

# HUMAN RIGHTS DUE DILIGENCE: THE ROLE OF STATES

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## Preface

The capacities of States to protect human rights have not kept pace with the expansion of global economic activity. As businesses have gained greater economic rights, access to markets and mobility, governments have increasingly failed to find a balance between the power of business and the duty of the State to protect human rights.

In theory, victims of harms caused by or contributed to by business may complain to governmental authorities and seek redress. But all too often those appeals are stymied by the absence of formal remedies within the home state of the victim or the business. Put simply, there is often no recourse for victims of human rights abuse. Where remedies do exist, victims may still be denied access to justice due to a range of legal, financial and political obstacles. Corporate structures may obscure precisely who is responsible for causing harm; jurisdictional obstacles may make transnational cases difficult and costly to litigate; courts or prosecutors may lack the appropriate expertise; corruption or political repression may make any such case impossible. In some States, governments may be unable to protect their citizens' human rights due to a lack of proper institutions or the fragility of the governance structure.

The concept of human rights due diligence has risen to prominence as a potential tool for meeting the twin challenges of shaping better business behavior and providing access to justice for victims when business fails to meet the standards set by society. Due diligence is not itself a replacement for providing victims with effective redress mechanisms. Rather, human rights due diligence is a means by which business enterprises can identify, prevent, mitigate and account for the harms they may cause, and through which judicial and regulatory bodies can assess an enterprise's respect for human rights.

The Human Rights Due Diligence (HRDD) Project was launched by the International Corporate Accountability Roundtable (ICAR),<sup>1</sup> the European Coalition for Corporate Justice (ECCJ)<sup>2</sup> and the Canadian Network on Corporate Accountability (CNCA).<sup>3</sup> The Project set out to understand how governments could use their regulatory authority to mandate or encourage businesses to engage in human rights due diligence activity.

At the request of the coalitions that launched the project, we came together as an expert group to receive input and author this final report. We formulated a research survey and plan and sought the advice of legal experts from regions around the globe. Throughout most of 2012, we attended consultations with those legal experts and with civil society from Africa, Asia, Europe and the Americas, listening to practitioners and scholars from a variety of jurisdictions about how due diligence regulation works in their own countries and how it does not. We received many examples of due diligence regulation confirming our initial sense that regulatory due diligence is common to most jurisdictions. But accompanying such examples was a very clear message: many of these regulations are not being fully implemented or enforced by States. We also learned, however, that if States do properly implement these regulations, they can be effective in preventing or mitigating harm. We found that in many cases, existing due diligence regimes concern human rights only tangentially, or even not at all: we found more examples in the area of environmental protection, product safety or

money laundering, than in the area of human rights as such. These are important lessons, and the inputs have had a profound impact on our thinking as we approached the task of describing State practice. Without the invaluable advice and knowledge of all who participated, our task would have been very much more difficult and the result less strong. We are indebted to all of you.

We are grateful to the member organization of the coalitions who invited us to participate in the Project. It has been a privilege to engage in such a timely debate, with as much substance as we could muster, in a short and intense period of consultation. It has been a pleasure to do so with the help of the excellent professionals who have led the Project, Amol Mehra, ICAR; Filip Gregor, ECCJ; and Catherine Coumans, CNCA. All the views and errors are, of course, our own.

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## Executive Summary

The United Nations Guiding Principles on Business and Human Rights (“Guiding Principles”)<sup>4</sup> affirm that business enterprises have a responsibility to respect human rights, and that States have a duty to ensure that they do so. The Guiding Principles describe the duty of States as including “appropriate steps to prevent, investigate, punish and redress” human rights abuse “through effective policies, legislation, regulations and adjudication.”<sup>5</sup> The Guiding Principles suggest due diligence as an operational means for business enterprises to respect human rights, but the specific options available to States to ensure the implementation of business due diligence are not specified.

The Human Rights Due Diligence Project sought to establish the extent to which the legal systems of States already make use of due diligence regulations to ensure that businesses respect established standards and to describe a range of regulatory options policymakers might use to take the next steps in ensuring businesses respect human rights.

This report is the culmination of Consultations with lawyers and scholars from around the world on the question of how States already use due diligence regulations to ensure that the behavior of business enterprises meets social expectations. The Authors were commissioned by the International Corporate Accountability Roundtable (ICAR), the European Coalition for Corporate Justice (ECCJ) and the Canadian Network on Corporate Accountability (CNCA). Based on a structured set of questions concerning how States ensure due diligence by business, the Authors sought input from experts familiar with a variety of areas of substantive law in the legal systems of countries from every region, including the largest economies, as well as both civil law and common law jurisdictions. The objective of seeking multi-jurisdictional examples was to take into account differences among legal systems and cultures, and varying levels of economic development. This approach allowed contributors to point out distinguishing characteristics of particular regulatory systems in their areas of expertise. The Project ultimately obtained more than 100 examples of due diligence regimes (the “Examples”)<sup>6</sup> in more than 20 States,<sup>6</sup> drawn from a wide variety of regulatory sectors. The Authors were also able to draw on their own expertise in business and commercial law, human rights law, national and international criminal law, and environmental law.

The Examples illustrate numerous approaches to the use of regulatory authority in promoting due diligence, as reflected in the Report. The Project is now in the process of preparing a searchable database that contains brief descriptions of the examples, along with legal citations and URLs. The database should be available on the ICAR website shortly after the beginning of the coming year.<sup>7</sup> The Project is considering keeping the database as an ongoing program, to which others could be invited to contribute additional examples. The Authors hope that the database will be of help to State officials, lawmakers, members of civil society and others as they search for ways to implement the human rights due diligence elements of the Guiding Principles.

The principal conclusion of the Report is that States could make far greater use of legal tools to ensure business respects human rights in general and implement due diligence for human

rights in particular. Existing labor, consumer and environmental protection laws, for example, do serve to protect various rights holders. They may also offer opportunities to integrate greater human rights protections into their due diligence regimes. States have therefore developed a range of techniques by which to ensure that business enterprises seek to integrate considerations that are not purely short-term and profit-driven into their decision-making processes: they have imposed various obligations to act with due diligence with regard to a range of values such as consumer protection or the protection of the environment, or the fight against money laundering or human trafficking; or they have created strong incentives to encourage companies to design ways of taking these concerns into account. Human rights now must be given the same degree of attention. Indeed, beyond laws which protect the interests of consumers, workers and the environment, the Authors found little in the way of explicit reference to human rights in the variety of due diligence regimes which exist in the legal systems of most States. States can do much more to utilize their existing regulations as part of the goal to ensure companies conduct human rights due diligence. In addition, in order to consolidate and strengthen existing protections, and to move forward in protecting the full range of human rights, States should look to the full range of regulatory options that make use of due diligence, including those presented in this Report, to ensure business respects human rights.

Drawing on State practice and international standards, the Report finds the following:

First, the Report confirms that the origins of due diligence are neither a creation of the United Nations Human Rights Council nor a voluntary measure for corporate social responsibility. Due diligence originates from legal tools that States are already using to ensure that business behavior meets social expectations, including standards set in law.

The Report establishes that the regulatory due diligence procedures found in a variety of legal systems are consistent with processes described in the Guiding Principles and other international instruments.

The Report describes how the concept of due diligence requirements are found in areas of law that are either analogous to or directly relevant to human rights, such as labor rights, environmental protection, consumer protection and anti-corruption.

The Report also establishes that due diligence requirements can be used to ensure that business enterprises can be held accountable for violations of law, by, for example, overcoming obstacles to effective regulation posed by complex corporate structures or their transnational activities.

The options described in the Report indicate at least four main regulatory approaches through which States can ensure human rights due diligence activities by business. Usually these approaches co-exist within the same jurisdictions and legal systems.

The first approach imposes a due diligence requirement as a matter of regulatory compliance. States implement rules that require business enterprises to conduct due diligence, either as a direct legal obligation formulated in a rule, or indirectly by offering companies the opportu-

nity to use due diligence as a defense against charges of criminal, civil or administrative violations. For example, the courts use business due diligence to assess business compliance with environmental, labor, consumer protection and anti-corruption laws. Similarly, regulatory agencies regularly require business due diligence as the basis upon which to grant approvals and licenses for many business activities.

The second regulatory approach provides incentives and benefits to companies, in return for their being able to demonstrate due diligence practice. For example, in order for companies to qualify for export credit, labeling schemes or other forms of State support, States often require due diligence on environmental and social risks.

A third approach is for States to encourage due diligence through transparency and disclosure mechanisms. States implement rules that require business enterprises to disclose the presence or absence of due diligence activities and any identified harms that their activities may create, such as the presence of child labor in a company's supply chain. Market participants will then attempt to constrain any identified harms on the basis of a company's disclosures. For example, securities laws, consumer protection laws and reporting requirements for corporate social responsibility operate on the logic that information serves the interests, and will prompt action by consumers, investors, regulators, and people who might be adversely affected by a business activity.

A fourth category involves a combination of one or more of these approaches. States regularly combine aspects of these approaches in order to construct an incentive structure that promotes respect by business for the standards set down in the rules and ensures that compliance can be assessed in an efficient and effective manner. For example, administrative rules governing environmental protection, labor rights, consumer protection or anti-corruption may require business due diligence as the bases for a license or approval, and may also require regular reporting disclosure of due diligence activities by business. Enforcement of such rules can combine administrative penalties, such as fines, and criminal law sanctions; and the possibility of civil action.

The Report is by no means the final word on which regulatory measures are most effective in ensuring respect for human rights. Extensive State practice with respect to due diligence as a method of regulation is not evidence of human rights protection, nor is it evidence of effective enforcement. In addition, no one form of due diligence regulation will suit all business sectors or address every human rights challenge. The report does not attempt to prescribe which particular regulatory options are best for particular human rights risks. The range of specific economic activities, national legal systems, human rights contexts and the range in business structures, operations and relationships is too varied and diverse for detailed prescriptions in one report. Further work will be necessary at the national and sector-specific levels to elaborate regulatory tools that respond to particular risks to human rights from specific kinds of business activity in a manner appropriate for particular national legal traditions.



## I. Introduction

The United Nations Guiding Principles on Business and Human Rights (“Guiding Principles”),<sup>8</sup> which were unanimously endorsed by the U.N. Human Rights Council in June 2011, affirm that business enterprises have a responsibility to respect human rights, and that States have a duty to ensure that they do so. The Guiding Principles suggest due diligence as an operational means for business enterprise to respect human rights, but the specific options available to States to ensure the implementation of business due diligence are not specified.

The Guiding Principles define a corporate responsibility to respect human rights based on business impacts, activities and relationships.<sup>9</sup> In principle, businesses should respect all internationally proclaimed human rights, in part because all rights are potentially at risk of infringement by business.<sup>10</sup> In practice, different business activities have differing human rights impacts. Similarly, the specifics of the human rights context will affect the way certain business activities impact rights. The Guiding Principles identify the interrelationship of business activity and the human rights context as the source of what they refer to as “human rights risks,” defined as “the business enterprise’s potential adverse human rights impacts.”<sup>11</sup>

The Guiding Principles identify human rights due diligence as the principal tool that a business should use to address these risks. This includes the practice of a business enterprise identifying risks related to its activities and relationships, taking steps to prevent its infringement of the rights of others and to account for both sets of actions. The Guiding Principles specifically define due diligence as follows:

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, and tracking responses as well as 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 on-going, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve;

The Guiding Principles make clear that “The responsibility of business enterprises to respect human rights refers to internationally proclaimed human rights – understood as those expressed in the International Bill of Human Rights and the principles concerning fundamental

rights set out in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work."<sup>12</sup>

To ensure that companies respect human rights, the Guiding Principles draw on the duty of States to regulate the conduct of private groups or individuals, including business enterprises. The duty to protect human rights is a general duty to prevent and, if prevention fails, to remedy human rights violations that result from the conduct of private parties. It is a duty that extends to all organs of the State. It requires that States take all measures that could reasonably be adopted to prevent the occurrence of a human rights violation. This duty to protect has been affirmed by a large number of decisions of human rights bodies, whether judicial or quasi-judicial, operating under both universal and regional instruments.<sup>13</sup> Under international human rights law, the responsibility of a business to respect human rights includes acting with due diligence in order to avoid violating such rights. International human rights law requires that States ensure that this responsibility is complied with by businesses.

In general terms, the duty to protect from human rights abuse requires States to take "appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."<sup>14</sup> That includes a range of measures, from providing effective guidance to business enterprises on how to respect human rights, to enforcing laws requiring business enterprises to respect human rights. It includes measures that the State uses to influence the conduct of business actors, whether as regulators, buyers, investors or owners.

Many States already implement such measures that help to ensure respect for human rights; for example, through the enforcement of labor, environmental and certain criminal laws or by ensuring that victims of human rights abuses have access to courts. Such State practices often encourage or require due diligence activities by businesses as a way to ensure respect for standards set by law.

At the same time, States have been working at the international level to clarify what the responsibility of business to conduct due diligence for human rights means. For example, the U.N. Security Council, acting under Chapter VII of the Charter, called upon States to encourage their businesses involved in the trade in conflict minerals to conduct due diligence.<sup>15</sup> The Organization for Economic Cooperation and Development (OECD) and the Intergovernmental Conference on the Great Lakes Region integrated due diligence into their frameworks for multinational enterprises as well as for responsible supply chain management in conflict situations.<sup>16</sup> The European Union has begun to integrate human rights due diligence into their work on corporate social responsibility,<sup>17</sup> as has the International Finance Corporation through a 2011 revision of its Performance Standards.

There is, in effect, an emerging regulatory framework for human rights due diligence, based on international standards and national state practice. This emerging framework defines the nature and scope of business responsibility to conduct human rights due diligence and defines what general processes businesses should follow to identify, prevent and remediate the adverse human rights impacts of their operations.

It is within this landscape of domestic and international efforts that the Authors began their inquiry into regulations and incentives that States could use to ensure businesses conduct due diligence for human rights. Through independent research and global consultations, the Authors gathered evidence of specific legal measures that were effective in generating business due diligence. In particular, the research sought to establish whether or not States commonly use regulation as a means of influencing businesses to conduct due diligence. The research also looked across a diversity of jurisdictions and legal systems and examined whether State-regulated due diligence regimes resulted in business processes coherent with the procedural aspects of the due diligence framework set forth in the Guiding Principles.

The Authors were greatly assisted in their efforts by the generous help of many of the individuals involved in the consultations, who provided detailed written descriptions of due diligence regimes that are already in place, or else have been proposed for adoption, in their own countries. The Project has, to date, obtained nearly a hundred examples of regulatory due diligence regimes from more than twenty States. These examples illustrate numerous approaches to the use of regulatory authority in promoting due diligence, as reflected in this Report. The Project is now in the process of preparing a searchable database that contains brief descriptions of the examples, along with legal citations and URLs. The database should be available on the ICAR website shortly after the beginning of the coming year.<sup>18</sup> The Project is considering keeping the database as an ongoing program, to which others could be invited to contribute additional examples.

The Report is a distillation of State practice to demonstrate the regulatory options that States have used and can further use to ensure businesses conduct human rights due diligence. In Section II, the Report sets forth a range of regulatory options that governments use to ensure business conducts due diligence in areas analogous to or relevant for human rights. The organizing principles in Section II, options supported by examples, reflects a key finding of the report, namely that most, if not all jurisdictions, use common regulatory approaches to require or encourage businesses to conduct due diligence. Section III considers the reach of the due diligence responsibility, examining how due diligence extends to partners of the business enterprise, both at home and abroad, and how due diligence is a responsibility of the entire corporate group, rather than only of each separate legal entity within that group. Section IV of the Report sets forth the procedural content of the due diligence obligations most commonly imposed by States at the domestic level, and by international bodies.



## II. Regulatory Options for States

This Report describes measures that States can adopt to ensure that businesses engage in human rights due diligence. The research that informs this report examined existing due diligence regimes from around the world in areas analogous to, or relevant for, human rights, such as labor standards, environmental protection, consumer protection, and the prevention and detection of financial crimes such as money laundering and bribery (corruption). The research also revealed that new State practice is emerging in the area of human rights due diligence specifically.

A key conclusion of this Report is that there is ample evidence that States already use due diligence in regulation as a means to ensure companies meet specified standards of behavior. The objective served by such regulation is to prevent adverse impacts or harms and to protect people, in part by clarifying standards of compliance for business enterprises. States already deploy due diligence in this manner in jurisdictions around the world.

In national legal systems, and under international human rights law, the responsibility of business enterprises to conduct due diligence does not end at the legal boundary of the individual firm. The rationale for extending the reach of due diligence provisions is based on the recognition that contemporary business activity relies on integrated business relationships that span national and organizational boundaries. Respect for legal standards, such as environmental protection, labor rights, and anti-corruption, may be undermined by legal questions of national jurisdiction or the creative use of business relationships by business entities registered in multiple jurisdictions. As many of the options highlight, national and international due diligence regimes have responded to the reality of business structures by creating responsibilities for business to implement due diligence consistent with their activities and relationships, which may cross national and organizational borders.

This section sets forth a set of regulatory options that States have at their disposal to ensure that companies act with due diligence in a host of subject areas. In practice, States can rely on a variety of mechanisms to cause businesses to conduct human rights due diligence. The evidence and examples presented here are merely representative; there are many more examples of national laws that directly or indirectly promote or require due diligence by business enterprises. States, in consultation with relevant stakeholders, will have to decide which regulatory options, or combinations of options, are best suited to addressing different types of harms in varying sectors and jurisdictions. Of course, regulations need to be properly implemented in order to achieve stated goals, such as influencing or changing business behavior. When properly implemented and enforced, each of the regulatory options outlined below have functioned well to influence corporate due diligence activity.

### **1. Criminal Liability for a Company's Failure to Act with Due Diligence**

States may impose criminal responsibility on a company for a failure to properly act with due diligence to prevent certain crimes. This includes within areas of criminal law directly relevant to the protection of human rights, such as violent crimes and environmental crimes that may threaten the right to life or the right to health. In other situations, States may impose

criminal penalties for harms that are linked more often to business activity, such as the prevention of transnational bribery of public officials. In the legal systems that allow for the criminal liability of legal persons, companies may be held liable for the actions of their employees and agents (those who act on behalf of the company), and face prosecution, fines and other sanctions unless the company can show it implemented effective due diligence measures to prevent the criminal acts of those employees or agents.

As part of a criminal statutory regime, States may impose a criminal penalty on a company. A number of jurisdictions apply the principle of *respondeat superior*:<sup>19</sup> the corporation as employer shall be held accountable for the criminal conduct of its officers, employees and other agents who commit crimes at the direction of, or for the benefit of, the corporation. This is often combined with some type of defense or mitigation for the company relating to its own due diligence. A company may, in some instances, avoid being charged with crimes committed by their agents by demonstrating that they have had in place effective programs of due diligence, sometimes called “compliance” programs.<sup>20</sup> In other situations, a company may face a smaller penalty or sanction as a result of its compliance efforts.

