Legislators may consider applying a scheme of escalating sanctions to promote deterrence for entities that are repeatedly or persistently non-compliant. In the UK, a 2018 report by the Secretary of State for the Home Department recommended that the *Modern Slavery Act* be amended to include graduated sanctions: initial warning, fine, court summons, and directors' disqualification. Also in the UK, the House of Lords and House of Commons Joint Committee on Human Rights following a review of the *Modern Slavery Act* also recommended stronger enforcement measures, including a 'failure to prevent' offence and other civil and criminal remedies against the parent company.[171]

In France, the *Duty of Vigilance Law* provides for two judicialization paths: (1) a two-step enforcement mechanism (regardless of whether a damage has been sustained) consisting of a formal notice to comply, and a request asking the competent court to order an injunction with a potential periodic penalty payment to ensure that a company falling within the scope of the vigilance obligations set forth in this duty of vigilance law; and, (2) in the event that a damage has occurred, a remediation mechanism, through civil liability.[172] The enforcement mechanism of the vigilance law relies on the actions of parties with standing who are the only ones who can legally trigger it. In practice, according to Savourey and Brabant, "it is

[171] Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting responsibility and ensuring accountability*, 6th Report of Session 2017-17 at 59, online: <https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>.

[172] Stephane Brabant & Elsa Savourey (24 January 2020) All eyes on France - French Vigilance Law first enforcement cases, *Business and Human Rights Resource Centre*. Available: https://www.business-humanrights.org/en/latest-news/all-eyes-on-france-french-vigilance-law-first-enforcement-cases-12-current-cases-and-trends/.

mostly NGOs and trade unions that have led the way initiating the first enforcement actions".[173] Remediation actions have not yet been dealt with by the courts.

Among stricter enforcement options, legislators may consider establishing *disqualification* sanctions for certain breaches to due diligence and transparency laws, or more directly for failing to prevent child or forced labour in their supply chain. Disqualification sanctions can be a powerful deterrent to help ensure corporate compliance: suspending or revoking authorizations or licences including denial from financial benefits and funds can have a serious detrimental impact on corporate activities. Breaches of supply chain due diligence and transparency obligations could also carry consequences for companies and directors if they are defined as grounds for future disqualification for company registration or director duties.

Serious infringements of due diligence obligations could also have consequence to exclude a company from public procurement for a set period of time.[174] The legislator may seize the opportunity to leverage government contracting to encourage supply chains transparency and due diligence in the private sector. Government buying practices can have substantial influence on suppliers and their conduct.[175] Public procurement also has the capacity to affect conditions in global supply chains given government's large purchases.

5. Complaints, Grievance Mechanisms, and Potential Remedies

Providing Access to Effective Remedies

UNGP Principles 25 to 31 provide a range of operational principles regarding effective State-based judicial mechanisms, State-based non-judicial grievance mechanisms and non-State-based grievance mechanisms including operational-level grievance mechanisms.

As an effective remedy is context-dependent, the appropriate remedy may include

The UNGP Principles 25 & 26

25: As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

26: States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

[173] Elsa Savourey & Stephane Brabant (2021). The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption. *Business and Human Rights Journal*, 6(1), 141-152, 150. doi:10.1017/bhj.2020.30

[174] See, e.g., Anni Lietonen and Natalia Ollus (2021). Labour Exploitation and Public Procurement. Guide for risk management in national supply chains. HEUNI. Available: https://heuni.fi/-/procurement-guide.

[175] Methven O'Brien, C., N. Vander Meulen and A. Mehra (2016). *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, Copenhagen and Washington DC, Danish Institute for Human Rights and ICAR. Available: https://globalnaps.org/wp-content/uploads/2018/08/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions.pdf.

prosecution and punishment of perpetrators as it relates to serious abuses, compensation for economically assessable damage, orders for restitution of victims, changes in company policies, guarantees of non-repetition, disciplinary action against responsible personnel and public apologies (*UNGP* Principle 25 Commentary). Remedies should be accessible for victims abroad who cannot access remedies in their own jurisdiction, and who would not traditionally have access to remedy in a business enterprise's home state. States must take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related abuse, including considering ways to reduce barriers.

The basic right to effective remedies has both procedural and substantive dimensions. As part of a business enterprise's duty to carry out human rights due diligence, *UNGP* Principle 22 makes clear that "they should provide for or cooperate in their remediation through legitimate processes." According to *UNGP* Principle 25: "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy". This principle does not deal with the question of extraterritoriality.

The UN Global Compact also highlights the importance of remediation efforts and offers examples of remediation for consideration (i.e., enrolling children in school and/or offering income-generating alternatives for parents or older siblings).[176] The UN Committee on the Rights of the Child, in its General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, recommended that "States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned (para 44)."

Operational Level Mechanisms

The UNGP Principle 22

Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

The business enterprise which identifies a situation of child labour or forced (or other human rights violation), whether through its supply chain due diligence process or other means, should be required to actively engage in remediation, by itself or in cooperation with other actors. Few supply chain due diligence or transparency legislation address this question directly.