With respect to the risk of criminal liability, the function of these programs is to establish that the agents were not acting pursuant to either direction from the company or within a “culture of indifference” prevailing in the company.<sup>21</sup> In most jurisdictions, there are legal limits to the actions of employees that can be imputed to the company. For example, the “directing minds” of a company must have played a role in the commission of the offence, in the vocabulary of the common law,<sup>22</sup> or a company must have failed to exercise due diligence regarding the activities of its employees.

This approach, liability coupled with a possible defense (or the potential for mitigation) linked to due diligence, has several practical functions. The first is to clarify responsibility under the law. This serves the courts and regulators in their tasks of assessing compliance, as well as businesses which conduct due diligence to avoid non-compliance. The second, is to prompt companies to conduct due diligence in order to avoid breaking the law or being complicit in the violations of others. Third, the combination of criminal liability and due diligence entails the potential for liability for a failure to conduct due diligence.

This approach is the regime recommended within Europe, where the potential for business enterprise liability has gained common acceptance in European jurisdictions. The Council of Europe Convention on the Protection of the Environment through Criminal Law of 4 November 1998 (E.T.S., n° 172) states that, “Each Party shall adopt such appropriate measures as may be necessary to enable it to impose criminal or administrative sanctions or measures on legal persons on whose behalf an offence referred to in [the provisions of the Convention defining certain environmental offences] has been committed by their organs or by members thereof or by another representative” (Article 9, paragraph 1). This instrument sets two conditions for corporate liability to be triggered for the acts committed by natural persons that might constitute a criminal offence, committed either intentionally or by negligence (as specified in Articles 2 and 3 of the Convention). First, the offence must have been committed by the natural person and “on behalf of” the legal person. The second condition requires the in-

volvement of “an organ, a member of its organs or other representatives” in the criminal offence, which therefore assumes that “those physical persons referred to are legally or by fact in such position which may engage the liability of the legal person.”<sup>23</sup>

The Explanatory Report to the Convention specifies that “Violations of the supervisory duties are in this respect sufficient.” In other words, the liability of the corporation may result from the mere fact that, though the offence was directly committed by an employee without an involvement of the “directing minds” of the corporation and thus at the sole initiative of that employee, the supervising authorities did not adequately exercise such supervision of the activities of that employee. Such failure to discharge “supervisory duties” is sufficient to trigger liability of the corporation. This constitutes a powerful incentive to establish due diligence procedures and a corporate culture that prevents such acts from being committed. At the same time, adequate due diligence may allow a company to avoid liability, even in situations where a criminal offence has been committed by a corporate employee within the scope of the company’s activities.

For example, under Italy’s Law 231/2001,<sup>24</sup> a company may be held criminally liable for the acts of its directors, senior managers or employees who manage the company or work under the direction of one of the foregoing, if the act was committed on behalf of the company, unless the company had adopted and effectively implemented a suitable compliance program prior to the commission of the crime. In order to be exonerated, the company must show: (a) that the individuals in question committed the crime on their own behalf and not on behalf of the Company; and (b) that a company has adopted adequate, effective and specific internal compliance measures.

A company must prove that it established and implemented effective internal control systems for the purposes of preventing offences, by approving and implementing a Law 231 Compliance Program and setting up a supervisory body, which must have independent initiative and inspection powers. Under Law 231, there are no official guidelines on what constitutes an effective “compliance program” although the statute envisions that industry associations may issue such guidelines. Such guidelines have been issued by Confindustria, a major Italian industrial confederation.<sup>25</sup>

Common law jurisdictions also impose criminal liability on companies for their failure to act with due diligence. Under Australian criminal law, the acts of an individual “high managerial agent” are generally attributable to the Company. Two Sections of the Australian Criminal Code are of interest with respect to due diligence. The first, Section 12.3, provides that such an act will not be attributed to the Company if the Company proves that it exercised due diligence to prevent the act or its authorization. The second, Sec. 12.5, provides that, in cases where a statute imposes “no fault,” i.e., strict or absolute liability, the Company may defend itself by showing that, in addition to having conducted such due diligence, “the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence.” The term “due diligence” is not defined in the statute, but

Section 12.5 does provide that “inadequate corporate management” or “failure to provide adequate systems for conveying relevant information” are evidence of a lack of due diligence.

Under the Canadian Environmental Protection Act, 1999 (CEPA), a company is required to observe a wide variety of requirements pertaining to pollution control and other environmental protection measures, all subject to criminal, civil and administrative penalties.<sup>26</sup> The Act provides for a complete due diligence defense based on the exercise of “all due diligence to prevent [the] commission” of the offence.<sup>27</sup> Neither the Act nor any authoritative guidance issued to date specifies what constitutes adequate due diligence in relation to a due diligence defense. Environment Canada has issued a guidance document, the *Compliance and Enforcement Policy for CEPA (1999)*.<sup>28</sup> The document discusses enforcement policy and activities under the Act, and describes the agency’s statutory obligation to publish detailed nonbinding “codes of practice and guidelines.” Such documents are to be “develop[ed] in consultation with interested parties, including provinces, territories, aboriginal governments and aboriginal people, industry and environmental groups. The personnel involved in the development of these guidance documents may be engineers, biologists, chemists, geologists or experts in environmental sciences.”<sup>29</sup>

The “Audit Policy” of the U.S. Environmental Protection Agency (USEPA), entitled “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations”<sup>30</sup> illustrates how due diligence activities can be prompted by an offer of leniency to a company that has adopted and implemented an effective compliance program aimed at ensuring compliance with environmental laws. The Agency has regulatory authority over air and water pollution, the disposal of hazardous waste, safe drinking water, ocean dumping, application of pesticides, control of hazardous substances (such as asbestos), the cleaning up of contaminated waste disposal sites, and other aspects of environmental protection. Under these programs, business entities must obtain permits for the generation of various forms of pollution, which require them to monitor and report on effluents, emissions, waste disposal practices and the like. New sources of pollution are required to obtain special permits that impose “new source performance standards” on their construction and operation.

Almost every industrial enterprise in the United States must deal in some way with these programs. There are heavy penalties, both civil and criminal, for violation of the statutes and regulations setting forth program requirements (e.g. fines of from \$25,000 to \$50,000 per day of violation, plus the potential for imprisonment of responsible individuals for serious offenses).

The Agency works closely with the U.S. Department of Justice, the various U.S. Attorneys, and the Attorneys General of every State to enforce federal requirements. Yet, even with the substantial enforcement resources at its disposal, the Agency acknowledges that it must also enlist the active efforts of business enterprises in policing compliance with the myriad environmental laws. In furtherance of this objective, the Agency has published a formal policy Audit Policy providing that the Agency will not recommend criminal prosecution of a regulated entity, nor seek gravity-based penalties for violations that are discovered, reported and corrected by an entity,<sup>31</sup> if the violation is discovered and reported as a result of a “compli-

ance management system” reflecting the entity’s due diligence in “preventing, detecting, and correcting violations.”<sup>32</sup>

These examples suggest that, depending on different statutory frameworks, a company’s due diligence activities may factor into criminal procedures at the charging, trial and sentencing phases.

### *Due Diligence and the Charging Phase*

If, in spite of a well-documented due diligence program, a crime is committed by an individual in the employ or under the control of the company (an “agent”), a prosecutor usually has the option (as part of her “prosecutorial discretion”) to charge a company, its servant, or both. A good due diligence program may convince the prosecutor that a company was not responsible for the crime, even though one of its servants was the principle perpetrator. In exercising her discretion, a prosecutor will be on the lookout for evidence that the due diligence program put in place by a company is only a “paper” policy. Where that appears to be the case, the prosecutor may opt to charge the company on the grounds that the crime was committed by the servant owing to either a “corporate culture of criminality”<sup>33</sup> or signs that company management in fact tolerates or turns a blind eye to criminal behavior.

If a prosecutor decides not to file formal charges, a company may, as a condition for avoiding prosecution, be required to sign a non-prosecution or non-enforcement agreement where it agrees to perform additional due diligence activities aimed at preventing a recurrence of the offending conduct. For example, Canada’s Environmental Protection Act of 1999 provides for informal written “alternative measures” in informally resolved cases of noncompliance.<sup>34</sup> In corruption cases, some regulators may appoint internal compliance monitors to conduct extended periods of oversight of company anti-bribery due diligence to ensure adequate procedures and proper implementation.<sup>35</sup>

This approach encourages companies to both establish due diligence regimes and to properly document all of their policies and efforts to enforce those policies.<sup>36</sup> It should be noted that if the company’s due diligence program enables it to avoid prosecution, the agent might still be charged. Indeed, a company may be expected to cooperate with the prosecution in seeing that an agent is convicted.

### *Due Diligence and the Trial Phase*

If a crime is an intentional crime, the prosecution will have to prove that a company intended for the servant to commit the crime. In such cases, due diligence is an important source of evidence. If the crime is a no fault, strict liability, or absolute liability crime, a company may be automatically liable for an agent’s acts, irrespective of its own intentions.

If the crime is a no fault crime, but provides for the defense of due diligence, a company’s due diligence program may provide a complete defense: if found to have implemented adequate and effective due diligence at the time of the commission of the offence, the company may be

exonerated. Statutes providing for a due diligence defense often use vague language such as “all reasonable efforts,” or simply “due diligence” in prescribing the standard to be met. However, a company’s due diligence program will only allow it to avoid being convicted for an agent’s if a court is convinced that the company’s due diligence program meets the statutory test.

For example, where liability arises for companies from acts of bribery by its employees and agents, there is a strong incentive for them to create and implement due diligence programs to detect and prevent bribery within their business operations. Under the U.K. Bribery Act 2010,<sup>37</sup> paying a bribe is a strict liability offence. It is a criminal offence for a person “associated”<sup>38</sup> with a company to bribe a foreign official in order to be awarded a contract or a business advantage. If an “associate” commits such an act, the company itself may be subject to a large fine. But there is a defense of due diligence where a company will not be convicted if it can “prove that [it] had in place adequate procedures designed to prevent persons associated with [it] from undertaking such conduct.”<sup>39</sup>

Under the U.K. Bribery Act, it is for the courts to decide whether a company has undertaken adequate due diligence once the offence has been committed. The U.K. Ministry of Justice has provided guidance as to what constitute adequate procedures. The guidance provides that “the commercial organization applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organization, and in order to mitigate identified bribery risks.”<sup>40</sup> The U.S. Foreign Corrupt Practices Act also allows for companies to demonstrate the adequacy of their compliance programs as a “mitigating” factor. This rule allows for a prosecutor to consider the company’s due diligence when assessing whether to charge the company or when assessing what types of penalties to apply in the case of a conviction.

### *Due Diligence and the Sentencing Phase*

Judges may be authorized to take into account whether a company had a due diligence program in place when passing sentence upon a company that has already been convicted of a crime. This authority can be either informal, through judicial custom,<sup>41</sup> or in a formal document.<sup>42</sup> In any case, a company’s due diligence efforts will likely be given the same close scrutiny as at the charging phase. A court may include due diligence requirements in sentencing a company to probation.<sup>43</sup> In India, for example, the criminal courts may take into account due diligence activities as evidence of a defendant’s *mens rea*, intent or mental element of a crime, which could lead to the mitigation of a sentence.<sup>44</sup>

## **2. Civil Liability for a Company’s Failure to Act with Due Diligence**

The legal systems of most States provide for civil liability for a business enterprise to arise from causing a victim harm or prejudice, including by failing to act with due diligence to prevent such harms. This may also be the case where the particular harm or prejudice resulting from the conduct is a negative impact on the human rights of a person or group of people. This section explores how due diligence is applied in some civil liability regimes. It shows how an expansion to cover all torts resulting in human rights violations could be

achieved, obliging companies to establish programs to ensure that they proactively seek to prevent such harms.

Under the laws of many States, directors of corporations have a fiduciary “duty of care” to their corporations, i.e., that they must act in the interests of the corporation. Of the jurisdictions surveyed, Australia, India, the United Kingdom and the United States create a statutory duty of care on company directors, which would allow for shareholders to sue directors for failure to properly exercise their judgment with respect to conducting company affairs. Two of the examples (United Kingdom and the United States) indicate that the duty of care implies the responsibility to see that the company puts in place an adequate compliance program.<sup>45</sup>

In addition, most legal systems provide that, where an employer has delegated certain duties to an employee, the employer remains civilly liable for any damage caused by that employee through the employee’s negligence, unless the employer has acted with due diligence in order to prevent the fault from being committed. Section 831(1) of the German Civil Code, which is representative of the approach of other civil law countries, includes a specific provision on “liability for vicarious agents.” The section provides:

A person who uses another person to perform a task is liable to make compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises reasonable care when selecting the person deployed and, to the extent that he is to procure devices or equipment or to manage the business activity, in the procurement or management, or if the damage would have occurred even if this care had been exercised.<sup>46</sup>

Where damage is caused by a person's negligence, that person is obliged to compensate for the harm.<sup>47</sup> Negligence is normally defined as behavior that is unreasonable and results in harm. In most legal systems, this may include a failure to act with due diligence, i.e., to take all the precautionary measures that could reasonably have been taken in order to reduce the risk. Both civil and common law countries provide for civil liability in the event a company is found to be negligent. States have also enacted specific statutes that provide for civil causes of action when companies have acted negligently in a particular context or have failed to prevent a particular type of harm. Once again, prevention of corruption is a useful analog.

Article 35 of the UN Convention against Corruption requires States Parties to provide mechanisms that would allow natural and legal persons to undertake private rights of action to seek compensation for damages as a result of acts of corruption. This concept is more fully developed under the Council of Europe’s Civil Law Convention on Corruption, which entered into force in 2003. The Civil Law Convention outlines the mechanisms by which natural and legal persons who have suffered damage through corruption can defend their rights and interests, including the possibility of receiving damages. Article 3 of the Convention requires that each State party “shall provide in its internal law for persons who have

suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage.”<sup>48</sup>

The Civil Law Convention on Corruption creates liability for those who directly participate in the act of bribery, as well as for those who have facilitated the commission of the act through their omission. Article 4 states further that a defendant “may be found liable if the defendant has committed or authorized the act of corruption, *or failed to take reasonable steps to prevent the act of corruption.*”<sup>49</sup> This article clearly notes that the negligence can be found in failure to take steps to prevent corruption (i.e. the failure to act with due diligence) and that this is a basis for liability along with direct acts of corruption.

In addition to negligence, most legal systems recognize strict liability (i.e. liability without fault) where an activity is inherently dangerous. The actor engaged in such an activity assumes the risks involved, and may have to compensate any damage resulting from the activity concerned even though no fault on his part can be identified. This is the case under the Brazilian Civil Code, for example, where “[a]longside cases regulated by law, an obligation to pay damages exists independently of fault if the nature of the activities habitually pursued by the person responsible for the damages endangers legally protected rights.”<sup>50</sup>

In the European Union, a clear example of this type of liability is the 1985 EU Products Liability Directive.<sup>51</sup> The Directive provides, in Article 1, that “The producer shall be liable for damage caused by a defect in his product.”<sup>52</sup> Producers include manufacturers, component part suppliers, importers and anyone using a trade name or trademark. A product is defective when it “does not provide the safety which a person is entitled to expect,” considering all circumstances (including the presentation of the product; the product's reasonably expected uses; and the time the product was put into circulation). The Directive allows consumers to sue producers for defective products and requires the consumer to prove defect, causation and damages. The standards for burdens of proof are not specified and are left to individual Member States. Several defenses are available under the Products Liability Directive. Article 7 provides that a producer is not liable if, for example, “existing knowledge and science could not have discovered the defect.”<sup>53</sup>

The EU Products Liability Directive, and related EU Member State laws, offer a useful example of a statute that provides consumers with a civil cause of action that holds manufacturers responsible for those products they introduce into the stream of commerce.<sup>54</sup> The imposition of civil liability creates an incentive for manufacturers and producers to take due care and proper precautions when designing products. These civil liability risks create an added incentive for preventive measures, such as due diligence. Private civil litigation can be used to ensure companies act with due diligence, reinforcing the incentive for due diligence created by criminal liability forms described above. Although the use of due diligence is not an absolute defense, the fact that a defect could not be discovered through existing science and knowledge demonstrates that companies are provided with a regulatory incentive to ensure their own production keeps pace with developments in the science, technology of product safety.

### **3. Administrative Penalties for a Company's Failure to Act with Due Diligence**

Both criminal and civil liabilities are dependent on judicial mechanisms to provide remedies to victims or impose sanctions for wrongful conduct. Administrative regulation presents a third option. In certain sectors or regulated areas (e.g. banking supervision, environmental protection, labor and employment), States may require companies to engage in due diligence as part of a regulatory requirement. Businesses may have to report to such regulators on the due diligence mechanisms they have in place to detect harm and risks, and potentially to report on harms detected as a result of due diligence activity.

The legal systems of many States provide for administrative penalties to be imposed on a business enterprise when it violates a regulatory provision. This section documents such provisions in the areas of occupational health and safety, the environment, and money laundering. These regimes are relied upon in regulatory regimes that are analogous to or relevant for human rights, and therefore the Authors see no difficulty in such regimes being expanded to cover human rights, or for similar techniques to be used to ensure compliance with human rights.

In some circumstances, States may assign a regulatory body with a lead responsibility for monitoring business compliance with such regulations. The same body may also have supervisory and enforcement authority for failure to comply with relevant due diligence rules and reporting obligations. Lead regulators may have authority to assess fines or other sanctions in the event a company fails to conduct due diligence or to comply with relevant reporting requirements.