[176] Available: https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-5.

As mentioned earlier, a covered enterprise, as part of its due diligence process, can provide (or be required to provide) a complaint and grievance mechanism as "an effective early-stage recourse, provided they are legitimate, accessible, predictable, equitable, transparent, human rights-compatible, based on engagement and dialogue, and protect against retaliation".[177] These company grievance mechanisms should not in any way undermine the right of a individuals to file a complaint before competent authorities or to seek justice before a court.[178] The *OECD Guidelines for Multinational Enterprises* make direct reference to the *UNGP* with the expectation that multinational enterprises should have processes in place to enable remediation by meeting these criteria. In alignment with the *UNGP*, the responsibility for

Protection for Complainants and Whistleblowers

The safety of complainants or whistleblowers and witnesses is a potential concern with respect to all complaints and grievances mechanisms. It may not always be necessary to include specific protection mechanisms if they are otherwise provided in other legislation and apply specifically to grievances in relation to a company's operations and due diligence obligations in relation to child labour and forced labour or other potential human rights violations.[179] A proposed *Supply Chain Modern Slavery Bill* in Tasmania includes a specific whistleblower protection.

addressing alleged human rights abuses should ideally rest with the business entities or their partners that cause or contribute directly to those harms. The ILO and the International Organisation of Employers also recognize the use of remedy and grievance mechanisms as one of seven key steps in its recommended business response to child labour in mineral supply chains.[180]

When drafting a new supply chains transparency and due diligence law, consideration should be given to creating a specific responsibility for a covered entity to establish a complaint/grievance mechanism as both an early warning system and as an early-stage recourse and avenue for mediation. A complementary approach may involve creating a dedicated complaint mechanism to bring complaints to the attention of covered entities. An example of such a mechanism is the OECD National Contact Points established to assist enterprises and their stakeholders to take appropriate measures in alignment with the OECD Guidelines. The question then becomes one of giving this mechanism the means to deal effectively with the complaints it received.

[177] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), para. 25.

[178] Ibid.

[179] See also the International Justice and Human Rights Clinic, Model Law - Transparency in Supply Chains Act, which includes whistleblower protection measures. Available: https://allard.ubc.ca/sites/default/files/2021-03/TSCA_proposed_model_bill_with_cover-FINAL.pdf.

[180] Available: https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-manila/documents/publication/wcms_720743.pdf p. 4.

Article 9 of the European Parliament proposed directive on corporate due diligence and corporate accountability would require Union member states to require that the following grievance mechanisms be put in place:[181]

> 1. Undertakings shall provide a grievance mechanism, both as an early-warning mechanism for risk-awareness and as a mediation system, allowing any stakeholder to voice reasonable concerns regarding the existence of a potential or actual adverse impact on human rights, the environment or good governance. Member States shall ensure that undertakings are enabled to provide such a mechanism through collaborative arrangements with other undertakings or organisations, by participating in multistakeholder grievance mechanisms or joining a Global Framework Agreement.
>
> 2. Grievance mechanisms shall be legitimate, accessible, predictable, safe, equitable, transparent, rights-compatible and adaptable as set out in the effectiveness criteria for non-judicial grievance mechanisms in Principle 31 of the United Nations Guiding Principles on Business and Human Rights and the United Nations Committee on the Rights of the Child General Comment No 16. Such mechanisms shall provide for the possibility to raise concerns either anonymously or confidentially, as appropriate in accordance with national law.
>
> 3. The grievance mechanism shall provide for timely and effective responses to stakeholders, both in instances of warnings and of expressions of concern.
>
> 4. Undertakings shall report on reasonable concerns raised via their grievance mechanisms and regularly report on progress made in those instances. All information shall be published in a manner that does not endanger the stakeholders' safety, including by not disclosing their identity.
>
> 5. Grievance mechanisms shall be entitled to make proposals to the undertaking on how potential or actual adverse impacts may be addressed.
>
> 6. Undertakings shall take decisions informed by the position of stakeholders, when developing grievance mechanisms.
>
> 7. Recourse to a grievance mechanism shall not preclude the claimants from having access to judicial mechanisms."

Article 10 (Extra-judicial remedies) of the European Parliament's proposed Directive on Corporate Due Diligence and Corporate Accountability (2021) would require European Union member states to "ensure that when an undertaking identifies that it has caused or contributed to an adverse impact, it provides for or cooperates with the remediation process". In such instances the remedy, which may consist of financial or non-financial compensation, reinstatement, public apologies, restitution, rehabilitation, a contribution to an investigation, or providing guarantees that the harm in question ill not be repeated, may be

[181] Ibid, Proposed Directive, Article 9.

proposed as a result of mediation and should be determined in consultation with the affected stakeholders. Paragraph 5 of the same article would require Union member states to ensure that a remediation proposal by an undertaking does not prevent affected stakeholders from bringing civil proceedings in accordance with national law; "decisions issued by a grievance mechanism shall be duly considered by courts but shall not be binding upon them".