Sometimes regulatory mechanisms deploy criminal and civil sanctions in support of enforcement of administrative rules. For example, labor inspectorates, financial regulators or consumer protection agencies will conduct their own oversight of working conditions, financial transactions and product safety, but the administrative rules governing these sectors may also permit criminal or civil actions. Under the Dutch labor migration regulations, a repeated offence may lead to criminal prosecution. An employee may bring a claim against his or her employer or, if such a claim fails, against the next highest employer.<sup>55</sup>

#### *Due Diligence and Workplace Health and Safety*

States around the world have often set in place administrative frameworks that require companies to engage in due diligence in areas such as occupational health and safety, labor rights, environmental protection, and the prevention of money laundering and illicit financial flows. For example, in Canada, occupational health and safety regulations use due diligence by companies to ensure workplace safety.<sup>56</sup>

China also requires companies to engage in due diligence with respect to overseas investment and hiring of laborers.<sup>57</sup> In response to this trend of overseas employment, China's Ministry of Commerce (MOFCOM) issued guidelines for management of safety issues arising out of overseas investment. The Guidelines require companies involved in overseas investment to engage in risk assessment activities. In addition to environmental due diligence and contin-

agency planning focused on “after arrival,” the Guidelines impose human rights-related compliance requirements for the protection of workers' rights. However, none of these requirements extend to supply chain due diligence, and the legal sanctions are not specified.<sup>58</sup>

In the Netherlands, labor immigration regulations<sup>59</sup> require a company to verify the identity papers of its employees and check, in the case of employment of non-EU nationals, whether the employed third-country national is in the possession of a valid work permit.<sup>60</sup> An “employer” is one “for or under the direction and/or supervision of whom employment is undertaken, regardless whether this is done by a natural person or a legal entity.” This includes a company that hires workers through an employment agency or contractor. An employer is subject to an administrative fine of €8000 per alien and a private individual may be fined €4000 per alien.<sup>61</sup>

### *Due Diligence and Environmental Protection*

Some of the most widespread examples of administrative frameworks that require due diligence are found in the area of environmental protection. One source estimates that over 130 countries have adopted an environmental assessment regime of one sort or another.<sup>62</sup> France has enacted a new environmental statute (Act No. 2008-757) pursuant to a directive from the EU<sup>63</sup> that imposes administrative liability on companies to encourage them to conduct due diligence (including follow-up preventive and mitigation measures). In a manner similar to the defenses described above, the new statute grants leniency if a company can prove that it has not been negligent. Article 162-3 requires the following of the “operator” of a facility:

In cases of imminent threat of injury, the operator shall, without delay and at his expense take preventive measures in order to prevent the occurrence or mitigate its effects. If the threat persists, it shall promptly inform the authority referred to in 2° of Article L. 165-2 of its nature, of the prevention measures it has taken and of their results.

In Germany, application for the construction and operation of a facility must include a detailed assessment of risks of pollution and the identification of control measures. The operation of pollution control equipment will entail detailed monitoring and reporting requirements, i.e. due diligence, in the operation of the facility so as to prevent unpermitted releases of pollutants. One who meets regulatory requirements is entitled to build and operate a plant. Conversely, the loss of a permit or an administrative or criminal fine will result from intentional or negligent disregard of operating parameters.

In the United States, the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)<sup>64</sup> established the federal program for cleaning up contaminated waste sites. The Act was passed in response to a widespread public belief that industrial waste disposal practices throughout the history of the nation had created a legacy of contaminated soil and groundwater.<sup>65</sup> It has led to the creation of a due diligence process that enables business enterprises to cope with the Act's strong liability scheme. CERCLA imposes

joint and several liabilities for cleanup costs upon all Potentially Responsible Parties (PRPs), which means that any single PRP can be held liable for the entire cost of cleaning up a site, including administrative costs incurred by the Agency.<sup>66</sup> Additionally, there are heavy penalties for failure to obey an administrative cleanup order issued by the Agency. Thus, fear of an enforcement action or a cost recovery action for the entire cost of site remediation frequently drives PRPs to collaborate in “steering committees” that seek to identify the other PRPs (so as to spread the liability net as widely as possible) and to plan for, and carry out a cleanup action and associated tasks. The business community’s response to CERCLA has been primarily to adopt thorough due diligence protocols aimed at ensuring either that a site has not been contaminated or, if contaminated, that the extent of contamination (and the financial exposure of the new owner for cleanup costs) is known.<sup>67</sup>

Due diligence efforts during the early years of the CERCLA program were essentially *ad hoc*, but it soon became apparent that there was a need for a commonly accepted industry-wide protocol for site investigations that banks, insurance companies, potential merger partners and even homeowners could rely upon. This need led to an effort on the part of an entity called ASTM International to create an investigative due diligence protocol that all parties could recognize as sufficient.<sup>68</sup> In the mid-1980s, ASTM International convened a series of meetings to which major consulting engineering firms, federal and state officials, industry representatives, lenders and insurers attended. Out of these conferences a consensus was formed around what ultimately became known as “ASTM E-1527 - 05 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process.”

CERCLA illustrates how a statute with a strong liability scheme can lead to effective due diligence activities on the part of the affected business community. It also shows how the business community has worked together to develop a consensus position on what adequate due diligence measures should be, and how a consensus industry standard was ultimately accepted as authoritative by the Congress and the US Environmental Protection Agency. It is noteworthy that the industry standard was written into the statute to become a “safe haven” for those who purchase potentially contaminated property.

#### ***Due Diligence and the Prevention of Money Laundering and Illicit Flows***

In certain situations, due diligence requirements arise from a consensus at the international level that regulatory due diligence is an appropriate mechanism for addressing a particular harm. Customer identification to prevent terrorist financing and money laundering is one such example. States throughout the globe have established regulatory processes whereby banks and financial institutions must “know your customer” (KYC). This requires banks to ascertain the identity of their customers and to identify the nature of the risk they pose before opening a new accounts or engaging in different types of financial transactions. This is sometimes referred to as “customer due diligence” (CDD).

The nearly ubiquitous existence of KYC/CDD requirements is a testament to a global regulatory consensus that banks have an important role to play in preventing and detecting money laundering and terrorist financing. As such, it represents an example of a due diligence

regime that has found its way into the regulatory structures of a diverse set of countries worldwide. For example, countries as diverse as China, Germany, India, South Africa, the United States and New Zealand all have KYC legislation in place.<sup>69</sup> Regulators have developed various tools for auditing and assessing whether financial institutions have complied with relevant KYC laws and regulations, and will impose penalties for failure to comply with relevant rules.<sup>70</sup>

In each country, regulators will have different tools at their disposal to address a bank or other financial institution's failure to conduct adequate KYC/customer due diligence. Banking regulators may be able to require remedial measures as a condition of receiving a certain type of supervisory rating, for example, or alternatively be labeled as having engaged in an "unsafe" or "unsound" banking practice, which gives regulatory authority to impose civil penalties. In addition, a bank's failure to engage in proper reporting of suspicious financial transactions, or evading reporting requirements, may also lead to administrative penalties, or possibly criminal prosecution.<sup>71</sup>

To ensure policy and statutory coherence between States, the Financial Action Task Force (FATF) has developed common standards for addressing money laundering and terrorist financing.<sup>72</sup> FATF Recommendation 10 relates to customer due diligence and states that "[f]inancial institutions should be required to undertake customer due diligence (CDD) measures".<sup>73</sup> The FATF Standards require that "the principle that financial institutions should conduct CDD should be set out in law. Each country may determine how it imposes specific CDD obligations, either through law or enforceable means." The Standards further specify the measures that financial institutions are meant to apply. In this way, an international standard specifies the basic contours of a due diligence obligation.<sup>74</sup>

Banking regulators are typically charged with monitoring customer due diligence as part of an overall banking supervision function. Bank regulators may work alongside financial intelligence units who may share responsibility. Along with monitoring financial institution compliance, regulators will have the ability to levy administrative penalties or to seek remedial action as part of their larger supervisory authority.

In 2001, the Bank for International Settlements (an intergovernmental bank regulatory body operating from Basel, Switzerland) also developed a set of guidelines on customer due diligence for banks.<sup>75</sup> The BIS through its Committee on Banking Supervision issued a series of recommendations that provide a basic framework for supervisors and banks. Supervisors should work with their supervised institutions to ensure that these guidelines are considered in the development of KYC practices. Sound KYC policies and procedures are critical in protecting the safety and soundness of banks and the integrity of banking systems. KYC requirements are found in regional as well as national legislation. In 2002, regulators representing nearly 120 countries at the International Conference of Banking Supervisors (ICBS) announced their support of the due diligence measures including "adoption of know-your-customer procedures within individual jurisdictions, as part of effective customer due diligence programs; and sharing of information related to terrorist financing and money laundering with other supervisors and with law enforcement agencies."<sup>76</sup>

The EU Anti Money Laundering Directive provides an example of how larger customer due diligence requirements flow through to national legislation. Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the "AML Directive") requires that credit and financial institutions apply a series of preventive measures with a view to prevent money laundering and terrorist financing. Article 7 of the AML Directive requires credit and financial institutions to engage in CDD measures. Furthermore, EU member states are responsible for supervising financial institutions on their compliance with Directive rules and for providing penalties for lack of compliance.

States have also required companies and financial institutions to engage in due diligence to ensure they comply with financial sanctions in order to prevent funds being transferred to persons from countries on international or national sanctions lists.

The Office of Foreign Assets Control (OFAC) is an agency within the U.S. Department of the Treasury that is responsible for administering trade sanctions. OFAC maintains a list of Specially Designated Nationals (SDN List) with whom financial transactions are prohibited.<sup>77</sup> The prohibition extends to entities that are majority-owned, directly or indirectly by an individual or entity on the SDN List, even if the entity is not on the SDN List itself.<sup>78</sup> In its publicly available guidance, OFAC explains that will hold banks responsible if they do not conduct due diligence on their own direct customers, and that based on the "totality of the circumstances," it may hold intermediary banks responsible for failing to block transactions with blocked persons.<sup>79</sup>

OFAC further counsels U.S. persons to maintain a "rigorous risk-based compliance program" in order to avoid sanctions for accidentally processing transactions with blocked persons.<sup>80</sup> OFAC also directs persons processing transactions to take particular "due diligence steps" to determine whether the transaction involves a "valid OFAC match."<sup>81</sup> OFAC can impose administrative penalties for non-compliance with sanctions programs, which vary from law to law but do not generally exceed hundreds of thousands of dollars. The penalty is assessed to the person that conducted the prohibited transaction, which generally is the entity (rather than its officers).

OFAC's enforcement guideline state that when deciding on the appropriate enforcement action, OFAC will take into account whether a person "had reason to know" about the conduct giving rise to the violation and whether "with the exercise of all reasonable due diligence," the conduct would have taken place. OFAC also evaluates the subject's "risk-based compliance program," which incorporates an element of due diligence procedures.<sup>82</sup>

Finally, the EU has resorted to administrative regulation in an attempt to stem the flow of illegal commodities. EU Regulation 995/2010 established a requirement that, beginning on March 3, 2013, EU member States must adopt laws that will exclude "illegally harvested timber" (including wood products) from being imported into the EU. An "operator" who wishes to import timber products must have complied with detailed due diligence measures intended to identify the original source of the timber and the circumstances under which it

was harvested. As is the case with EU regulations generally, Regulation 995/2010 can be implemented only through conforming laws passed by EU Member States.

The Regulation specifies the following due diligence requirements:

- (1) gathering information on the source, such as: the timber and timber products, country of harvest, species, quantity, details of the supplier and information on compliance with national legislation;
- (2) preparation of an assessment of the risk of illegal timber in his supply chain, based on the information identified above and taking into account criteria set out in the legislation; and
- (3) mitigating the risk of illegal timber in the supply chain by:
  - (a) requiring additional information, documentation or certification (upon standards or upon external audit); or
  - (b) changing the supply source.

The European Commission is expected to provide future detailed guidance on the due diligence system to contractors, governmental agencies involved in the procurement of timber products, and financial institutions. States are also expected to provide technical guidance to operators.

#### **4. Due Diligence as a Basis for Regulatory Approval**

All States have regulatory processes for the granting of licenses, permits and other forms of State approval for business activity. Such processes often require or encourage due diligence by business as the basis for State approval of the designated activity. The Authors found a number of examples that deal with regulatory approvals, licensing schemes and permits, often with respect to the initiation of major land development, and extractive projects. Regulatory approvals conditioned on due diligence applied to both overseas and domestic projects and increasingly include human rights within the standards they set for business.

A State can require a company to conduct a variety of due diligence activities, in the process of granting a license or permit, or approving a project. Submitting proof of such due diligence may be a condition of receiving a relevant government approval. This is a common practice in environmental regulation. Companies are required to submit environmental impact assessments prior to commencing a particular project relating to natural resources or to other forms of development and exploitation of land.<sup>83</sup> For example, the Democratic Republic of the Congo's mining regulations require all mining operations, including processors and transportation firms, to complete an Environmental Management Project Plan and an Environmental Impact Study ("EIS") before beginning a project. According to Article 458 of the Mining Regulations, this report must include a description of mitigation measures and rehabilitation efforts that have been completed; the status of mitigation and rehabilitation compared to those provided for in the approved Environmental Management Project Plan. The sanctions are administrative and can rise to the level of the suspension of mining contracts if environmental requirements are not met.

All of the examples reviewed apply the same regulatory tool: before a company may obtain an approval or a related but essential benefit from a government agency (such as a permit, loan, loan guaranty or political risk insurance) it must first go through an assessment process to determine whether it meets an agency's criteria. This comports with the Guiding Principles, which suggest that due diligence should commence "as early as possible in the life of a project."<sup>84</sup>

Many of the examples analyzed focus on environmental and related types of due diligence for projects that have no extraterritorial impacts, i.e., all the expected impacts are located within the national borders.<sup>85</sup> Other examples require due diligence in the context of major overseas infrastructure and development projects.<sup>86</sup>

The approvals to gain access to related government benefits are not optional, they are typically a prerequisite for a company to engage in these types of commercial activities or to receive forms of State support, such as risk insurance and export credit. A company seeking an overseas investment guarantee, or export credit, may be engaging in due diligence to access a State-provided benefit – and that benefit is often critical to the type of project or activity that a company seeks to perform.

Both domestic and internationally oriented approval processes provide useful examples of how States can require due diligence at the inception of a project. Such prior approval processes could be used to encourage or require human rights due diligence as part of a process for obtaining company registration.

### *Due Diligence and Environmental Impact Assessments*

A significant number of countries require companies to prepare environmental impact assessments (EIAs) where they plan an activity that may have environmental impacts. In India, for example, the original process for the preparation of an environmental impact assessment is presented in Section 3 of the Environment Protection Act 1986.<sup>87</sup> The Act arose out of the public reaction to disasters such as that occurring at Bhopal. The current procedures are found in the Environment Impact Notification 2006.<sup>88</sup> They require the proponent to supply an application describing the project, its physical impacts, the use of natural resources, use of harmful substances, production of solid waste, pollution, noise, risks of environmental contamination, risks of accidents and other factors which should be considered which could lead to the environmental effects or the potential for cumulative impacts with other existing or planned activities in the locality. They provide for a scoping process by a committee of experts named the "Environmental Assessment Committee" (EAC) that will decide the parameters of the eventual environmental impact assessment.

The Act provides for a public participation process, including a public hearing in the locality concerned, where stakeholders can comment on the proponent's assessment, the scoping document, etc. The EAC must provide a written decision for the minutes as to whether to accept or reject the project, giving its reasons for such decision. There are criminal penalties for providing false or misleading information or omitting required information that apply

both to the head of the government agency responsible for the preparation of the assessment statement, as well as for the head of the company that is the project proponent. In addition, there is a defense of “due diligence” but a faulty assessment statement could also lead to the suspension or revocation of the project’s permit.

In Ghana, the Environmental Assessment Administration Procedures<sup>89</sup> require all new developments to do the following:

- (1) register with the Environmental Protection Agency (EPA);
- (2) conduct an environmental assessment of their proposal;
- (3) submit an environmental assessment report to the EPA for review, including an assessment of impacts and a proposal for mitigation measures for any environmental impact likely to be associated with the project.

The EPA undertakes different levels of assessment depending upon the type, scale and location of the activity before a decision to grant an environment permit is made and the development can start.

The legislation also requires industries to submit Environmental Management Plans (EMP) be submitted to the EPA for review. This applies also for industries which pre-date the EPA legislation and did not go through the pre-development assessment process. New developments must submit an EMP within 18 months of start-up. The EMP has a life of three years, after which a new plan must be submitted. Monthly reports on various forms of pollution may also be required. An Annual Environmental Report must also be submitted “indicating how they have performed environmentally, what have been achieved, what went wrong and what needs to be done.”<sup>90</sup>

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention)<sup>91</sup>, adopted in 1998 under the framework of the United Nations Economic Commission for Europe, provides that “Each Party shall encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labeling or eco-auditing schemes or by other means.”<sup>92</sup> The Aarhus Convention has been implemented in the EU through Regulation No. 1367/2006 of the European Parliament and the Council of 6 September 2006 on the application of the provisions of the Convention to EU institutions and bodies.<sup>93</sup> Within the EU, Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment,<sup>94</sup> also requires certain plans and programs which are likely to have significant effects on the environment, to be subject to an environmental assessment, thus enabling environmental considerations to be integrated in the preparation and adoption of these plans and programs.

Although Directive 2001/42/EC applies only to plans or programs that are prepared or adopted by public authorities, Council Directive 85/337/EEC of 27 June 1985 on the

assessment of the effects of certain public and private projects on the environment, which Directive 2001/42/EC complements, applies to public and private projects alike. This directive is based on the idea that consent for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out.

Although the formal responsibility for the preparation of an assessment document is that of a government regulator, in practice, the burden falls largely on the shoulders of the private party, who must perform the extensive due diligence activities necessary in order to provide the agency with the needed documentation. This activity is generally performed by professional consultants, who have expertise in the various scientific fields involved, such as economics, air and water pollution, and use and the like. The costs incurred by a government in dealing with the assessment, including its own administrative costs and the costs of outside consultants, are often charged to the project proponent.<sup>95</sup>

A requirement imposed on private developers to prepare environmental impact assessments is also imposed, for instance, under the Canadian Environmental Protection Assessment Act; the National Environmental Policy Act of 1969 (NEPA) in the United States; or the California Environmental Quality Act (CEQA).

The optimal EIA process is virtually identical for either a domestic or overseas project:<sup>96</sup> the project itself must first be described; a baseline study must be performed that examines and documents existing conditions at the affected site and upon any affected community; impacts are projected and assessed for their severity; mitigation measures are identified, including alternatives to the project itself or to various of its aspects; and recommendations for mitigation measures aimed at addressing project impacts are recommended, including proposals for terms and conditions to be incorporated into loan agreements, permits and the like.<sup>97</sup> There should be provisions for some sort of follow up monitoring and enforcement.<sup>98</sup> Once a foreign project is approved, a company should be held accountable on a continuing basis for the life of the project for its mitigation responsibilities, and, to the extent possible, for any impacts that were unforeseen and unmitigated during the initial assessment process. The governing permits and other documents must allow an agency to retain continuing jurisdiction and control over the project; otherwise there is a danger that the mitigation measures will fall into desuetude.

Stakeholder participation and transparency of the process are vital to the credibility and quality of any impact assessment. A recurring criticism of impact assessments is that they seem merely to go through the motions of stakeholder consultation. This may be because a regulatory body does not scrutinize the nature of consultations held by a company in order to ensure proper community engagement. In other instances, companies may simply invite a limited group of community representatives to a meeting, rather than seeking more open engagement.

Many regulations require the dissemination of draft documents, public hearings, solicitation of public comments, written responses to such comments, and the like. A main goal of the

process should be to ensure open and effective dealing with “project affected communities.”<sup>99</sup> A project that goes through the planning phase without consultation with the very people whose lives it will affect is courting a serious risk of local trouble. The U.S. Overseas Private Investment Corporation (OPIC) urges its clients to aim to achieve “broad community support for the project.”<sup>100</sup>

Peru has an example of a law focused on stakeholder consultation. The Law of the Right to Prior Consultation with Indigenous or Native Peoples guarantees the consultation rights embodied in the 1989 Convention (No. 169) of the International Labour Organization (ILO) on Indigenous and Tribal Peoples. The law requires the Peruvian government engage in meaningful consultations with indigenous and tribal peoples on issues that affect them.<sup>101</sup> Meaningful consultations require the people be informed, consulted prior to agency action, and with an opportunity to influence the decision.<sup>102</sup> Essentially the law requires agencies to perform due diligence in the form of consultations before enacting “legislative or administrative measures” or implementing “plans, programs [or] projects,” that “directly affect [the] collective rights, physical or cultural identity, quality of life and development” of indigenous and tribal people.<sup>103</sup>

Stakeholders’ interests can be protected if there are “watchdogs” observing the process, e.g., governmental agencies whose role it is to police the quality of assessment documents and to interfere in cases of noncompliance,<sup>104</sup> and civil society organizations that may bring lawsuits to challenge the sufficiency of the process.<sup>105</sup>

### *Due Diligence and Overseas Infrastructure and Development Projects*

The International Finance Corporation (IFC), a member of the World Bank Group, has developed and updated a set of eight “Performance Standards”<sup>106</sup> and companion “Guidance Notes”<sup>107</sup> and “Procedures”<sup>108</sup> that together impose a due diligence regime in which all IFC “clients” are obliged to participate, through: (1) a pre-approval assessment process; (2) the adoption of policies that conform to the Standards; and (3) contractual undertakings (in project approval documents) to comply with the Performance Standards throughout the life of their projects (referred to by the IFC as the “investment cycle”). In cases where local law contains requirements that are different from the Standards, the clients are obliged to follow the more stringent of the two.

The IFC’s policy regarding human rights due diligence is set forth in the Introduction to the Performance Standards:

3. Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project.<sup>109</sup>

As the titles to the various Performance Standards suggest, they contain numerous requirements aimed at avoiding adverse impacts on specific human rights, including, among others: environmental protection, land acquisition and resettlement, protection of affected communities and indigenous peoples, security issues, observance of international labor standards, including prevention of slave labor and child labor, and associated supply chain assessment.

The IFC's procedures for due diligence activities, such as evaluating proposed projects and monitoring projects in being are set forth in its Environmental and Social Review Procedures Manual,<sup>110</sup> which covers all aspects of the investment cycle, including: pre-approval due diligence and assessment, identification of mitigation measures, stakeholder consultation and other public participation and information activities, records management, monitoring, ensuring that mitigation measures are made part of the approval documentation, etc. It assigns responsibilities for the various aspects of its assessment and monitoring activities, including responsibilities for receiving and responding to comments from affected communities and individuals and other stakeholders.

The Performance Standards are used by the Multilateral Investment Guarantee Agency (MIGA), the investment guarantee arm of the World Bank Group.<sup>111</sup> Export development agencies in Canada and the United States have incorporated the IFC "standards" as part of their own due diligence regimes.<sup>112</sup> While these recently revised Performance Standards could be improved and strengthened, they do illustrate how development banks or other lenders can integrate human rights among the conditions at which they provide support, particularly since in addition to the funds they provide, the participation of public institutions in development projects is often valued as guaranteeing the integrity of the project in which they agree to enter. States may seek inspiration from this in their own role as lenders and as insurers against investment risk.

## **5. Due Diligence as a Requirement for Doing Business with Government**

States are significant market participants, both as purchasers and as owners. When States contract for goods and services through public procurement efforts, they influence company practice by requiring companies to engage in due diligence, or by providing them with preferential treatment in competition for government contracts based on their performance with respect to human rights.

In general, States may offer preferential treatment to companies that engage in human rights due diligence. Conversely, States may also suspend or prohibit companies from competing for government contracts when they have failed to exercise adequate due diligence, and have contributed to human rights violations.

Many jurisdictions allow public authorities to impose human rights due diligence obligations on companies seeking to be awarded public contracts. This is the case, for example, in the EU. The 2002 White Paper of the Commission on Corporate Social Responsibility already mentioned that "access to public procurement, conditional on adherence to and compliance with the OECD guidelines for multinational enterprises, while respecting international

commitments, could be considered by EU Member States and by other States adherent to the OECD Declaration on International Investment.”<sup>113</sup>

The existing legislation on public contracts in the EU<sup>114</sup> now confirms that environmental and social clauses may be included as criteria for the award of public contracts.<sup>115</sup> The applicable instruments also provide that in the selection of tenderers, certain disqualification clauses will apply, or may apply if the public authorities so choose. Article 45(1) of Directive 2004/18/EC provides that any candidate or tenderer, who has been the subject of a conviction by final judgment for participation in a criminal organization, corruption, fraud, money laundering, as defined in the relevant EU instruments, shall be excluded from participation in a public contract.

Under Article 45(2), any economic operator may be excluded from participation in a contract, *inter alia*, where that economic operator “has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct.” If national law contains provisions to this effect, this may include non-compliance with environmental legislation, or the non-observance of national provisions implementing instruments related to anti-discrimination<sup>116</sup> where such non-compliance has been the subject of a final judgment or a decision having equivalent effect.<sup>117</sup> At present, these rules do not explicitly make the award of public contracts conditional upon human rights due diligence obligations; nor do they authorize the EU Member States to impose such conditions, unless they are part of social or environmental conditions. However, such developments may take place in the future, and the existing legislative framework in the EU could easily be adapted to that effect.

### *Due Diligence and Green Procurement*

Several Asian States have required government ministries to procure environmentally friendly goods, through so-called “green procurement” schemes. This requires vendors who want to supply goods to government entities to ascertain if the goods they sell are produced in a manner that conforms to certain environmental and sustainability standards. Japan’s Law Concerning the Promotion of Procurement of Eco-Friendly Goods and Services by the State and Other Entities (the Law) has been in effect since April 2001. The Law stipulates that central government agencies shall establish green procurement policies, conduct purchases in accordance with published policies, and then report on results and achievements of green procurement. To implement the Law, the government has designated green procurement items and established evaluation criteria for use in such purchasing decisions. Implementation of the Law has resulted in green procurement of, since 2004, over 90% of office paper, 95% of stationary and office equipment, and all official vehicles.<sup>118</sup>

In the Republic of Korea, the Act on the Promotion of the Purchase of Environment-Friendly Products took effect in July 2005. In accordance with the Act, the public agencies (both national and local) are to publish green procurement policies and implementation plans, carry out the plan and report the results.<sup>119</sup>

In Taiwan, a green procurement article has been inserted into the Government Procurement Act that has been in effect since May 1999. In addition, there is a requirement for mandatory green procurement contained within the Resource Recovery and Reuse Act. As stipulated by the Article, all government agencies are to conduct preferential purchases of designated eco-products that can enjoy a 10% price preference. The government has also designated product categories and various evaluation criteria for green procurement and tracks the reporting and progress of implementation results. The annual target for purchases in designated product categories has been increased gradually since 2002.<sup>120</sup>

### *Due Diligence, Labor Rights and Prevention of Trafficking*

The U.S. Federal Acquisition Regulation (FAR), governing federal procurement, requires a person seeking a government contract to certify either: (a) that it will not supply an “end product” from a country identified on a list (of countries known to use forced or indentured child labor); or (b) that:

- (i) It has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any end product to be furnished under the contract that is on the List and was mined, produced, or manufactured in a country identified on the List for that product; and
- (ii) On the basis of those efforts, the offer or is unaware of any such use of child labor.

The penalty for filing a false certificate is suspension or termination of the contract and/or debarment from federal procurement for up to three years.<sup>121</sup>

On September 25, 2012, the U.S. President issued Executive Order, 13627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts,”<sup>122</sup> which prohibits specific trafficking-related activities and establishing affirmative duties for contractors and subcontractors. The Executive Order prohibits contractors and their subcontractors from engaging in a broad array of trafficking-related activities, such as providing misleading information about working conditions, requiring employees to pay recruitment fees, confiscating employees’ identity papers, or failing to pay return transportation costs for employees brought to a locale to work on a government contract.<sup>123</sup> To ensure compliance contractors and their subcontractors must agree by contract to cooperate fully with contracting agency audits and investigations and, for contracts above \$500,000, contractors and subcontractors are required to maintain a compliance plan. Any violation of the provisions in this Executive Order can result in termination of the contract and potentially debarment from future federal contracts.

Contractors, and their subcontractors, are required to perform due diligence to ensure they and their employees are not engaged in human trafficking activities.<sup>124</sup> Like other public procurement schemes, the Executive Order requires contractors and subcontractors certify their compliance.<sup>125</sup> The Order further requires annual certifications that neither they nor their employees have engaged in trafficking-related activities.<sup>126</sup> Failure to comply with any of these provisions may result in suspension or termination of the contract and possible debarment.<sup>127</sup> The Executive Order covers all federal contracts for services or goods whether

performed in the United States or abroad. The only exception is for contracts or subcontracts for commercially available off-the-shelf items.<sup>128</sup> Contractors or subcontractors performing those contracts are exempt from the compliance plan requirement.<sup>129</sup>

The United States has also regulated employee wages in the construction sector via the Davis-Bacon Act<sup>130</sup> (DBA), initially enacted in 1931. The DBA is a statute targeted at combating social dumping within the United States on sites that benefit from federal contracts.<sup>131</sup> It requires contractors and subcontractors to pay the laborers and mechanics (“covered employees”) they employ the locally prevailing wages and fringe benefits as determined by the Department of Labor (DOL) when they are employed directly at the site of work of a federally funded or assisted<sup>132</sup> construction<sup>133</sup> project exceeding \$2,000.<sup>134</sup> Contractors and subcontractors are required to pay covered employees the “prevailing wage” rate unconditionally, weekly and without subsequent deductions<sup>135</sup> or face civil liability, criminal liability, and possibly debarment.<sup>136</sup>

The due diligence component consists of a requirement for contractors to insert provisions requiring their sub-contractors to pay laborers and mechanics the DOL determined prevailing wage in the locale in any contracts they form with such subcontractors.<sup>137</sup> Thus, the duties imposed on the contractors concerning the level of pay, are passed on to the subcontractors if the work is thus subcontracted;<sup>138</sup> and the federal contractors are expected to collect the weekly payrolls from their subcontractors and are ultimately responsible for any of their failures.<sup>139</sup> The potential impacts of this legislation are considerable: approximately 20% of all construction projects in the United States are covered by the Act, affecting more than 25% of all construction workers in the nation at any given time.<sup>140</sup>

#### *Due Diligence and Ethical Requirements for Investment of State Funds*

Governments may attempt to influence company behavior by requiring State investment funds to invest only in companies engaged in due diligence in order to avoid certain types of harms. Norway’s State Pension Fund-Global administers a set of ethical standards that include the following:

- (a) serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labor, the worst forms of child labour and other child exploitation;
- (b) serious violations of the rights of individuals in situations of war or conflict;
- (c) severe environmental damage;
- (d) gross corruption; or
- (e) other particularly serious violations of fundamental ethical norms.<sup>141</sup>

An Ethical Council screens companies in which the Fund is invested for these violations, as well as for companies that “produce weapons that violate fundamental humanitarian principles through their normal use.” In making its determination, the Ethical Council conducts its own investigations and, where it finds violations, engages with companies to determine whether it should recommend that the company be excluded from the Fund’s investment universe. Although the phrase due diligence is not mentioned explicitly, the considerations for

exclusion in effect require companies to show what due diligence measures they are implementing in order to insure against their causing or participating in future violations:

In assessing whether a company shall be excluded . . . the Ministry may among other things consider the probability of future norm violations; the severity and extent of the violations; the connection between the norm violations and the company in which the Fund is invested; whether the company is doing what can reasonably be expected to reduce the risk of future norm violations within a reasonable time frame; the company’s guidelines for, and work on, safeguarding good corporate governance, the environment and social conditions; and whether the company is making a positive contribution for those affected, presently or in the past, by the company’s behavior.<sup>142</sup>

Exclusion is not the only option available to the Fund. Companies may also be put under “observation,” where the Fund will regularly review the ethical performance of the company.<sup>143</sup>

## **6. Due Diligence as a Condition for Trade and Investment Support**

States encourage companies to engage in human rights due diligence by making it a condition of receiving government support for international trade and investment activity, such as export credit assistance, investment guarantees, and participation in trade missions.

Companies that engage in international trade and overseas investment often rely on home governments for access to export credit, investment guarantees and other support services (such as trade missions) that help them to export to or invest in global markets. To date, export credit agencies and other overseas development and trade agencies have required companies to demonstrate compliance with international environmental and core labor standards.

### *Due Diligence and Export Credit Agencies*

In response to the UN Guiding Principles, export credit agencies have begun to address a broader range of human rights. In June 2012, the OECD Council adopted a Recommendation on Common Approaches for Officially Supported Export Credits and Environment and Social Due Diligence (the Recommendation).<sup>144</sup> For the first time, the Recommendation refers to both environmental and social impacts, the latter of which includes human rights:

“Social impacts” are the project-related impacts on the local communities directly affected by the project and on the people involved in the construction and operation of the project; these social impacts encompass relevant adverse project-related human rights impacts.<sup>145</sup>

The Recommendation explicitly references the UN Guiding Principles on Business and Human Rights and also deploys human rights due diligence:

“Due diligence” is the process through which Members identify, consider and address the potential environmental and social impacts and risks relating to applications for officially supported export credits as an integral part of their decision-making and risk management systems.<sup>146</sup>

The Common Approaches on Environment and Officially Supported Export Credits (Common Approaches) have long required participant export credit agencies to establish procedures for the screening of all projects with a repayment period superior to two years and value above 10 million SDRs.<sup>147</sup> Regardless of the nature of the credit, projects must be classified as high- (A), medium- (B) or low risk (C). Consistent with the principle according to which the depth of the impact assessment should be commensurate with the reality of the risk and its severity, full environmental impact assessment is required for Category A projects.<sup>148</sup> A somewhat lighter assessment applies to Category B projects.

In the decision on whether to support the project, participant export credit agencies are required to indicate which conditions are to be fulfilled prior to, during or after the conclusion of the project. Where certain conditions are imposed, the faithful implementation of such conditions must be monitored. Finally, the Recommendations provide that participants must report semi-annually on all category-A projects supported and on their compliance with the Common Approaches, and that they must evaluate the participant’s experience with the implementation of the standards contained in them.<sup>149</sup>

The OECD's Working Party on Export Credits and Credit Guarantees (ECG) also prepared a *Recommendation on Bribery and Officially Supported Export Credits*, which the OECD Council adopted in 2006.<sup>150</sup> This Recommendation requires States to adopt a number of measures such as: informing exporters and applicants of the legal consequences of corruption and encouraging them to develop management controls against bribery; demanding they provide declarations to the effect that they or their agents have not been engaged or will not engage in bribery; and requiring them to verify and notify if any of the parties to the transactions being envisaged are on publicly available debarment lists.

The integration of human rights considerations into the policies of export credit and investment guarantee agencies remain in its infancy. A study reviewing twenty-five publicly held agencies offering overseas investment insurance found that only four required labor or employment-related standards of their clients.<sup>151</sup> In the case of the U.S. Overseas Private Investment Corporation (OPIC), the standards against which the screening of projects was to be made involved the rights to organize and bargain collectively, minimum age for labor, prohibition of forced labor and acceptable conditions of work. The study assessed labor standards by asking potential investors to explain how labor relations were integrated into the project. The same respondents were asked to answer precise questions on the status of workers in the project envisaged. Misrepresentations and failure to disclose information could lead to cancellation of insurance.

Some ECAs, such as U.S. OPIC, the Swiss Export Risk Insurance and the U.K. Exports Credits Guarantee Department assess projects in terms of their coherence with the State’s

other international policies, such as the promotion of sustainable development, human rights and good governance. However, these criteria are not assessed via specific questionnaires administered to exporters or investors applying for insurance.

More progress has been made with regard to the use of environmental criteria in ECA-supported projects. A 2003 study assessed the environmental conditions required by nine OECD-member ECAs in relation to large dam projects, using the World Commission on Dams' framework of analysis.<sup>152</sup> All of these nine ECAs integrate environmental conditions, though the methods and depth of their integration into the project design process vary considerably. The ECAs screen the projects they support and categorize them according to their risk. In accordance with OECD Arrangement rules, a full environmental assessment is required only in the highest risk category. Small or short-term projects are often exempted from screening procedures. The requirement that mitigation measures designed to reduce impact be monitored has also increasingly been included in loan agreements, establishing covenants and imposing reporting requirements.

The project sponsor usually does the reporting, although some ECAs are starting to use third-party monitoring. Failure in the reporting duties and in the implementation of mitigation measures can result, in most cases, in withdrawal of coverage. However, the study confirms that this has hardly ever been used by the agencies. Transparency and disclosure policies of ECAs have traditionally been a contentious issue. This is due to the conflicting demands of ECAs to serve the public and to also protect client confidentiality. The study observed, however, a trend towards more disclosure, in a timely and accessible manner. Finally the issue of public participation remains elusive, though ECAs have in general tended to require that sponsors undertake consultations with affected communities, as part of the environmental impact assessment.

Though they are important tools, export credit and investment guarantees are not the only trade and investment mechanisms that States have at their disposal to encourage business enterprises to act with due diligence as regards the human rights impacts of their activities. The Netherlands has developed an *OS bedrijfsleveninstrumentarium* or Trade and Industry Tool (T&I tool), as an initiative granting subsidies to Dutch enterprises undertaking several activities in developing countries. The T&I tool contains several subsidized programs that encourage enterprises to contribute to the development of the private sector in developing countries.<sup>153</sup> Among them are the ODA (Official Development Assistance) programs, which are focused on cooperation with local and international enterprises in developing countries and operate with respect for the principle of people, planet and profit. The programs are funded by the Dutch Ministry of Foreign affairs and are executed, monitored and evaluated by organizations including *Agentschap NL* (Agency NL) and *FMO* (Entrepreneurial Development Bank). Dutch enterprises interested in contributing to the investment climate in developing countries may choose to accede to one of the T&I tool's programs. The programs are open for all kind of Dutch businesses, though most applications are submitted by SMEs.