Operational-level grievance mechanisms are often criticized for, among other things, failing to engage and consult with stakeholders, follow a coherent and consistent process, or provide meaningful remedies.[182] Additionally, studies have shown that a lack of corporate support for the grievance mechanisms often tends to make them much less effective.[183] Accordingly, one good practice, consistent with the engagement and dialogue criterion of *UNGP* Principle 31, consists of requiring enterprises to develop operational-level grievance mechanisms with the stakeholder groups for whom they are intended for. France's *Duty of Vigilance Law*, as an example, specifies that an alert mechanism under the vigilance plan be developed in partnership with the trade union organization representatives of the company.

UNGP 31

Effectiveness Criteria for Non-Judicial Grievance Mechanisms

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- **Legitimate**: Enabling trust from the stakeholder groups for whose use they are intended and being accountable for the fair conduct of grievance processes.
- **Accessible**: Being known to all stakeholder groups for whose use they are intended and providing adequate assistance for those who may face particular barriers to access.
- **Predictable**: Providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.
- **Equitable**: Seeking to ensure that aggrieved parties have reasonable access to sources of information, advice, and expertise necessary to engage in a grievance process in fair, informed, and respectful terms.
- **Transparent:** Keeping parties to a grievance informed about its process and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake.

[182] For example, a Ludwig Boltzmann Institute's study assessed the strengths and weaknesses of five different complaints mechanisms. The study identified key challenges and weaknesses, including establishing and maintaining trust by the stakeholders, ensuring equity during the process, and lack of consequences for non-compliance. See Barbara Linder, Karin Lukas, & Astrid Steinkellner (April 2013). The Right to Remedy: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest between Business Actors and Those Affected by their Operations, Ludwig Boltzmann Institute of Human Rights. Available: https://bim.lbg.ac.at/files/sites/bim/Right%20to%20Remedy_Extrajudicial%20Complaint%20Mechanisms_2013_1.pdf.

[183] The International Institute for Environment and Development has summarized the perceived disadvantages of grievance mechanisms from the companies' perspective, which included "perceived loss of control over the dispute resolution process by one internal function of the company over the other," as well as the risk of encouraging vexatious claims. See International Institute for Environment and Development (2013). Dispute or dialogue? Community perspectives on company-led grievance mechanisms, p. 31.

- **Rights-compatible**: Ensuring that outcomes and remedies accord with internationally recognized human rights.
- **Based on engagement and dialogue**: Consulting the stakeholder groups for whose use they are intended on their design and performance and focusing on dialogue as a means to address and resolve grievances.
- **Continuous learning**: Drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Source: *UN Guiding Principles on Business and Human Rights* (2011), Principle 31.

State-Based Judicial Grievance Mechanisms

The *UNGP* provide guidance regarding the effective implementation of non-judicial and judicial state-based grievance mechanisms.

In most jurisdictions, judicial grievance mechanisms are available for dealing with cases of forced labour, child labour, or human trafficking that may occur at any stage of the supply chains and in the countries where the offence occurs. Judicial mechanisms are sometimes also available in many instances for compelling covered entities to comply with the transparency and due diligence requirements of the law, usually at the instigation of an administrative authority. To a lesser extent judicial grievance mechanisms are sometimes also available in relation to the civil liability (tort or civil wrong) of a covered entity for a failure to exercise due diligence throughout its supply chain to prevent forced and child labour. In that regard, it is important for the law to ensure that judicial authorities are able to act on a complaint by third parties through safe and accessible channels (without fear of reprisals). For example, commentators on the California *Transparency in Supply Chains Act* have argued that stakeholders should be able to address grievances through civil litigation, which also serves as an enforcement mechanism.[184]

Conducting due diligence should not automatically absolve a covered enterprise from liability for the harm it has directly or indirectly caused or contributed to. This applies to other entities that are part of the enterprise supply chain, including joint and several liability in subcontracting chains. The legislator can explore clarifying the civil and administrative liability of enterprises domiciled or operating in their jurisdiction that have failed to prevent child labour or forced labour within their own operations and supply chains.

The concept of negligence, applied to an enterprise's due diligence obligations, may be the basis for a corporate liability. The tests of negligence, depending on the jurisdiction, may include the following elements: the existence of a legal duty of care towards an affected person (i.e., a legal obligation to act in such a way that others are not harmed by one's actions or, in some cases, omissions); a breach of the

[184] Marieke Koekkoek, Axel Marx & Jan Wouters (2017). Monitoring Forced Labour and Slavery in Supply Chains: The Case of the California Act on Transparency in Supply Chains, *Global Policy*, 8(4), 522 at 528.

applicable standard of care by the duty bearer; and a resulting injury to the affected person(s) caused by the breach.[185]