A company that wishes to participate in one of the programs and to qualify for the subsidies must provide a risk assessment on the activity intended, modeled on the OECD Guidelines

on Multinational Enterprises. The burden imposed on a company is designed to avoid overburdening SMEs, particularly as regards the search for information concerning the business partners. However, companies should at least ascertain the origin of the main materials used that are supplied by third parties.<sup>154</sup>

Export Development Canada (EDC), the country's export credit agency, makes various benefits available to companies engaging in activities in other countries, including accounts receivable insurance, foreign buyer insurance, export guarantees, bonding services, political risk insurance and equity support and project financing. Such benefits are intended to support the purchase of Canadian goods and services to be used in a project.

EDC is required to conduct an environmental and social review to determine whether a project that meets certain threshold criteria is likely to have adverse environmental effects, despite the implementation of mitigation measures; and, if such is the case, whether the EDC is justified in entering into the transaction. EDC may approve a project, despite its having unmitigated adverse environmental impacts, if it finds that such impacts are not "significant," that the project exceeds international standards, and that the project brings certain environmental benefits to the country involved. It may also deny support to a project if the environmental impacts are too great.

EDC has its own procedures for the environmental and social review, which are not subject to the Canadian Environmental Assessment Act of 2012. These procedures are derived in part from the OECD Guidelines for Multinational Enterprises, the OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence, International Finance Corporation Performance Standards, IFC Guiding Principles on Human Rights and the Equator Principles.

The human rights component of EDC's "social" review is limited. EDC does not acknowledge any statutory obligation to go beyond the potential social impacts as part of the environmental review, which includes: involuntary resettlement or other harmful project-related impacts on health, cultural sites, indigenous peoples or other vulnerable groups. However, it may conduct country reviews and other examinations of human rights matters on its own initiative.

EDC monitors its "client's" compliance with requirements contained in its various contracts, as well as compliance with local law, the mitigation measures contained in an environmental assessment, through regular monitoring reports. In cases of non-compliance, EDC has authority to withdraw its support, should its efforts to achieve compliance not be successful. In the case of suspicion that a client has violated anti-bribery laws (or provisions in EDC documents) the EDC will notify the appropriate enforcement authorities.

#### *Due Diligence and Trade Preferences*

States can use trade and investment related finance and other benefits to influence the behavior of its own companies (i.e. those domiciled or operating within its borders). However,

it may also use trade related incentives to influence the behavior of companies located in other jurisdictions, seeking to become trading partners. In these circumstances, States may use trade agreements, or trade preference programs, to require companies from other companies to engage in human rights due diligence.

The use of trade preferences to stimulate due diligence has been implemented in the apparel and textile sector. In order to create incentives for overseas suppliers to comply with international labor standards, while at the same time stimulate foreign investment in the apparel sector in Haiti, the U.S. Congress, enacted the Haitian Hemispheric Opportunity through Partnership Act (HOPE I) in 2006,<sup>155</sup> and, subsequently, HOPE II. Building upon the Caribbean Basin Trade Partnership Act of 2000 (CBTPA),<sup>156</sup> HOPE I gave duty-free status to apparel imports that met certain rules of origin, provided the President certified that Haiti was making progress towards, *inter alia*, an improved protection of labor rights.

HOPE II was adopted in 2008.<sup>157</sup> HOPE II incentivizes Haitian apparel manufacturers to comply with these labor standards by offering duty-free treatment for their apparel exports and technical assistance to comply with labor standards. The standards implemented include the right of association; the right to organize and bargain collectively; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor and a prohibition on the worst forms of child labor; and the elimination of discrimination in respect of employment and occupation.

HOPE II required Haiti to create a new independent Labor Ombudsman's office to ensure Haitian firms are complying with labor standards and to establish a Technical Assistance Improvement and Compliance Needs Assessment and Remediation (TAICNAR) Program. This Program shall, in particular, assess firm compliance with core labor standards and national labor law, support remediation efforts, and publicly report on progress for all factories on the Labor Ombudsman's register. The manufacturers that comply with core labor rights and that subject themselves to the oversight of Haiti's Labor Ombudsman Office and firm level inspections by the ILO will be rewarded by duty-free access to the United States market.

The United Nations used a similar approach in its 1999 U.S.-Cambodia Bilateral Textile Trade Agreement.<sup>158</sup> Under this trade agreement, the United States provided Cambodia access to US markets by giving expanded apparel and textile quotas conditional on improved working conditions in the garment sector. The bilateral agreement used the ILO Better Factories Cambodia (BFC) program,<sup>159</sup> to monitor and report on whether working conditions in Cambodian garment factories complied with ILO Core Labor Standards and Cambodian labor law.

Trade incentives such as those provided in HOPE II may constitute a strong incentive for the importing company, or the retailers, to encourage their suppliers to improve their compliance with labor rights even beyond the minimum requirements set under the local legislation, and to dutifully submit to monitoring mechanisms established to verify compliance.

Such mechanisms indicate that trade agreements might be used constructively to build State capacities and create incentives for corporations to put in place adequate systems for human rights due diligence. Such agreements could make the trade protection benefiting the investor conditional upon that investor complying with certain standards related to human rights, a solution inspired by the “clean hands” doctrine sometimes alluded to by arbitrators.

## **7. Encouraging Due Diligence Through Consumer Protection Law**

States may use administrative processes regulating consumer product safety to hold companies accountable for failure to conduct adequate due diligence. Companies will, for example, be held vicariously liable for the safety of their food products, ensuring that an importer or food manufacturers will engage in quality control and due diligence to ensure their food is free from contaminants and safe for consumption. Similar regulations exist for other product classes that pose specific health and safety risks, such as children’s toys and pharmaceuticals. By holding a manufacturer or importer responsible, States create an incentive for companies to engage in due diligence throughout their supply chains to ensure the final product is fit for use or consumption.

In addition to such rules, most States have in place consumer protection laws that aim to ensure that companies advertise their products and services in a way that is truthful and accurate. These laws typically focus on whether the information provided to consumers, and the way in which products and services are marketed, is not unfair or deceptive. Such consumer protection statutes hold companies accountable for the specific communications they make to consumers that seek to influence purchasing practices. This is relevant because, as expectations of consumers rise in this regard, companies increasingly may be tempted to make claims about their supply chain management and about the principles with which their business partners, their suppliers in particular, comply. False and misleading advertising laws increasingly provide consumers with remedies to challenge such representations, ensuring that companies effectively monitor the behavior of their business partners when they have made such statements. Such statements (through which, in effect, a company undertakes to control its suppliers) shall in fact become binding on the company, because States may treat such mode of expression as a form of advertising, that commits the company to act in accordance with its stated policies regarding due diligence. In order to ensure that such advertising shall not mislead consumers, States may also establish mechanisms allowing for a verification of compliance with the code of conduct adopted.

The 1984 EU Directive concerning misleading and comparative advertising is illustrative. It defines “advertising” in the broadest fashion possible, as “the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services”.<sup>160</sup> Codes of Conduct are covered by this definition. The information misleading to the consumers which, “by reason of its deceptive nature, is likely to affect their economic behavior”, includes in particular the method of manufacture or the geographical origin.<sup>161</sup> thus, whenever codes refer to the working conditions in which the advertised goods were produced, or – as may be justified when certain boycott campaigns are

launched – to the countries in which the production took place, this form of communication, if deceptive, should be sanctioned.

The Directive details the procedural safeguards, which must be provided by national legislations of the Member States, for the consumer to be effectively protected against misleading advertising. In particular, organizations regarded under national law as having a legitimate interest in prohibiting misleading advertising should be able to take legal or administrative action;<sup>162</sup> in addition, in such proceedings courts or administrative authorities should have the power “to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if, taking into account the legitimate interest of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case,” and “to consider factual claims as inaccurate” if the evidence thus demanded “is not furnished or is deemed insufficient by the court or administrative authority.”<sup>163</sup>

The latest amendments to Directive 84/450/EC<sup>164</sup> confirm what was already implicit in the original text. The Unfair Commercial Practices Directive (2005/29/EC) now explicitly notes that:

It is appropriate to provide a role for codes of conduct which enable traders to apply the principles of this Directive effectively in specific economic fields. In sectors where there are specific mandatory requirements regulating the behavior of traders, it is appropriate that these will also provide evidence as to the requirements of professional diligence in that sector. The control exercised by code owners [responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it] at national or Community level to eliminate unfair commercial practices may avoid the need for recourse to administrative or judicial action and should therefore be encouraged. With the aim of pursuing a high level of consumer protection, consumers’ organizations could be informed and involved in the drafting of codes of conduct.<sup>165</sup>

The Unfair Commercial Practices Directive seeks to harmonize the rules on misleading advertising beyond the minimum requirements initially set forth in the 1984 Directives. It provides that a misleading commercial practice may consist in practice which “contains false information and is therefore untruthful or in any way . . . deceives or is likely to deceive the average consumer,” in relation, *inter alia*, to “the main characteristics of the product, such as its . . . method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use. . . .”<sup>166</sup> Article 6(2)(b) of the Directive moreover explicitly defines as constituting a misleading commercial practice non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:

- (i) The commitment is not aspirational but is firm and is capable of being verified, and;

- (ii) the trader indicates in a commercial practice that he is bound by the code.

Consumers organizations should have the possibility to file claims against the company or group of companies that are in violation of the provisions of the directive, i.e., that resort to unfair commercial practices. Article 11(1) of the Directive provides in this regard that the EU member States should adopt “legal provisions under which persons or organizations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may: (a) take legal action against such unfair commercial practices; and/or (b) bring such unfair commercial practices before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings;” and Article 4 of Directive 84/450/EEC includes a similar provision.<sup>167</sup>

Enforcement of the requirements established under the Unfair Commercial Practices Directive or under the 1984 Directive concerning misleading and comparative advertising is decentralized: it is the consumers themselves, through their representative organizations, who may seek to ensure that codes of conduct are not abused. Although the “owners” of the code of conduct, who have the direct responsibility of enforcing it and ensure it is complied with,<sup>168</sup> may be encouraged to control unfair commercial practices and to establish bodies allowing for complaints to be filed, this is only to be favored “if proceedings before such bodies are in addition to the court or administrative proceedings,” and “recourse to such control bodies shall never be deemed the equivalent of foregoing a means of judicial or administrative recourse,” as required by the Directive.<sup>169</sup>

There is some experience with this regulatory framework that demonstrates its usefulness as a tool to enforce due diligence undertakings by a company. In Germany, the EU Directive on Unfair Commercial Practices (2005/29/EC) has been implemented by the Unfair Commercial Practices Law (*Gesetz gegen den unlauteren Wettbewerb*, UWG). The law provides for remedies when a company advertises that it adheres to Corporate Social Responsibility (CSR) policies, but in fact does not.<sup>170</sup> For instance, one retailer advertised such participation in a CSR scheme on their website under “social responsibility” and in a brochure available in shops, as well as in replies to consumers' requests.<sup>171</sup> They were sued by the Hamburg Consumer's agency (Hamburger Verbraucherzentrale, VZ HH)<sup>172</sup> for false advertisement. The VZ HH was able to prove that there are at least three factories in Bangladesh, which supplied the company with textiles where the standards of the code of conduct were clearly not respected. While the code of conduct is not legally binding in a strict sense, the code of conduct states that the adhering company is responsible to ensure the respect of fundamental workers' right all along the supply chain. The lawsuit was based on the argument that the company was misleading consumers to believe that the code was in fact binding and that the standards outlined in the code of conduct were complied with, which in reality it had not done. The plaintiffs alleged that such conduct was in contravention of Section 5(1) No. 6 UWG as well as the more general norm Section 3(1) UWG. The company accepted the claim of VZ HH and therefore decided to change its advertisements. No court decision was delivered.

In the United Kingdom, the Consumer Protection from Unfair Trading Regulations 2008 make it a criminal offense for a Company to knowingly or recklessly engage in an “unfair

commercial practice,” consisting of one or more defined acts that mislead a consumer in his or her “economic behavior.”<sup>173</sup> The Act provides for a due diligence defense, requiring a company to prove: “that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offense by himself or any person under his control.”<sup>174</sup> The U.K. Office of Fair Trading, a part of the Department for Business Enterprise and Economic Reform, has issued guidance on how companies may comply with the Act.<sup>175</sup> A formal quality management system is advised – although not mandatory, other than the manufacture of gas appliance – and no specific due diligence program advised.

In the United States, all fifty States, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands, have Consumer Protection Laws based on the U.S. Federal Trade Commission Act’s prohibition against deceptive and unfair methods of competition in or affecting commerce. Because the laws are modeled after Section 5(a)(1) of the FTC Act<sup>176</sup> (which prohibits “unfair or deceptive acts or practices” (UDAP)), the States’ laws are often called “little FTC acts,” or “UDAP” statutes. State statutes provide for private rights of action for those injured by a violation of the statute; generally only consumers who purchased goods in reliance on false or deceptive advertising have standing to sue. In at least one case, a UDAP action survived a constitutional challenge based on the argument that advertising should be protected as an exercise of freedom of expression. In *Kasky v. Nike, Inc.*, the California Supreme Court ruled that false commercial advertising is not constitutionally protected speech under the First Amendment to the U.S. Federal Constitution.<sup>177</sup> In a decision dismissing a writ of certiorari in the case, the U.S. Supreme Court raised the issue whether advertising that mixes both commercial and non-commercial speech is entitled to some form of First Amendment protection, but this issue was not definitively decided because the case was settled out of court.<sup>178</sup>

States may also try to move companies to conduct human rights due diligence with respect to products and services by offering them the opportunity to participate in a government-sponsored labeling or certification scheme. To date, these programs are not widespread, and have not lead to large-scale company adoption, but provide an option for States to consider, alongside other types of regulation.

For example, The EU has adopted regulatory schemes on voluntary eco-labeling and eco-auditing.<sup>179</sup> The EU Eco-Management and Audit Scheme (EMAS) is a management tool for companies and other organizations to evaluate, report and improve their environmental performance. It is conceived as a voluntary instrument, which acknowledges organizations that improve their environmental performance on a continuous basis and that seek to gain registration under the label in order to “gain added value in terms of regulatory control, cost savings and public image provided that they are able to demonstrate an improvement of their environmental performance.”<sup>180</sup> The scheme was initially, in 1993, open to organizations from the industrial sector only.<sup>181</sup> It was later, in 2001, extended to all sectors,<sup>182</sup> and it is now open to all organizations, both private and public, in and outside the community, whose activities have an environmental impact. EMAS registered organizations undertake to (i) conduct an environmental review considering all environmental aspects of the organization’s

activities, products and services; (ii) establish an environmental management system aimed at achieving the organization's environmental policy; (iii) carry out an environmental audit; and (iv) report on their environmental performance through the publication of an independently verified environmental statement.<sup>183</sup>

Companies may be suspended or deleted from the register if it is found that they have failed to comply with the requirements set out in the Regulation, or with any applicable legal requirements relating to the environment.<sup>184</sup> The EMAS registration is valid for three years, after which it must be renewed based on the verification of a full environmental management system and audit program and of its implementation. It is notable that the competent bodies that the EU Member States must establish, and which shall independently and impartially verify whether an applicant organization can be registered, may establish the conditions under which observations from interested parties may be received before deciding on the application, which opens the possibility for a public scrutiny of the conduct of the applicant organization.<sup>185</sup> The EMAS Regulation provides that each Member State establishes a system for the accreditation of independent environmental verifiers and for the supervision of their activities, ensuring that they are independent and that they fulfill their tasks impartially.<sup>186</sup>

In 2002, Belgium adopted a law focused on socially responsible production.<sup>187</sup> The law provides that a company may be authorized to place the social label on a service or good it commercializes on the Belgian market, thus certifying that all the steps of the production are in conformity with the eight core conventions of the ILO (relating to the prohibition of forced labor, freedom of association, the right to collective organization and bargaining, the prohibition of discrimination in employment and remuneration, minimum age for child labor and the prohibition of the worst forms of child labor).

The Belgian Ministry of Economic Affairs grants a company the use of the socially responsible label on the basis of a binding opinion delivered by a 16-members committee composed of a variety of stakeholders.<sup>188</sup> A company requesting the label for any product it intends to market must ensure compliance with ILO core labor standards throughout its production chain. Not only must it provide such assurances in its initial request, it also must agree to submit to independent auditing procedures performed on an annual basis, thus allowing regular verification of the claim of the company to which the label has been granted.<sup>189</sup> In addition, a participating company must establish a complaints mechanism, allowing any interested person to allege that a company is not fully complying with relevant ILO conventions in its production chain. This may lead to *ad hoc* verifications of such claims. Misuse of the label may lead to sanctions being imposed on the company concerned, in the form of fines or even imprisonment for the executives of the company.

Both labeling systems are based on the certification on the basis of objective criteria, verified through an independent monitoring, in order to encourage organizations to ask for such certification and the public to have confidence in the logo through which the certification is made visible. It should be added, however, that such incentives to establish robust due diligence mechanisms, relying on the obtaining the right to use a certified label, depends on the fulfillment of two conditions: the public must be well informed of the label, in order to the

acquisition of the label to be worthwhile in a marketing strategy, and the market concerned must be large enough for the company to invest in the acquisition of the label and the improvement of its practices in order to comply with its requirements. Neither of these two conditions is satisfied as regards the Belgian 2002 law on socially responsible production, which may explain its poor rate of success as measured by the number of companies having joined the scheme.

## **8. Reporting, Transparency and Disclosure Requirements for Due Diligence**

States increasingly require companies to publish or disclose their policies and practices with respect to particular issues. States create transparency requirements as a means of (a) providing regulators and stakeholders with information about significant corporate activities that may have an impact on the public or particular communities and (b) getting companies to articulate what, if anything, they are doing with respect to a particular type of risk. Such reporting, disclosure and transparency requirements could be extended to ensure that companies disclose the human rights risks involved in their activities, as well as down the supply chain. While companies generally may prefer to avoid assessing such risks, both in order to avoid having to take remedial or mitigating action and because of the potential reputational costs involved in acknowledging the risks involved, large institutional investors are increasingly demanding this information from the companies in which they intend to invest. Yet, the pressure from the socially responsible investment sector may not be sufficient to channel existing reporting and disclosure practices towards reporting about human rights risks, encouraging companies to act with due diligence in order to avoid such risks from materializing. This section examines how the State could take action to encourage such practices.

Some jurisdictions have made significant progress in imposing reporting obligations on companies. In France, Art. L225-102-1 of the Commercial Code now provides that the annual management report of a company should include “information on how the company takes into account social and environmental consequences of its activity and its social commitments in sustainable development and the fight against discrimination and promoting diversity.”<sup>190</sup> This requirement is imposed on companies, both listed and unlisted, that exceed certain thresholds of total assets, cash flow or number of employees, as determined by the Conseil d'Etat. The current threshold is fixed at total assets or turnover of at least 100 million euros and an average payroll of at least 500 employees. All subsidiaries and other companies that a company controls must be included in cases where a Company prepares consolidated financial statements. An independent third party must verify social and environmental information concerning legal obligations.