In some instances, when facing claims of negligence, the exercise of due diligence can be a basis for a possible defense to liability. Permitting a defense to liability based upon human rights due diligence activities could incentivize companies to meaningfully engage in such activities and have important preventative effects; however, there are serious concerns with the appropriateness of a human rights due diligence defense in some cases.[186] Imposing a strict liability for negligence of due diligence obligations, thus shifts the burden of proof onto a company to prove that it should not be held liable for some negligence resulting in harmful consequences, offenses permit defenses. Creating absolute liability offenses automatically leads to the liability of the responsible party. In that regard, the 2018 OHCHR report notes that "(w)hile the use of strict and absolute liability provides incentives to companies to exercise due diligence activities to avoid liability, allowing a strict liability defense based upon human rights due diligence in appropriate cases can potentially ensure even higher levels of vigilance".[187]

A company may also be exposed to secondary liability. Secondary liability or "complicity" may arise when a business enterprise contributes to adverse human rights impacts caused by other parties. The extent of such liability, depending on the jurisdiction, vary between jurisdictions with respect to the degree of culpability needed (e.g., intentional, knowing, reckless, or negligent assistance) and the degree of contribution needed (e.g., material or substantial assistance) to give rise to legal liability. According to the 2018 report by the United Nations High Commissioner for Human Rights, "Conducting human rights due diligence should help companies reduce the risk of legal liability based on theories of complicity by showing that they took every reasonable step to avoid involvement with or contribution to alleged human rights abuse."[188]

Article 19 of the European Parliament's proposed Directive on Corporate Due Diligence and Corporate Accountability (2021) would require Union member states to adopt several measures relating to the liability regime with respect to their due diligence obligations:

> 1. The fact that an undertaking respects its due diligence obligations shall not absolve the undertaking of any liability which it may incur pursuant to national law.
>
> 2. Member States shall ensure that they have a liability regime in place under which undertakings can, in accordance with national law, be held liable and provide remediation for any harm arising

[185] United Nations (2018), *Report of the United Nations High Commissioner for Human Rights: Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability*, para 19. A/HRC/38/20/Add.2. Available: https://digitallibrary.un.org/record/1637328?ln=en.

[186] Ibid, para 29.

[187] Ibid, para 26.

[188] Ibid, para 31.

> out of potential or actual adverse impacts on human rights, the environment or good governance that they, or undertakings under their control, have caused or contributed to by acts or omissions.
>
> 3. Member States shall ensure that their liability regime as referred to in paragraph 2 is such that undertakings that prove that they took all due care in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, are not held liable for that harm.
>
> 4. Member States shall ensure that the limitation period for bringing civil liability claims concerning harm. (Article 19).

As mentioned earlier, the French *Duty of Vigilance Law* provides for a remediation mechanism consisting in a civil liability action in the event that damage has occurred. The vigilance law requires that companies take all steps in their power to achieve results (obligation to use certain means), but not that they necessarily achieve certain results (obligation to produce certain results). While various Notices have been filed, it is still too early to know how these provisions will be interpreted by the courts.[189]

State-Based Nonjudicial Grievance Mechanisms

Non-judicial state complaints and grievance mechanisms can also be created specifically to deal with issues relating to child and forced labour. This may involve incorporating a non-judicial grievance mechanism within the duties and responsibilities of a designated administrative authority. For example, the Netherlands' *Child Labour Duty of Care Act* provides for a state-based grievance mechanism and stipulates that a designated regulator may receive complaints from victims, consumers, and other stakeholders should their interests be affected by a company acting contrary to the duty of care. This provision is qualified in that complaints must be based on concrete evidence of non-compliance. Further, claimants can only do so after the company itself has dealt with the complaint, or if the company has not responded to the complaint six months after filing it which means the regulator's powers are limited to addressing a grievance in a timely manner. As another example, the law for New South Wales creates the role of a commissioner responsible for identifying and providing support to victims of modern slavery while also establishing a hotline to assist such persons. However, the Commissioner's role is limited in terms of its investigatory powers: the Office cannot directly engage with the individual complainant and can merely provide referrals to other agencies. In Canada, CORE has also been subject to similar criticisms with respect to its limited authority to investigate complaints. There is also the largely unresolved question of the international investigatory authority of regulatory bodies.

In Canada, the Canadian Ombudsperson for Responsible Enterprise (CORE), as a State-based non-judicial grievance mechanism, could potentially be given a broader mandate as a state-based mechanism for

[189] Elsa Savourey & Stephane Brabant (2021). The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption. *Business and Human Rights Journal*, 6(1), 141-152, 150. doi:10.1017/bhj.2020.30

dealing with complaints and grievances with respect to companies' supply chain transparency and due diligence obligations. In March 2021, CORE launched its complaints process to receive and review "claims of alleged human rights abuses arising from the operations of Canadian companies abroad in the mining, oil, and gas, and garment sectors."[190] However, CORE powers to compel the production of documents and testimony may need to be expanded.[191] The powers and authority of a state-based grievance mechanism tends to be limited if it is not accompanied by some extraterritorial investigatory authority.