In Argentina, the City of Buenos Aires enacted Law No. 2594 to promote socially and environmentally friendly behavior. It requires companies, whether domestic or foreign, that employ over 300 people and whose main business has resided in in the city for over a year to prepare an annual report of their social, environmental and economic impact.<sup>191</sup> Companies that fail to comply may be held criminally liable.<sup>192</sup> Companies that voluntarily submit annual reports may receive access to credit and other special programs.<sup>193</sup>

The fact that a company is required by regulators to disclose its policies and procedures will prompt companies to not only report, but also to act affirmatively to ensure compliance with the standards set. If a company fears adverse consumer reaction for example, it may alter its company compliance mechanisms to address a subject on which they previously took no action or less comprehensive action. Transparency also allows stakeholders, such as consumers, shareholders, and civil society organizations, to have access to information about a company's activities, and to advocate for changes to such policies.

States have started to require companies, particularly large publicly listed companies, to disclose whether they have policies and activities focused on corporate social responsibility (CSR). These standards are usually different concept from business and human rights, and may or may not include a company's policies and activities relating to human rights. In addition, States have begun to enact legislation that requires companies to disclose their due diligence activities with respect to particular human rights issues, most notably, prevention of human trafficking, and use of conflict minerals. In tandem with State-mandated transparency measures, stock exchanges and other corporate governance bodies are developing new types of reporting procedures for companies, in areas focused on environmental and social reporting.

Under Section 99 of the Danish Financial Statements Act,<sup>194</sup> Danish companies above a certain size, and certain institutional investors, mutual funds and other listed financial enterprises are required to publish an annual CSR report that states whether or not a company has a CSR policy, and includes at least a summary of such policy. Businesses have to either report about their CSR activities or state that they do not engage in CSR. The report must be published in the management section of a company's annual report, as a supplement to its annual report, or on its website. The mandatory CSR report must remain accessible for at least five years. Reports must include the company's evaluation of progress made towards achieving CSR goals during the past year (stated in qualitative terms). If no specific results have materialized yet, the report must provide that information. If a company has expectations on future achievements as a result of its CSR policies, information on these must also be provided.

Since 2012, any company that reports on its CSR policy must include both human rights and climate change provisions in such policy. Otherwise, there are no requirements for the contents of CSR policies, although the securities laws (which require all issues of materiality to be included in a covered company's reports under those laws) indicate that CSR is the voluntary consideration of, amongst others, human rights, societal, environmental and climate conditions as well as combating corruption in their business strategy and activities.

For the purposes of the Danish laws, a company that has acceded to the UN Global Compact or Principles on Responsible Investment (PRI) may choose to report through the Communication of Progress (CoP) report, which it is expected to prepare under these instruments. A subsidiary company may be exempted from the reporting provision provided (1) the parent company provides a CSR report, which includes information on subsidiaries, or (2) the parent company has prepared a report required under the international instruments.

Danish CSR reports covered by the CSR reporting law are subject to auditing, which is limited to a consistency check to ensure consistency between the management report and other parts of the report subjected to audit requirements. No audit of consistency between CSR policies and actual practice or performance is required. Regardless of where a company's report is published, the auditor's statement on its mandatory reports must cover the CSR report, and the reports are subject to the same rules as to accuracy and completeness as other information submitted under those laws. Non-compliance by the management with the reporting requirements is subject to punishment by fine. An auditor's non-compliance with the auditing requirements is also subject to punishment by fine.

Canada's federal securities laws,<sup>195</sup> along with guidance jointly adopted by all of the provincial securities agency<sup>196</sup> and policies issued by the Canadian Institute of Public Accountants (CICA),<sup>197</sup> require companies that must file periodic reports to identify, among other matters, the principal risk factors ("in order of seriousness") that might adversely affect the company's financial performance. Companies may be subject to criminal and civil liabilities if their reports contain false or misleading information.

Among the risk factors specifically mentioned in the securities laws or in the accounting standards are "political or environmental issues," which must be discussed in either the "management discussion and analysis" (MD&A) that relates to interim and annual financial statements or to the annual information form (AIF).<sup>198</sup> The potential impact of such risks must be disclosed, along with the company's management systems for dealing with such risks. Separate rules dealing with mineral projects require the inclusion of "a general discussion on the extent to which the estimate of mineral resources and mineral reserves may be materially affected by any known environmental . . . legal . . . socio-economic . . . political or other relevant issues . . ."<sup>199</sup>

A company must disclose its corporate social responsibility policies, which the CICA advises should be integrated into corporate financial statements in particular instances, addressing: "policies regarding your company's relationship with the environment or with the communities in which it does business, or human rights policies . . . and the steps your company has taken to implement them."<sup>200</sup>

Spain's 2011 Sustainable Economy Law says that government-sponsored commercial companies and state-owned business enterprises, "attached to the central government," shall adapt strategic plans to file annual corporate governance and sustainability reports in accordance with generally accepted standards, and must mention whether this information has been examined by an independent third party. If the corporation has more than one thousand employees, this report must also be sent to the Spanish CSR Council. The law suggests that the government will make available a set of indicators for self-evaluation in accordance with international standards on social responsibility.<sup>201</sup>

Malaysian law also requires all listed companies to publish corporate social responsibility information in their annual reports.<sup>202</sup> In 2006, recognizing that voluntary CSR disclosure were having little impact, then Prime Minister, Abdullah Ahmad Badawi, announced that as

of 2008, the government would require all publicly listed companies in Malaysia to publicly report their CSR activities. In support of this policy, Bursa Malaysia, the Malaysian Stock Exchange, changed its listing rules to require such reporting.<sup>203</sup>

Some governments are focused on reporting in particular sectors. Australia, for example, has introduced ethical disclosure requirements under the Financial Services Reform Act (FSRA).<sup>204</sup> Issuers of financial products must disclose the extent to which “labor standards or environmental, social or ethical considerations are taken into account in the selection, retention or realization of an investment.” Product issuers are required to make two separate Product Disclosure Statements (PDS). The first disclosure is on labor standard considerations, and the other on environmental, social and ethical deliberations.

Finally, States may also require companies to disclose what steps they are taking with respect to due diligence to prevent and detect human rights violations in their global supply chains. The California Transparency in Supply Chains Act requires a retailer doing business in California who has worldwide sales in excess of \$100 million (reportedly some 3200 companies) to “conspicuously” disclose on its website<sup>205</sup> the extent to which the company engages due diligence on its supply chains with respect to human trafficking. Companies do not have to actually do anything with respect to human trafficking prevention, they must merely report on whether they do or do not take certain steps. As such, it is a disclosure statute that simply asks companies to tell the public what they do, and to publish this on their website with a conspicuous link to the pertinent information. The statute provides that “The exclusive remedy for a violation of this section shall be an action brought by the Attorney General for injunctive relief.”<sup>206</sup>

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>207</sup> requires companies with securities registered with the Securities and Exchange Commission to report on their due diligence with respect to conflict minerals<sup>208</sup> originating in the Democratic Republic of the Congo or an adjoining country (the “Covered Countries”).<sup>209</sup> The SEC promulgated implementing rules under the Act on September 12, 2012.<sup>210</sup>

In its preamble to the rules, the SEC states, “Congress intended to further the humanitarian goal of ending the extremely violent conflict in the DRC, which has been partially financed by the exploitation and trade of conflict minerals originating in the DRC.” The preamble explains that “to accomplish the goal of helping end the human rights abuses in the DRC caused by the conflict, Congress chose to use the securities laws disclosure requirements to bring greater public awareness of the source of companies' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains.”<sup>211</sup>

If a company's conflict minerals originated in one of the Covered Countries, it is to submit a report to the SEC<sup>212</sup> that includes a description of the measures it took to exercise due diligence on the conflict minerals' source and chain of custody.<sup>213</sup> Such measures must include an independent private sector audit of the report that is conducted in accordance with standards established by the Comptroller General of the United States.<sup>214</sup> The report must include a description of the products manufactured or contracted to be manufactured that are

not “DRC conflict free,” the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin.

A company that finds conflict minerals in its supply chain that originated in the Covered Countries must determine and disclose whether those minerals directly or indirectly financed or benefited armed groups in the Covered Countries. Products are “DRC conflict free” when those products do not contain conflict minerals that “directly or indirectly finance or benefit armed groups” in the Covered Countries. The term “armed group” is defined as “an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices issued by the United States Department of State under sections 11 (d) and 502B(b) of the Foreign Assistance Act of 1961.” If a Company is unable to determine, after conducting due diligence, whether its products are “DRC conflict free,” it must report that they are “DRC conflict indeterminable.” Issuers with “DRC conflict undeterminable” products are required to provide a Conflict Minerals Report that describes, among other matters, the measures taken by the issuer to exercise due diligence on the source and chain of custody of the conflict minerals.



### III. The Reach of Human Rights Due Diligence

National and international due diligence regimes require business enterprises to implement due diligence across organizational and national boundaries. An examination of various national and international legal texts that rely on due diligence suggests due diligence is used by these different legal regimes to overcome the obstacles to effective regulation posed by complex corporate structures or trans-jurisdictional activities. This section describes the reach of the human rights due diligence that States should require of business enterprises.

Contemporary business activity is integrated across national and organizational boundaries. Companies operate through networks of suppliers, sub-contractors, franchisees, and distributors, often located in different States. The corporate group usually includes a number of separate legal entities, over which the parent company, which owns part or all of the stock, exercises variable degrees of control. These various entities may be incorporated or operate in different jurisdictions. As a result, most products and services available today may be said to be the result of collaboration between a number of business entities, entertaining contractual or investment links, and often escaping the jurisdiction of any single State.

Over time, the legal regimes governing due diligence activities have adapted their reach to the activities and relationships created by this integration of business enterprises. In national legal systems, and under international law, the responsibility of business enterprises to conduct due diligence does not end at the legal boundary of the individual company. The rationale defining the reach of due diligence provisions in this way is to protect against situations in which respect for legal standards, such as environmental protection, labor rights, and anti-corruption, may be undermined by the creative use of business relationships, the various forms of business entities and the organization or structure of corporate groups.

This approach is also reflected in the international instruments developed with respect to business and human rights. Guiding Principle 2 recommends that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations,"<sup>215</sup> thus excluding a restrictive reading of the human rights responsibilities of companies that would be limited to the individual legal entity, or to operations only within the territory of the State of incorporation. Guiding Principle 13 addresses both a business enterprise's "own activities" and those impacts that arise from activities "directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts." The Commentary to Guiding Principle 13 states:

Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties . . . For the purpose of these Guiding Principles, a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships 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.

Guiding Principle 14 states that responsibility applies to all business enterprises, regardless of “structure,” which the UN Office of the High Commissioner for Human Rights interprets to mean that “the corporate group structure does not make any difference to whether entities within the group have to respect human rights. It simply affects how they go about ensuring that rights are respected in practice, for instance through their contractual arrangements, internal management systems, governance or accountability structures. In the event that human rights abuses occur, it will be national law in the relevant jurisdictions that determines where the liability falls.”<sup>216</sup>

Similarly, the OECD Guidelines on Multinational Enterprises (as updated in 2011) provide that business enterprises domiciled in OECD countries should use their “business relationships” to “Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.”<sup>217</sup> Both the Guiding Principles and the OECD Guidelines recognize that many business enterprises operate as part of large networks of agents, suppliers, subcontractors and clients and that, as a result, it may be difficult for the enterprise to systematically monitor the activities of all its business partners. Both respond to this in ways similar to those developed at a national level to ensure that corporations act with due diligence: through the use of leverage.<sup>218</sup> Neither the Guiding Principles nor the OECD Guidelines restrict due diligence to the limits of the legal entity or the boundaries of the state.

At the national level, there are numerous examples of state regulations that create due diligence obligations that extend beyond an individual business enterprise to also reach different actors that have significant relationships with a company. Most legal systems attribute responsibility to a business enterprise for the acts of its managers and employees, but also through the acts of agents, partners or contractors who were acting on its behalf. On this basis, the legal systems of most countries have deployed due diligence as a way for a business enterprise to defend itself against liability for the acts of such agents. Such due diligence typically extends beyond the scope of the immediate company to include business enterprise groups, networked businesses, subsidiaries, agents and subcontractors.

For example, many legal systems impose legal obligations with regard to a business enterprise’s risk management to prevent harms to workers. States often require the implementation of due diligence to detect and protect against such risks. Thus, the German *Arbeitnehmer-Entsendegesetz* (AEntG) provides that a corporation will be held liable for any failure to fulfill important duties arising from the employment contract between a business enterprise’s subcontractor and the latter’s employees. The objective of the law is to encourage corporations to adopt better monitoring mechanisms in relation to sub-contractors and to prevent wage dumping.<sup>219</sup>

In Canada, Section 217.1 to the Criminal Code establishes a legal duty for a business to conduct due diligence to protect against the risk of bodily harm of employees and the public and to take reasonable steps to ensure their safety. In the event of serious injury or death, a company may face criminal liability if “senior officers” fail to prevent a violation by one of their “representatives” (or, with the at least partial intent to benefit the organization, direct

one of their “representatives” to commit a violation). The statute identifies a “representative” as “a director, partner, employee, member” but also an “agent or contractor of the organization.” This definition extends the responsibility of the enterprise beyond its own legal boundaries to include those with whom it is working. This approach reflects the increasing complexity of business organizations where contracting and partnerships can cloud the actual responsibility for health and safety in practice. The resulting implementation guidance to the law describes a “due diligence process” that is strikingly similar to the Guiding Principles as well as other national definitions of due diligence.<sup>220</sup>

The effect of the German and Canadian examples is to require that due diligence is not restricted to a company as narrowly defined in law, but rather to require that due diligence reaches the various actors in the value chain of the business enterprise that can have an impact on the ability of the company to comply with the law. In effect, the regulations align the reach of the due diligence requirements imposed on a business enterprise to include the scope of its business relationships.

The approach to due diligence that extends its reach beyond the legal boundary of the individual company to include its business relationships also recognizes that business relationships cross national boundaries. Part of the rationale for extending the reach of due diligence provisions to include business relationships is to respond to the problems posed by the reality of the integration of global commercial activity, which makes regulatory oversight by any one regulator both difficult and complex. The approach adopted by national due diligence regimes, and more recently by international standards outlined by the Guiding Principles and the OECD Guidelines, recognizes that business responsibility arises through these business relationships and extends the due diligence requirement throughout the global business operations of the firm and does not limit due diligence to the borders of the jurisdiction where the rule is made.

Indeed, because due diligence throughout the operations of the business enterprise extends across a number of jurisdictions, States may require the adoption of due diligence measures even though such measures may influence conduct outside the national territory. This approach finds support in international law,<sup>221</sup> which imposes on States a duty to prevent their national territory to be used to cause harm on another State's territory. Though initially affirmed in the context of transboundary pollution,<sup>222</sup> the obligation is not limited to such cases, and the rule goes beyond international environmental law:<sup>223</sup> The duty of the State extends to the regulation of the activities of private persons within its territory, which “is no less applicable where the harm is caused to persons or other legal interests within the territory of another State.”<sup>224</sup>

In China, for example, the Ministry of Commerce (MOFCOM) and other relevant government agencies have since 2010 issued a series of regulations and guidelines to Chinese businesses operating abroad and to employment companies placing Chinese workers at foreign firms abroad.<sup>225</sup> Rules that took effect on August 1, 2012, require employment firms to have a “sound internal management system and an emergency handling system,” to “track and understand overseas working and living conditions of the laborers,” to provide accident

insurance where the foreign employer does not, and to intervene with foreign employers “to resolve the difficulties and problems encountered by the laborers in their working and living conditions.”<sup>226</sup>

In February 2012, MOFCOM issued its Guidelines on Safety Management of Overseas Chinese-invested Enterprises, Institutions and their Personnel, which complement the Regulation on Safety Management of Overseas Chinese-invested Enterprises, Institutions and their Personnel (issued by seven ministries, including MOFCOM, in August 2010). The guidelines explain how companies should conduct risk assessments, including certain human rights-related compliance requirements, as well as contingency plans for security of staff. The Guidelines on Safety Management include advice on the due diligence investigation process with respect to foreign investment projects with a particular focus on the investment environment (political and social stability) and environmental protection.<sup>227</sup>

National laws prohibiting bribery of public officials require companies to conduct due diligence with respect to their subcontractors, partners and others with whom they work, regardless of whether they are separate legal entities or are domiciled in jurisdictions abroad. For example, under the U.K.’s Bribery Act (2010), it is a criminal offense for a person “associated” with a business enterprise to bribe a foreign official in order to obtain business or a business advantage.<sup>228</sup> In the Act, an “associate” is defined as “a person who performs services for or on behalf of (a business enterprise),” a function that is to be determined “by reference to all the relevant circumstances and not merely by reference to the nature of the relationship.” The Act makes explicit that the capacity in which the associate is acting “does not matter,” whether an “employee, agent or subsidiary.”<sup>229</sup>

Under the U.K. Bribery Act, a business enterprise can defend itself against charges of bribery by showing that it had “adequate procedures” in place, including due diligence with respect to employees, agents, and subsidiaries, or anyone who performs services on its behalf. The Act applies to any British national or corporate body, regardless of where the bribe is paid or where the actions (or omissions) of the firm were committed. The law also applies to foreign entities with U.K.-based operations.

A company’s need to extend its due diligence beyond the jurisdiction where it is domiciled may stem from the scope of its legal liability for negligence under civil and tort law, in the jurisdiction where it is domiciled, for acts committed abroad. Accordingly, people harmed by tortious acts carried out by company’s agents or partners may raise claims against this company for its involvement or lack of involvement in the management of the harmful operation and for failing to exercise due care to prevent the harm.

In the EU, under Council Regulation (EC) No 44/2001 (the “Brussels I” Regulation),<sup>230</sup> the national courts of the EU Member States are in principle competent to hear civil proceedings against persons, including corporations domiciled in the EU, for certain tortious acts, even if the damage occurs or is caused outside the territory of the Member States and the claimants are not domiciled in an EU Member State.<sup>231</sup> The action may be lodged either in the State where the parent business enterprise is domiciled or, where a branch of that business enter-

prise has actually been at the basis of the act causing the damage, in the State where that branch is located. For instance, a Dutch court relied on the Brussels I Regulation as the basis for establishing jurisdiction over charges of pollution in Nigeria that were filed by a Nigerian citizen against the oil business enterprise, Shell.<sup>232</sup> The same was done by a London court ruling on charges filed against a British corporation for its involvement in the dumping of toxic waste on the Ivory Coast.<sup>233</sup> Such torts may include violations of human rights norms or international crimes.<sup>234</sup> Similar cases have been raised in the United States, Australia, and Canada, however, whereas in these common law jurisdictions such claims must pass the *forum non conveniens* test - there must be no other competent forum accessible to the victims which on balance presents closer links to the case presented - such a test cannot be imposed where the action is based on the "Brussels I" Regulation, which stipulates compulsory rules on jurisdiction.