Examples of Legislation

Examples of supply chains transparency and due diligence enacted or proposed laws that include provisions concerning both non-judicial and judicial grievance mechanisms include:

> **France**, Duty of Vigilance Law 2017:
>
> A covered entity must establish an alert mechanism under the vigilance plan developed in working partnership with the trade union organizations representatives of the company concerned for collecting reports of existing or actual risks (art. 1).
>
> A covered entity that fails to comply with its vigilance obligations (i.e., fails to take reasonable measures to identify and prevent the covered risks) is obliged to compensate any damage, where compliance would have prevented the harm (art. 2). Any person with a legitimate interest may bring an action to the competent court to establish the civil liability of the entity (art. 2). The court can enforce a decision under penalty and the court may order the publication, distribution or display of its decision or an extract thereof, in accordance with its procedures (art. 2).
>
> **Netherlands**, proposed Child Labour Duty of Care Act 2019:
>
> A natural person or legal entity may submit a complaint to the designated regulator if their interests are affected by the actions or omissions of a company relating to compliance with this act (art. 3(2)). Only a concrete indication of non-compliance constitutes grounds for submitting a complaint (art. 3(3)). The regulator may only address a complaint after the company has had the chance to do so, or after six months have passed without it having been addressed by the company (art. 3(4)).

[190] Available: https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/index.aspx?lang=eng.

[191] International Justice and Human Rights Clinic, Empowering the CORE. Available: https://allard.ubc.ca/sites/default/files/2021-02/Empowering-the-CORE-FINAL.pdf.

6. Administration and Enforcement of the Law

Supply chains transparency and due diligence laws may also establish an administrative authority to fulfill some or all of the following functions: advocacy and education; providing guidance and/or developing regulations; managing a central public database on covered entities reports or due diligence statements, including in some cases some information about non-complying entities; monitoring covered entities compliance with the reporting obligations; initiating enforcement mechanisms in cases of non-compliance; managing a complaint mechanism; and, facilitating access to remedies (or implementation of remedy).

Examples:

New South Wales, *Modern Slavery Act 2018:*

- The Commissioner established by the Act (Part 2, Division 1 – 3) is tasked with advocacy, making recommendations on the prevention of modern slavery, and monitoring entities' reporting on risks of modern slavery in supply chains – in addition to victim identification/assistance/referral functions (Part 2, Division 2).
- The Act also establishes a Modern Slavery Committee to report on modern slavery to Parliament (Part 2, Division 4). However, the Committee does not investigate individual cases (s 22(2)).

Netherlands, *Child Labour Duty of Care Act:*

- A 'superintendent' (the 'toezichthoude') is established by art. 3(1) to supervise compliance with the act.

Some laws create an independent administrative authority (Australia, the Netherlands), while others rely on a Minister or a government body to administer the law (e.g., California, U.K., Australia, and Canada as proposed by Bill S-216). Laws that rely on the exercise of political or administrative discretion are often criticized for the fact that they do not appear to be diligently enforced.

Regulatory Role

Legislators and policy makers need to consider the level of detail they include in the law regarding the precise due diligence obligations to be implemented and enforced. In some instances, the requirements may be set out in detail in the law itself, but in other instances further guidance may be needed and provided by regulation (as has been recognized in relation to the French Corporate Duty of Vigilance Law).

As mentioned before, several laws or proposed laws include specific provisions for either the government or a regulatory body to modify or add to the reporting obligations of business entities and to prescribe the format to be used for reporting (by regulation or decree). Another possibility is for the legislator to

leave it entirely to the body responsible for the administration of the law to adopt regulations concerning the scope, contents, periodicity, and format of the report that must be prepared by business enterprises, including how and to whom they must be submitted.

Enforcement Role

Article 12 of the European Parliament's Proposed Directive on Corporate Due Diligence and Corporate Accountability would require each Union member state to designate one or more national competent authorities responsible for the supervision of the application of this Directive, as transposed into national law, and for the dissemination of due diligence best practices. Article 13 of the proposed directive would require member states to give "competent authorities the power to carry out investigations to ensure that undertakings comply with the obligations set out in this Directive, including undertakings which have stated that they have not encountered any potential or actual adverse impact on human rights, the environment or good governance".

The administrative authority responsible for ensuring compliance with the transparency and due diligence obligations of the law may have different tools at its disposal, including injunctions, orders, binding instructions, and perhaps in some instances prosecution. In some instances, the law may allow or even encourage enforcement of the law at the motion of third parties. This approach, recently applied by France's *Duty of Vigilance Law*, appears promising.

In Canada, Bill S-216 was proposing to establish an inspection regime whereby a person designated by the Minister would have been authorized to enter and examine a place in which there are reasonable grounds to believe there is anything related to the administration of the Act (s. 11). The designated person would have been empowered to issue a warrant to enter a dwelling house (s. 12). In cases of non-compliance with the reporting obligations of the law, the Minister would have been authorized to order an entity to take corrective measures necessary to comply its obligations under the law (s. 14).

Responding to Grievances

As discussed in the previous section, some administrative bodies may also be given responsibility for receiving and dealing with grievances, or for oversight over complaint and grievance mechanisms.

7. Other Resources

Canadian Bar Association. Model Business Principles on Forced Labour, Labour Trafficking, and Illegal or Harmful Child Labour, 2016. https://www.cba.org/getattachment/Our-Work/Resolutions/Resolutions/2016/Model-Business-Principles-on-Forced-Labour,-Labour/Model-Business-Principles-on-Forced-Labour,-Labour-Trafficking,-and-Illegal-or-Harmful-Child-Labour.pdf

Canadian Bar Association. Business and Human Rights Guide. https://www.cba.org/Publications-Resources/Practice-Tools/Business-and-Human-Rights?lang=en-ca

Council of Europe. Business and human rights - A handbook for legal practitioners, 2019. https://edoc.coe.int/en/fundamental-freedoms/7785-business-and-human-rights-a-handbook-for-legal-practitioners.html

European Parliament. EU Human Rights Due Diligence Legislation: Monitoring, Enforcement and Access to Justice for Victims, 2020. https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603505/EXPO_BRI(2020)603505_EN.pdf

European Parliament. Towards a mandatory EU system of due diligence for supply chains, 2020. https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI(2020)659299_EN.pdf

International Bar Association. IBA Business and Human Rights Guidance for Bar Associations, 2015. http://shiftproject.org/wp-content/uploads/2017/07/IBA-Business-and-Human-Rights-Guidance-for-Bar-Associations.pdf

International Bar Association. IBA Practical Guide on Business and Human Rights for Business Lawyers, 2016. https://shiftproject.org/resource/iba-practical-guide-on-business-and-human-rights-for-business-lawyers/

Organisation for Economic Co-operation and Development. OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (Third Edition), 2016. https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf

Office of the United Nations High Commissioner for Human Rights. Guiding Principles on Business and Human Rights, 2011. https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

Appendix 1 - International Standards and Guidance on Preventing and Combating Child Labour in Global Supply Chains

International Standards and Guidance on Preventing and Combating Child Labour and Forced Labour in Global Supply Chains		
Organization	Policy/Legislation	Summary
United Nations General Assembly	*UN Sustainable Development Goals* *Target 8.7 & Target 16.2*	**Target 8.7:** Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking, and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers and by 2025, end child labour in all its forms. **Target 16.2:** End abuse, exploitation, trafficking, and all forms of violence against and torture of children.
	Resolution 73/327, 2021 - International Year for the Elimination of Child Labour	The UNGA unanimously adopted resolution 73/327 on July 25, 2019, declaring 2021 as the International Year for the Elimination of Child Labour.
	United Nations Convention on the Rights of the Child, 1989	Children should be protected from economic exploitation and from performing any work that is likely to be hazardous, or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral, or social development. State parties shall provide for a minimum age for employment, appropriate regulation of hours and conditions of employment, and provide for appropriate penalties or other sanctions to ensure effective enforcement of Article 32.
International Labour Organization	*Convention No. 182 (1999): Worst Forms of Child Labour*	Requires ratifying countries to take immediate, effective, and time-bound measures to eliminate the worst forms of child labour as a matter of urgency. *Recommendation 190:* Recommends a definition of hazardous work.
	Convention No. 138 (1973): Minimum Age	Establishes a minimum age for entry into work or employment and to establish national policies for the elimination of child labour. *Recommendation 146:* Stresses what should be incorporated into national policies and plans.
	Protocol No. 29 (2014): Protocol of 2014 to the Forced Labour Convention, 1930	Provides specific guidance on effective measures to be taken to eliminate all forms of forced labour. Supplements the Forced Labour Convention, 1930 (No. 29).

	Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration) (2017)	*Section 10.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. *Section 27:* Multinational enterprises, as well as national enterprises, should respect the minimum age for admission to employment or work in order to secure the effective abolition of child labour in their operations and should take immediate and effective measures within their own competence to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.
UN Committee on Economic, Social and Cultural Rights (CESCR)	*International Covenant on Economic, Social and Cultural Rights (1966) – Article 10*	Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.
UNICEF, Save the Children, and The Global Compact	*Children's Rights and Business Principles (CRBP) (2012)*	Provides a list of ten principles that should guide businesses, including: Meet their responsibility to respect children's rights, contribute to the elimination of child labour, provide decent work for young workers, parents, and caregivers, ensure the protection and safety of children, ensure that products and services are safe and seek to support children's rights, use marketing and advertising that respect and support children's rights, respect and support children's rights in relation to the environment and to land acquisition and use, respect and support children's' rights in security arrangements, help protect children affected by emergencies, and reinforce community and government efforts to protect and fulfill children's rights.
Office of the United Nations High Commissioner for Human Rights (OHCHR)	*The UN Guiding Principles on Business and Human Rights (2011)*	Provides an authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. The use of the term "human rights" is meant to include children, but the document does not specifically mention an obligation to eradicate child labour. *Principle 13:* The responsibility to respect human rights requires that business enterprises (a) avoid using or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur, and (b) 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. (p.14)
OECD	*Practical Actions for Companies to Identify the Worst Forms of Child Labour in Mineral Supply Chains (2017)*	The practical actions seek to help companies mitigate and account for the risks of child labour in their mineral supply chain. The document goes into depth about each of the following due diligence steps: 1. Establish strong company management systems 2. Identify and assess for risks, including the worst forms of child labour in the supply chain 3. Design and implement a strategy to respond to identified risks 4. Carry out an independent third-party audit of smelter/refiner's due diligence practices with regards to worst forms of child labour 5. Report annually on supply chain due diligence on the worst forms of child labour
	Due Diligence Guidance for Responsible Business Conduct	Provides practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises by providing plain-language explanations of its due diligence recommendations and associated provisions. Seeks to promote a common understanding among governments and stakeholders on due diligence for responsible business conduct.
	OECD Practical Actions for Companies to Identify the Worst Forms of Child Labour in Mineral Supply Chains (2017)	The practical actions seek to help companies mitigate and account for the risks of child labour in their mineral supply chain. The document goes into depth about each of the following due diligence steps: 1. Establish strong company management systems 2. Identify and assess for risks, including the worst forms of child labour in the supply chain 3. Design and implement a strategy to respond to identified risks 4. Carry out independent third-party audit of smelter/refiner's due diligence practices with regards to worst forms of child labour 5. Report annually on supply chain due diligence on the worst forms of child labour