The 1990 Americans with Disabilities Act provides another example where the forum State protects human rights abroad, by imposing certain requirements on companies domiciled under its jurisdiction. The Act prohibits discrimination against persons with disabilities by any employer, employment agency, labor organization, or joint labor-management committee. It provides for the extraterritorial scope of the prohibition by establishing a presumption according to which "If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer."<sup>235</sup> However, in order to remain within the boundaries of extraterritorial jurisdiction as circumscribed under international law by the principle of active personality (i.e., as justified by the nationality of the regulated entity), this section does not apply with respect to "the foreign operations of an employer that is a foreign person not controlled by an American employer."<sup>236</sup> This is equivalent to imposing on all American employers covered by the Act a due diligence obligation to monitor the compliance of all the corporations they control in foreign countries with the prohibition of discrimination on grounds of disability.

The intent of such provisions is to prevent business enterprises from escaping responsibility by outsourcing risky activities to others through their business relationships. These laws approach responsibility in a way that recognizes the formal limits of the legal entity but does not allow the choice of organizational forms to create obstacles to addressing the potential harms or violations arising from the business activities of that entity. The purpose of the due diligence concept is to require a business to identify, prevent or mitigate, and account for, a harm or violation. By doing so across a firm's business relationships globally, the scope of due diligence is designed to overcome other legal boundaries, such as the reality of separate legal entities, or separate jurisdictions. Its scope is, therefore, often determined first and foremost by the nature of the harm to be avoided.

### Raising the Bar for Human Rights Protection: Determining Which Law Applies

The Guiding Principles on Business and Human Rights state in Guiding Principle 2: “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.” This raises the question of which law shall apply to transnational cases, and whether, in exercising its (extraterritorial) jurisdiction by allowing its courts to adjudicate certain claims concerning situations that occurred abroad, the forum State shall apply its own laws to the situation concerned or apply the locally applicable legislation.

In the EU, two separate instruments regulate the question of jurisdiction and the question of the applicable law. As mentioned above, the 2000 “Brussels I” Regulation is a jurisdictional statute that has been increasingly relied upon in recent years by victims of activities of corporations domiciled in the EU, which were considered civilly liable for damages caused by human rights violations in third countries. However, the “Brussels I” Regulation does not address directly the question of which law will apply in any claims. In the EU, that question is answered, for tort liability claims presented to the national courts, by Regulation (EC) No. 864/2007 of the European Parliament and Council of 11 July 2007 on law applicable for non-contractual obligations (“Rome II” Regulation).<sup>1</sup> This Regulation in principle designates the *lex loci delicti*, or the rules in force in the State where the damage occurred, as the applicable law for the purposes of civil actions. That is the principle established by Art. 4(1) of this Regulation.

There are exceptions to this rule, however. First, the law of the forum State may apply where the *lex loci delicti* is not sufficiently protective of the human rights of the person to whom damage is caused. This would include, for example, a situation where labor rights as recognized in the core ILO conventions are violated. Courts in Germany have recognized, for instance, that the right to maternity leave or the right to sick pay are both mandatory in such circumstances;<sup>1</sup> and so should the right to form unions or the prohibition of discrimination.

Second, “In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.” (Art. 17) This provision is important for the management of global supply chains, because it implies that where a harm occurs in State B as a result of the conduct of a business enterprise domiciled in the forum State A, the definition of the conduct that may be considered reasonable shall be defined in accordance with the law of this latter State. Therefore, business enterprises domiciled in an EU Member State whose laws provide that a failure to act with due diligence may engage their liability, could be found liable on that basis, even if the harm occurs in a third State, and even though the law applicable to the claim for damages filed before national courts in the EU would in principle be the *lex loci delicti*.

## IV. Human Rights Due Diligence Procedures

The experience of States with regulating due diligence suggests that there is no single due diligence procedure to satisfy all regulatory challenges, but it is possible to describe core elements of due diligence procedures. This section describes the core elements of due diligence processes found in the regulatory regimes of States and finds that these are consistent with the description of human rights due diligence described in the Guiding Principles.

Under the Guiding Principles, the business responsibility to conduct human rights due diligence includes the responsibility to (i) identify actual or potential impacts; (ii) prevent and mitigate impacts thus identified; and (iii) account for impacts and responses to them. These components are common to the various due diligence regimes established under national systems.<sup>237</sup> Such regimes exhibit common procedural elements, operationalizing each of these components, based on what is often referred to as “reasonable steps” that would be expected of a responsible business under various legal regimes in different countries.

This Section of the Report does not detail every conceivable due diligence framework available to policymakers. However, it is possible to summarize the key elements common to a variety of due diligence regimes. States should integrate these key elements into the design of their own regulatory measures focused on corporate human rights due diligence.

### 1. The Responsibility to Identify Actual or Potential Impacts

States should ensure that business enterprises seek information about the actual or potential impacts of their activities. The existing due diligence regimes in different national jurisdictions all require a business enterprise to investigate its activities and relationships for actual or potential violations of standards described in law. Human rights due diligence requires a business enterprise to actively seek information about the negative human rights impacts of its activities, as well as about the risk that negative human rights impacts may occur in the future. Once a company identifies such impacts, this triggers a responsibility to prevent and mitigate potential or existing violations, and to remediate any violations that have previously occurred. Seeking information requires an ongoing, continuous process of information gathering, monitoring and analysis, ideally performed prior to the start of an activity and at regular intervals during the course of an ongoing activity.

The existing due diligence regimes are based on the notion that the size and nature of a particular commercial activity, in combination with the characteristics of a particular operating context, will significantly influence the kinds of harms or violations that are likely to arise. The interaction of the business activity with a particular human rights context gives rise to potential or actual human rights violations and helps to define the focus of human rights due diligence by a business enterprise.

Due diligence rules require a business entity to take a systematic approach to its investigation. In practice, due diligence regimes require a company to assign investigative responsibility within its organization to specific individuals or units, committing resources to the tasks of detection and investigation and ensuring that the people responsible for investigation have

access to the levels of the organization where decisions are made. In addition, a company is normally required to actively investigate, which includes identifying and communicating with stakeholders in order to identify human rights risks. Reporting mechanisms, grievance mechanisms, and protections for whistleblowers are integral to an organizational culture that has a proactive and systematic approach to seeking information and provide needed feedback from within and outside the business enterprise.

## **2. The Responsibility to Prevent and Mitigate**

States should ensure that business enterprises take appropriate action to prevent potential negative impacts. The existing due diligence regimes in different national jurisdictions all require a business enterprise to prevent potential negative impacts of their activities and relationships. These rules require companies to give a high priority to risks with severe and possibly irreparable impact. In practice, a company's options for appropriate preventive action with respect to human rights will depend on the particular activity involved, the risks it poses and the rights at issue.

Some risks arise from conditions that are beyond the power of one business enterprise alone to resolve through its own due diligence. Where this is the case, regulators in the past have taken into consideration industry-wide efforts to deal with those risks. States or intergovernmental organizations have used their convening power to initiate collective business efforts to improve ethical performance in value chains.<sup>238</sup> However, most due diligence rules do not permit such efforts to obviate the basic requirement that a company take preventive and mitigating measures with respect to an identified violation. Such measures include cutting ties with a known source of risk, for example by divesting from a business enterprise or ending a contractual agreement with a supplier.

States regulate to ensure that business enterprises create a culture of prevention. Rules concerning due diligence often seek to promote an organizational culture in business enterprises that prevents violations. This usually includes a consistent record of adopting policies designed to prevent violations. Companies are required to elaborate, approve and disseminate, internally and externally, a policy explaining the business enterprise's commitment to respect a standard set down in law. This should be accompanied by standards and procedures for employees or those acting on behalf of the business enterprise to follow. Specific individuals or units within a business enterprise should have clearly delineated responsibility for preventing specific harms or violations. These individuals or business units should be provided with the necessary access to decision makers and resources adequate to the task of prevention. There should be consistent enforcement of internal disciplinary measures, where applicable. In addition, awareness of particular risks can be raised within the business enterprise through general training of employees and the internal dissemination of information specific to certain operational contexts.

States should ensure that business enterprises inform the affected stakeholders of potential risks. Due diligence rules usually include prevention and mitigation measures that require companies to inform affected stakeholders of identified risks. This is the first step to developing measures to mitigate or remedy those harms or violations. Companies are required to

provide such information in a timely manner, preferably early in a decision-making process concerning business activities that present a risk. They are required to provide information in a manner that is easily accessible to affected stakeholders and other non-experts, to describe the activity at issue and include all the key elements of an action that might have an impact on the stakeholders. In addition, a company is required to provide information relevant to stakeholders in their consideration of how they might respond to the risks, such as how and when a decision will be taken by the company, what other organizations are involved, what government agencies have jurisdiction, and how people can find out more.

States regulate to ensure that business enterprises take appropriate action to mitigate harms or violations that have already occurred. Due diligence regimes in all jurisdictions are based on the idea that once a risk or harm has been identified, a business enterprise should develop options for appropriate mitigation. As in the case of preventive action, a business will have to consider the particular activity involved, the risks it poses and the rights at issue. Once a harm or violation has occurred, a business is required to implement mitigation measures to reduce the severity of impact of the harm or violation, or to remediate the harm or violation. Wherever possible, remediation should involve repairing the damage done (*restitutio in integrum*). Where there is irreparable damage, remediation may involve various forms of compensation, both monetary and non-monetary, for victims. In every case, companies should conduct remediation through processes that are transparent and perceived as legitimate by affected stakeholders. Internal or informal redress mechanisms should not foreclose stakeholder access to judicial remedies.

### **3. The Responsibility to Account**

States should ensure that business enterprises report on their due diligence procedures. Due diligence rules usually require business enterprises to report to stakeholders. One of the functions of due diligence reporting requirements is to assure stakeholders, including investors and regulators, that a business has the proper procedures in place to manage certain risks. Due diligence rules normally specify the detail necessary for reporting and require such reporting on a regular basis (e.g. annually). In principle, a company's due diligence reporting should be as detailed and transparent as possible including the company's policies pertaining to human rights, a description of the due diligence procedures implemented within the firm, the identification of risks and the substance and process of mitigation measures implemented. However, there is at present significant variation in the rules concerning reporting, the mechanisms through which companies are required to report and the criteria as to what constitutes effective disclosure for the purposes of human rights due diligence.



## V. Conclusion

The variety of legal and regulatory measures described above makes clear that due diligence is a concept that is widely used in national laws in a wide range of countries in all regions of the world, and across different legal traditions. Those national due diligence measures are consistent with the due diligence process described in the Guiding Principles. In addition, the concept of due diligence is found in areas of law that are either analogous to or directly relevant to human rights, such as labor rights, environmental protection, consumer protection, and anti-corruption. On the basis of State practice and international standards, it is possible to discern an emerging standard of due diligence practice that is familiar in many jurisdictions.

The diversity of legal traditions, the complexity of business activities, and the variety of human rights contexts at the national level, suggest that there will not be a single form of due diligence regulation that will be appropriate for every jurisdiction. In order to consolidate and strengthen existing protections, and to move forward in protecting the full range of human rights, States should make expanded use of well-established legal tools to require business due diligence for human rights, and to encourage compliance by creating appropriate incentives. Lawmakers and advocates have a diverse range of options for State action to choose from as they look for the most effective way to ensure that businesses respect human rights. To this end, the role of due diligence is to both clarify expectations of business and make it easier for regulators and the courts to assess compliance.

In light of the extensive State practice described above, the legal obstacles to regulating human rights due diligence by business must be considered to be rather low. However, extensive State practice with respect to due diligence as a method of regulation is not evidence of effective enforcement. States regularly impose civil, administrative or criminal sanctions on business entities for violations of standards set in law. The evidence points to frequent deployment of such sanctions with respect to human rights, such as labor rights, or analogous public goods, such as the environment, consumer protection, or anti-corruption. In all of these areas, due diligence is required by national legal systems as way to ensure compliance by business with a standard of care. Yet further investigation is necessary to elaborate specific combinations of enforcement that respond to particular risks to human rights from specific kinds of business activity. Such an analysis was beyond the scope of this project.

In addition to requiring business entities to respect human rights through the implementation of human rights due diligence, States should use regulation to create incentives for business to implement human rights due diligence. States should do so through their roles as regulators, purchasers, financiers and owners, to ensure the incentives for business are oriented towards encouraging business to respect human rights in general and to conduct due diligence in particular. There are a number of ways in which states should do this, including by rewarding compliance by business with preferential access to state support, through the various regulatory approval processes which states conduct, and via specific provisions in trade agreements.

The options described in the Report indicate at least four main regulatory approaches through which States can ensure human rights due diligence activities by business. Usually these approaches co-exist within the same jurisdictions and legal systems. The first approach imposes a due diligence requirement as a matter of regulatory compliance. States implement rules that require business enterprises to conduct due diligence, either as a direct legal obligation formulated in a rule, or indirectly by offering companies the opportunity to use due diligence as a defense against charges of criminal, civil or administrative violations. For example, the courts use business due diligence to assess business compliance with environmental, labor, consumer protection and anti-corruption laws. Similarly, regulatory agencies regularly require business due diligence as the basis upon which to grant approvals and licenses for business activities.

The second regulatory approach provides incentives and benefits to companies in return for their being able to demonstrate due diligence practice. For example, in order for business enterprises to qualify for export credit, labeling schemes or other forms of State support, States often require due diligence on environmental and social risks.

A third approach is for States to encourage due diligence through transparency and disclosure mechanisms. States implement rules that require business enterprises to disclose due diligence with the intention that markets and society will attempt to constrain any identified harms. For example, securities laws, consumer protection laws and reporting requirements for corporate social responsibility operate on the logic that information serves the interests and will prompt action by investors, regulators, and people who might be adversely affected by a business activity.

A fourth category involves a combination of one or more of these approaches. States regularly combine aspects of these approaches in order to construct an incentive structure that promotes respect by business for the standards set down in the rules and ensures that compliance can be assessed in an efficient and effective manner. For example, administrative rules governing environmental protection, labor rights, consumer protection or anti-corruption may require business due diligence as the bases for a license or approval, and may also require regular reporting disclosure of due diligence activities by business. Enforcement of such rules can combine a combination of administrative penalty (fines), criminal law sanctions and the possibility of civil action.

The principal conclusion of the Report is that States could make far greater use of legal tools to ensure business due diligence for human rights. The Report also concludes that States can better utilize their existing regulations as part of the goal to ensure companies to conduct human rights due diligence. Existing labor, consumer and environmental protection laws, for example, often serve to protect the human rights of various stakeholders and might offer opportunities to integrate human rights due diligence to existing regulatory regimes. In order to consolidate and strengthen existing protections, and to move forward in protecting the full range of human rights, States should look to the full range of regulatory options, including those presented in the body of this report, to ensure business respects human rights.

## VI. Recommendations

- States should ensure that their legal systems extend existing criminal laws to business enterprises for crimes directly relevant to the protection of human rights, such as violent crimes and environmental crimes that may threaten the right to life or the right to health. Criminal liability should arise for the acts of the business enterprise as well as for failure to act with due diligence to prevent such crimes by its own conduct or by conduct of its employees or agents, or of the companies belonging to the corporate group throughout its operations globally.
- States should ensure that their legal systems provide for the civil liability against a business enterprise for causing a harm or prejudice to human rights, including by failing to act with due diligence to prevent such harms caused by its own conduct or by its employees or agents, or by the companies belonging to the corporate group throughout its operations globally.
- States should make greater use of administrative regulation to ensure business due diligence activities related to human rights. States can better utilize their existing regulations – such as those governing labor, environment, consumer protection, and other business activities over which they can exercise influence – by holding companies to account under administrative laws for their responsibility to respect human rights.
- States should ensure that their due diligence regimes accord with their duty to prevent their national territory from being used to cause violations of human rights on another State’s territory, including by private persons domiciled on their territory.
- States should ensure that victims have access to judicial remedies for human rights abuse, including access to both courts and regulatory processes. In addition, States should address the practical obstacles victims face in seeking judicial redress, such as the often prohibitive financial costs of litigation or the difficulty to obtain enforcement of judicial decisions in a State other than the forum State.
- Where criminal, civil or administrative law offers a business enterprise a defense based on its due diligence, States should ensure that such a defense is based on evidence that the enterprise concerned has adopted and applied measures that were adequate and effective in relation to the human rights risk. The mere presence of due diligence policies and procedures cannot be deemed sufficient to shield a company from liability. States should require that prosecutors, the courts, regulators and other State bodies engaging with business assess business due diligence practices in order to ensure that such measures were not intended primarily for the purposes of compliance “on paper” only, that management has not tolerated or wilfully ignored human rights violations, or that such measures were effectively designed to deal concretely with the human rights risk at issue.

- States should ensure that penalties imposed on companies are adequate in light of the nature of the human rights violation and the participation of the various persons involved, both legal and natural persons. In addition to any reparation to victims, options for penalties imposed on legal persons could include, for example, fines, revocation of licenses, exclusion from government support or investment, probation (such as independent observation, internal auditing or judicial supervision), the closing of the establishment where the offence was committed, or a judicial winding-up order.
- States should consider an appropriate mix of incentives and penalties in light of the human rights violation at issue and the national regulatory framework applicable to a particular business sector. The touchstone should be whether, in the context to which it applies, the particular mix of duties and incentives is reasonably effective in preventing human rights violations by business enterprises, or that businesses enterprises may have contributed to by their actions or omissions.
- States should ensure that the fiduciary “duty of care” obligation of directors of business enterprises is interpreted to support respect for human rights. States should ensure, under the law, that when directors act in accordance with their responsibility to respect human rights they are considered to be also acting consistent with their fiduciary duties to their shareholders.
- States should require human rights due diligence as the basis of approval of licenses and permits for specific projects or business activity, for instance by ensuring that human rights considerations are integrated into environmental impact assessments. States should make any form of support, for instance in the granting of loans or risk insurance for overseas development projects or for export activities, conditional on the integration of human rights due diligence. Similarly, States should require human rights due diligence from business enterprises in which they invest through State funds or in other forms.
- Public procurement schemes at all levels should include a requirement for companies to be able to show compliance with specified human rights due diligence standards, provided the human rights standards referred to are universally recognized and provided the assessment of compliance is made in an objective and impartial manner, and does not result in unjustified discrimination.
- States should grant trade preferences based in part on requiring businesses to be able to show compliance with specified human rights due diligence standard, provided the human rights standards referred to are universally recognized and provided the assessment of compliance is made in an objective and impartial manner, and does not result in unjustified discrimination.
- States should require businesses to publish or disclose their due diligence policies and practices, including human rights risks that have been identified and the prevention

and mitigation steps taken to address such risks. In general, States should require the disclosure of information necessary for regulators, investors and consumers and other stakeholders to assess business respect for human rights. More generally, by requiring companies to explain which steps they are taking to address a particular type of human rights risk, disclosure regulations play a vital role in the effectiveness and legitimacy of the overall due diligence regime. Without regulation of the means and methods of disclosure, the effectiveness, and therefore legitimacy, of a company's human rights due diligence will remain in doubt.