UN Committee on the Rights of the Child	*General Comment No. 16 (2013) on state obligations regarding the impact of the business sector on children's rights*	Host States have the primary responsibility to respect, protect and fulfil children's rights in their jurisdiction. They must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child and/or aid and abet violations in foreign jurisdictions. (Para 42) States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned. (Para 44) Both home and host States should establish institutional and legal frameworks that enable businesses to respect children's rights across their global operations. (Para 46)
International Trade Union Confederation	*Eliminating Slavery: Frontline Guide for Trade Unions*	Outlines goals and strategies for eliminating slavery and mentions the Protocol of 2014 to the Forced Labour Convention and the 2030 Agenda for Sustainable Development.
European Union	*EU Legislation*	*Article 32 of the EU Charter of Fundamental Rights* Prohibits child labour and provides for the protection of young people at work. EU institutions are required to take this charter into account in the design and implementation of legislation or policies, both internally and in their external relations.
		EU Guidelines on the Rights of the Child (Revised in 2017) Article 15b: Support partner countries to promote, protect and fulfill the rights of the child with a focus on economic, social and cultural rights such as the right to education, health and nutrition, social protection and the fight against the worst forms of child labour, always guided by the best interests of the child.
		Guidelines on Children and Armed Conflict (2008) Aims to eliminate children's recruitment for the purposes of armed conflict.

Appendix 2 - Selected Transparency and Due Diligence Laws

	AUSTRALIA: MODERN SLAVERY ACT	CALIFORNIA: TRANSPARENCY IN SUPPLY CHAINS ACT	CANADA: MODERN SLAVERY ACT (BILL)	FRANCE: DUTY OF VIGILANCE LAW	GERMANY: SUPPLY CHAIN LAW	NETHERLANDS: CHILD LABOUR DUE DILIGENCE ACT	NEW SOUTH WALES: MODERN SLAVERY ACT	NORWAY: TRANSPARENCY LAW	UNITED KINGDOM: MODERN SLAVERY ACT
STATUS	In force since January 2020.	In force since 2012.	Previously proposed.	Adopted and in force 27 March 2017.	Adopted but not yet in force (2023).	Adopted 14 May 2019. Not yet in force.	Assented to, but not yet in force.	Adopted but not yet in force.	In force since October 2015.
COVERAGE	• Modern slavery • Forced labour • Trafficking in persons • Child labour	• Slavery • Human trafficking	• Forced labour • Child labour	• Human Rights Serious • Health and safety of persons • Environment	• Human Rights • Working conditions	• Child labour	• Any form of slavery, servitude or forced labour to exploit children	• Human Rights • Working conditions	• Slavery, servitude • Forced labour • Human trafficking
SCOPE - COVERED ENTITIES	An entity with a consolidated revenue of at least $100 million and is Australian or carries on business in Australia at any time during the reporting. An entity that is not covered may also volunteer to submit a statement.	A retailer, seller or manufacturer that does business in California and has annual worldwide gross receipts that exceed US $100,000,000.	Entities listed on a stock exchange in Canada, or with a place of business in Canada, or doing business in Canada, or with or has assets in Canada and meets two of the following conditions: (i) it has at least $20 million in assets, (ii) it has generated at least $40 million in revenue, (iii) it employs an average of at least 250 employees.	Large companies based in France with more than 5,000 employees within itself and direct or indirect subsidiaries.	Large companies based in country with more than 3,000 employees (1,000 employees after 2024) (including foreign companies with office in country).	A company registered in the Netherlands or elsewhere that sells or supplies goods or services to Dutch "end users" (natural persons or legal entities that use, consume or purchase the good or service).	A corporation, organization, partnership, or other body of persons (other than a NSW government agency) that has employees in NSW and supplies goods/services for profit and has a total annual turnover of not less than A$50 million.	Large companies domiciled or delivering services in country.	A body corporate (wherever incorporated) or a partnership (wherever formed) that carries on a business or part of a business in any part of the United Kingdom if it supplies goods or services and has a total turnover no less than an amount prescribed by regulation, currently £36 million.
TRANSPARENCY OBLIGATIONS/ REPORTING	Prepare an annual risk statement to be submitted to the Minister (Department of Home Affairs) within six months of the end of the annual reporting period. A joint statement for multiple entities is possible.	Annual disclosure report with proscribed contents.	Annual report to Minister of Public Safety setting out steps taken in the previous financial year to prevent /reduce the risk of forced/child labour at any step of the production of goods (in Canada or elsewhere), or of goods imported into Canada.	Covered entities must publish vigilance plan in annual report.	Publish annual report on company website and submit it to relevant authority.	Filing a statement about the due diligence measures taken to prevent goods/services from being produced using child labour. Statement to be published by administrative authority.	Produce annual statement with steps taken to ensure that goods and services are not a product of supply chains in which modern slavery is taking place.	Publish annual report on company website and amend when significant changes occur.	Produce annual report with the steps taken in the previous financial year to ensure that slavery and human trafficking are not taking place in any of its supply chains and any part of its own business, or a statement that it has not taken any steps.
DUE DILIGENCE OBLIGATIONS	Obligation to report on risk assessment and due diligence activities, but no specific obligation to	Obligation to report on efforts to eradicate slavery and human trafficking from their direct supply	Obligation to report on due diligence activities, but no specific obligation to undertake these activities (UNGP based).	Publish a vigilance plan in the annual report. Applies to own operations (vis	Due diligence measures required (partly UNGP and OECD based).	A statement of due diligence must be filed, but the due diligence measures are not specified by law.	Obligation to report on due diligence activities, but specific due diligence measures are	Duty to know of all salient risks and duty to exercise due diligence (OECD based).	Obligation to report on due diligence activities, but no specific obligation to undertake

	AUSTRALIA: MODERN SLAVERY ACT	CALIFORNIA: TRANSPARENCY IN SUPPLY CHAINS ACT	CANADA: MODERN SLAVERY ACT (BILL)	FRANCE: DUTY OF VIGILANCE LAW	GERMANY: SUPPLY CHAIN LAW	NETHERLANDS: CHILD LABOUR DUE DILIGENCE ACT	NEW SOUTH WALES: MODERN SLAVERY ACT	NORWAY: TRANSPARENCY LAW	UNITED KINGDOM: MODERN SLAVERY ACT
	undertake. these activities.	chains, but no obligation to take any specific measure.		subsidiaries) and part of the supply chain.	Only apply in full to own operations and direct subsidiaries and direct suppliers). Requirement to mitigate risks identified in indirect suppliers.		not required by law.	Applies to own operations and whole value chain (supply chain and non supply chain business partners).	these activities.
COMPLIANCE AND ENFORCEMENT	Administered by the Department of Home Affairs, which must also report annually to parliament. There is no legal sanction. The Minister may formally request that an entity provide an explanation why the entity did not submit their annual statement and/or may request remedial action to complete a statement. Minister may publish the entity's identity and details of noncompliance on the Modern Slavery Statements Register.	Administered by the Attorney General, who may bring an action for injunctive relief if an entity fails to properly create and post its disclosure.	Administered by the Minister of Public Safety, which must also report annually to parliament. The Minister may designate persons or classes of persons for the purposes of the administration and enforcement of the Act. In case of non-compliance, the Minister may, by order, require the entity to take any measures that he or she considers necessary to ensure compliance with provisions. Establishes an inspection regime. Non-compliance is an offence punishable on summary conviction and liable to a fine of not more than $250,000.	Any concerned party can file a complaint for non-compliance before the judge. The judge may issue compliance notice and, when non-compliance persists, impose penalties.	Public regulator can review reports, conduct risk-based inspections at its own initiative or following complaints by affected parties. Regulator my issue orders to comply and impose fines for non-compliance.	A binding instruction (with time limits) may be Issued by the superintendent. Fines may be imposed by the superintendent, for failing to carry out an investigation, to make an action plan, or to comply with the requirements of the investigation or action plan. Failing to perform the due diligence obligations is an offence if an administrative fine was imposed for the same violation in the past five years.	Administered by an independent Anti-slavery Commissioner. A covered entity is liable for a fine of up to A$1.1 million if it fails to prepare a statement or fails to make the statement public. A person is liable for a fine of up to A$1.1 million if they provide information that they know or ought reasonably to know is false or misleading.	Any person can file a request for information about due diligence activities. The Consumer agency monitors compliance and issue injunctions or prohibitions and impose fines.	Administered by the Secretary of State who may seek an injunction by bringing civil proceedings in the High Court or, in Scotland, for specific performance of a statutory duty.
	Australia	**California**	**Canada**	**France**	**Germany**	**Netherlands**	**New South Wales**	**Norway**	**United Kingdom**

International Centre for Criminal Law Reform and Criminal Justice Policy

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