- States should look to effective due diligence procedures at the national and international level for options in setting standards for business due diligence procedures. At a minimum, the standards they set for business due diligence procedures should be consistent the United Nations Guiding Principles on Business and Human Rights.

## Endnotes

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<sup>1</sup> The International Corporate Accountability Roundtable (ICAR) is coalition of leading human rights, environmental, development and labor groups. ICAR works to build frameworks of corporate accountability, strengthen current measures and defend existing laws, policies and legal precedents.

<sup>2</sup> The European Coalition for Corporate Justice (ECCJ) promotes corporate accountability (CA) by bringing together national platforms of civil society organizations (CSOs) including NGOs, trade unions, consumer advocacy groups and academic institutions from all over Europe. ECCJ represents over 250 CSOs present in fifteen European countries such as FIDH and national chapters of Oxfam, Greenpeace, Amnesty International and Friends of the Earth.

<sup>3</sup> The Canadian Network on Corporate Accountability (CNCA) unites environmental and human rights NGOs, faith groups, labor unions, and research and solidarity groups across Canada, including the Halifax Initiative. CNCA members seek the adoption of federal legislation that establishes mandatory corporate accountability standards for Canadian extractive companies that operate abroad. CNCA maintains that the provision of government support to Canadian corporations should be conditional on compliance with these standards. The network aims to enhance the effectiveness of its members' activities through information sharing, policy analysis and research, and to coordinate joint advocacy for legal and policy reform. The CNCA also seeks to promote public awareness of these issues.

<sup>4</sup> Special Representative on Business and Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, unanimously adopted by the United Nations Human Rights Council, Principle 1 U.N. Doc. A/HRC/17/31 (June 2011) (by John Ruggie) [hereinafter the "Guiding Principles"].

<sup>5</sup> *Id.*

<sup>6</sup> The States were: Argentina, Belgium, Bolivia, Australia, Canada, China, Colombia, Congo (Dem. Rep. of), Cote D'Ivoire, Denmark, France, Germany, Ghana, Guatemala, Honduras, Hong Kong, India, Indonesia, Italy, Kenya, Japan, Liberia, Malawi, Mexico, Nepal, the Netherlands, New Zealand, Nigeria, Pakistan, Peru, Singapore, South Africa, Spain, Uganda, the United Kingdom, the United States, and Zimbabwe.

<sup>7</sup> International Corporate Accountability Roundtable, [www.accountabilityroundtable.org](http://www.accountabilityroundtable.org).

<sup>8</sup> *Guiding Principles*, *supra* note 4.

<sup>9</sup> *Guiding Principles*, *supra* note 4, Guiding Principle 11 ("Business enterprises should respect human rights. This means that they should avoid infringing on the rights of others and should address adverse human rights impacts with which they are involved."); *see also* *Guiding 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.").

<sup>10</sup> Special Representative on Business and Human Rights, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, ¶ 52 U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) (by John Ruggie) (The Special Representative studied some 300 reports of alleged human rights abuses by businesses and came to the

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conclusion that “there are few if any internationally recognized rights business cannot impact - or be perceived to impact - in some manner . . . . Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized rights, their responsibility to respect applies to all such rights.”), *available at* <http://www2.ohchr.org/english/issues/globalization/business/docs/A.HRC.8.5.pdf>.

<sup>11</sup> Guiding Principles, *supra* note 4, Principle 17, Commentary.

<sup>12</sup> *Guiding Principles*, *supra* note 4, Principle 12 and Commentary, noting:

An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises . . . .

Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.

<sup>13</sup> See *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (ICCPR/C/21/Rev.1/Add.13), 26 May 2004, ¶ 8 (under the International Covenant on Civil and Political Rights, Human Rights Committee “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities”); *General Comment No. 12 (1999): The right to adequate food (Art. 11)*, U.N. Doc. E/C.12/1999/5, ¶ 15 (under the International Covenant on Economic, Social and Cultural Rights, Committee on Economic, Social and Cultural Rights, “[t]he obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food”); *Young, James and Webster v. the United Kingdom*, 44 Eur. Ct. H.R. (ser. A) 49 (1981) (under the European Convention on Human Rights); *X and Y v. the Netherlands*, 91 Eur. Ct. H.R. (ser. A) 27 (1985) (under the European Convention on Human Rights); Council of Europe, European Committee of Social Rights, collective complaint n° 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, decision on admissibility of 30 Oct. 2005, ¶ 14 (under the European Social Charter “the state is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant’s allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator”); *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29 1988) (under the American Convention on Human Rights “[a]n illegal

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act which violates human rights and which is initially not directly imputable to a State [for example, because it is the act of a private person or because the person responsible has not been identified] can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”); African Commission on Human and Peoples’ Rights, application 74/92, *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, 9th Annual Activity Report of the ACHPR (1995-96); 4 IHRR 94 (1997) (“The Charter specifies in Article 1 that the state parties shall not only recognise the rights, duties and freedoms adopted by the Charter, but they should also ‘undertake . . . measures to give effect to them.’ In other words, if a state neglects to ensure the rights in the African Charter, this may constitute a violation, even if the State or its agents are not the immediate cause of the violation.”), or the African Commission on Human and Peoples’ Rights, application 55/96, *SERAC and CESR v Nigeria*, 15th Annual Activity Report of the ACHPR (2002), ¶ 46 (“the State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.”).

<sup>14</sup> *Guiding Principles*, *supra* note 4, Principle 1.

<sup>15</sup> The Council supported the recommendation of its Group of Experts, which included a framework based on human rights standards. The Council also supported the Group’s call for business to conduct due diligence with respect to the trade in conflict minerals. S.C. Res. 1952, U.N. Doc. S/Res/1952 (Nov. 29, 2010), *available at* [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/RES/1952\(2010\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1952(2010)).

<sup>16</sup> In May 2011, the OECD Council of Ministers approved a revision of the *OECD Guidelines for Multinational Enterprises*, *available at* <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>. The Council contemporaneously adopted the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*. Both documents integrate the business responsibility to respect and explain the concept of due diligence. The *Due Diligence Guidance* had previously been endorsed by the Intergovernmental Commission on the Great Lakes Region in Africa, which had participated in the process of formulating the Guidance. In June 2012, the OECD Council on Common Approaches of export credit agencies formally adopted a resolution recognizing a business responsibility to respect human rights, with reference to the Guiding Principles and the operative concept of due diligence. *See* OECD, *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence*, TAD/ECG(2012)5 (June 28, 2012), [hereinafter the Common Approaches] *available at*: <http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=TAD/ECG%282012%295&doclanguage=en>.

<sup>17</sup> In October 2011, the European Union issued a new definition of CSR based in part on the Guiding Principles and integrating the concept of due diligence. *See Communication of the European Commission, A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final (Oct. 25, 2011) *available at*: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:229:0077:0084:EN:PDF>. Also in 2011, the Association of South East Asian Nations (ASEAN) Intergovernmental Commission on Human Rights agreed to prepare a “baseline study on Corporate Social Responsibility

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and Human Rights in ASEAN,” *See* Press Release, ASEAN Intergovernmental Commission on Human Rights Fifth Meeting (Apr. 25-29, 2011), *available at* [http://www.asean.org/news/asean-statement-communicues/item/press-release-of-the-fifth-asean-intergovernmental-commission-on-human-rights-jakarta-25-29-april-2011-2?category\\_id=26](http://www.asean.org/news/asean-statement-communicues/item/press-release-of-the-fifth-asean-intergovernmental-commission-on-human-rights-jakarta-25-29-april-2011-2?category_id=26).

<sup>18</sup> International Corporate Accountability Roundtable, [www.accountabilityroundtable.org](http://www.accountabilityroundtable.org)

<sup>19</sup> Criminal Code Act 1995 (Cth) s 12 (Austl.), *available at* <http://www.comlaw.gov.au/Details/C2012C00547>; Corruption of Foreign Public Officials Act, S.C., 1998, c. 34 (Can.), *available at* <http://laws-lois.justice.gc.ca/eng/acts/C-45.2/index.html>; Decrete Legislativo 8 giugno 2001, n. 231 (It.), *available at* <http://gazzette.comune.jesi.an.it/2001/140/1.htm>; Bribery Act 2010, c. 23 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2010/23/contents>; Dep’t of Justice Principles of Prosecution of Bus. Org., 9 U.S.A.M. 9-28.00 (2008), *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm).

<sup>20</sup> There is surprising unanimity among the various regimes that define what an “effective compliance program” should consist of. *Compare* OECD Guidelines for Multinational Enterprises (2011 Ed.), especially Part I(IV), “Human Rights,” *supra* note 18, *and* Decrete Legislativo 8 giugno 2001, n. 231 (It.), *available at* <http://gazzette.comune.jesi.an.it/2001/140/1.htm>, *and* U.S. SENTENCING GUIDELINES MANUAL (2011), *available at* [http://www.ussc.gov/guidelines/2011\\_Guidelines/Manual\\_HTML/](http://www.ussc.gov/guidelines/2011_Guidelines/Manual_HTML/), *with* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (EPA Audit Policy), 65 Fed. Reg. 19,618 (Apr. 11, 2000), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2000-04-11/pdf/00-8954.pdf>.

<sup>21</sup> This is also the principle that inspired the adoption of a Recommendation of the Committee of Ministers of the Council of Europe to Member States concerning the liability of enterprises with legal personality for offenses committed in the exercise of their activities. Council of Europe, Committee of Ministers, Recommendation No. R (88) 18 (1988), *available at* <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=233230&SecMode=1&DocId=698704&Usage=2/>. According to this Recommendation, adopted in 1988, the enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission (Principle I.4).

<sup>22</sup> G. Ferguson, Corruption and Corporate Criminal Liability, paper presented at the conference *Corruption and Bribery in Foreign Business Transactions: A Seminar on New Global and Canadian Standards*, (Feb. 4, 1999), in M. Wagner, Corporate Criminal Liability: National and International Responses, *Commercial and Financial Fraud: A Comparative Perspective*, (July 8-12, 1999) at 6.

<sup>23</sup> The 1988 Council of Europe Recommendation does not require for the liability of the corporate body to be engaged that the offense be committed *for its benefit*: all that the Recommendation would impose is that enterprises may be held criminally liable for offences committed “in the exercise of their activities, even where the offence is alien to the purposes of the enterprise.” Eur. Consult. Ass., Recommendation Concerning the Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities, Recommendation No. R (88) 18 (1988).

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<sup>24</sup> Decreto Legislativo 8 giugno 2001, n. 231 (It.), *available at* <http://gazzette.comune.jesi.an.it/2001/140/1.htm>.

<sup>25</sup> For listed companies, additional guidelines can also be found in the Code of Corporate Governance of Borsa Italiana, the Italian Stock Exchange. According to these guidelines, “adequate procedures” means: (1) the adoption of effective and specific internal compliance measures and effective internal control systems for the purposes of preventing offences; (2) the control system must be cut on the specific characteristics of the company; (3) the identification of the activities in which offences may be committed; (4) the approving of appropriate procedures for the purposes of implementing decisions about the prevention of crimes; (5) the setting of proper rules for the management of financial resources to prevent crimes being committed; (6) the approving of an adequate disciplinary system for the purpose of punishing cases of abuse and violations of the provisions of the compliance programme; and (7) the creation of a supervisory body with effective power. Another area where particular due diligence is required to the companies is the safety of employees. Companies, which deal with particular activities, must: (1) adopt a “Document for Risk Assessment;” (2) appoint a safety officer; and (3) provide information, education and training to employees, including fire safety and first aid staff. Failure to perform these steps may subject the Company to the imposition of a fine, and, in exceptional cases, the loss of its business license. Corporate Governance Code, 2011, *available at* [http://www.borsaitaliana.it/borsaitaliana/regolamenti/corporategovernance/corporategovdec2011.en\\_pdf.htm](http://www.borsaitaliana.it/borsaitaliana/regolamenti/corporategovernance/corporategovdec2011.en_pdf.htm).

<sup>26</sup> Canadian Environmental Protection Act, S.C. 1999, c. 33, *available at* <http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=24374285-1>.

<sup>27</sup> *Id.*, § 283. (“No person shall be found guilty of an offence under this Act, other than an offence under section 273 if the offence is committed knowingly or under section 228 or 274, where the person establishes that the person exercised all due diligence to prevent its commission.”).

<sup>28</sup> Environment Canada, Compliance and Enforcement Policy for the Canadian Environment Protection Act, 1999 (March 2001) (“CEPA Policy”), *available at* <http://laws-lois.justice.gc.ca/PDF/C-153.31.pdf>.

<sup>29</sup> *Id.*, at ¶ 1, “Measures to Promote Compliance, Environmental Codes of Practice and Guidelines,” [wording slightly modified in brackets and “these” removed].

<sup>30</sup> 60 Fed. Reg. 66,706 (Dec. 22, 1995), as updated by 65 Fed. Reg. 19,618 (Apr. 11, 2000).

<sup>31</sup> 65 Fed. Reg. 19,618 (Apr. 11, 2000), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2000-04-11/pdf/00-8954.pdf> (“‘Gravity-based penalties’ are that portion of a penalty over and above the economic benefit, i.e., the punitive portion of the penalty, rather than that portion representing a defendant’s economic gain from noncompliance.”)

<sup>32</sup> *Id.*

<sup>33</sup> *See* Allens Arthur Robinson, “‘Corporate Culture’ as the Basis for the Criminal Liability of Corporations,” (Prepared for the Special Representative, Feb. 2008) (This paper examines various ways in which companies may be charged when a servant has committed a crime.), *available at* <http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>.

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<sup>34</sup> Canadian Environmental Protection Act, S.C. 1999, c. 33, available at <http://laws-lois.justice.gc.ca/PDF/C-153.31.pdf>.

<sup>35</sup> F. Joseph Warin et al., *Somebody's Watching Me: FCPA Monitorships and How they can Work Better*, 13 U. PA. J. BUS. L. 2 (2011) ("From 2004 to 2010, more than 40% of all companies that resolved an FCPA investigation with the U.S. Department of Justice ("DOJ") or Securities and Exchange Commission ("SEC") through a settlement or plea agreement retained an independent compliance monitor as a condition of that agreement.").

<sup>36</sup> For example, the U.S. Attorneys' Manual provides:

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formulaic requirements regarding corporate compliance programs. The fundamental questions any prosecutor should ask are: Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work? In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.

Dep't of Justice Principles of Prosecution of Bus. Org., 9 U.S.A.M. 9-28.00 (2008), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm).

<sup>37</sup> Bribery Act 2010, c. 23 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

<sup>38</sup> MINISTRY OF JUSTICE, BRIBERY ACT 2010, GUIDANCE, PRINCIPLE 4: DUE DILIGENCE (p. 27) (U.K.) (herein after "BRIBERY ACT GUIDANCE") ("A person 'associated' with a commercial organisation as set out at section 8 of the Bribery Act includes any person performing services for a commercial organisation. As explained at paragraphs 37 to 43 in the section 'Government Policy and section 7,' the scope of this definition is broad and can embrace a wide range of business relationships. But the appropriate level of due diligence to prevent bribery will vary enormously depending on the risks arising from the particular relationship.") available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>

<sup>39</sup> Bribery Act 2010, c.23 Sec. 7(2) (U.K.).

<sup>40</sup> Bribery Act Guidance, *supra* note 39.

<sup>41</sup> See REPORTER'S NOTE [to Section 4.01 of the Principles of Corporate Governance of the American Law Institute (2005)] ("About 37 states [of the United States] have now enacted statutory duty of care provisions." And, "In about 13 states the common law is the source of duty of care standards.").

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<sup>42</sup> Examples of formal authorization can be found in: Corruption of Foreign Public Officials Act, S.C., 1998, c. 34 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/C-45.2/index.html>; Canadian Environmental Protection Act, S.C. 1999, c. 33, available at <http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=24374285-1>; Migratory Birds Convention Act, 1994, S.C. 1994, c. 22 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/M-7.01/index.html>; Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, available at <http://laws-lois.justice.gc.ca/eng/acts/C-15.21/index.html>; Work Health and Safety Act 2011 (Cth) (Austl.), available at [www.legislation.act.gov.au/2Fa%2F2011-35%2Fcurrent%2Fpdf%2F2011-35.pdf](http://www.legislation.act.gov.au/2Fa%2F2011-35%2Fcurrent%2Fpdf%2F2011-35.pdf); Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2008, S.I. 2008/37 (U.K.), available at <http://www.legislation.gov.uk/ukxi/2008/37/contents/made>; Control of Substances Hazardous to Health Regulations 2002, S.I. 2002/2677 (U.K.), available at <http://www.legislation.gov.uk/ukxi/2002/2677/contents/made>; U.S. SENTENCING GUIDELINES MANUAL (2011), available at [http://www.ussc.gov/guidelines/2011\\_Guidelines/Manual\\_HTML/](http://www.ussc.gov/guidelines/2011_Guidelines/Manual_HTML/); Foreign Assets Control Regulations, 31 C.F.R. §§ 500-598 (2010), available at <http://www.gpo.gov/fdsys/pkg/CFR-2012-title31-vol3/pdf/CFR-2012-title31-vol3-subtitleB-chapV.pdf>.

<sup>43</sup> U.S. SENTENCING GUIDELINES MANUAL (2011), *supra* note 22, § 8D1.4(b)(1) (Recommended Conditions of Probation - Organizations) (This subsection authorizes the court to order the convicted organization, as a condition of probation, “develop and submit to the court an effective compliance and ethics program consistent with §8B2.1”). *See also* the probation order issued in *Queen v. Niko Resources, Ltd.*, described in Canada: Corruption of Foreign Public Officials Act, S.C., 1998, c. 34 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/C-45.2/index.html>.

<sup>44</sup> Comment by participant during ICAR Asia and Australia Consultation.

<sup>45</sup> *See In re Caremark*, 698 A.2d 959, 970 (Del. Ch. 1996). (“Thirdly, I note the potential impact of the federal organizational sentencing guidelines on any business organization. Any rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account this development and the enhanced penalties and the opportunities for reduced sanctions that it offers.”).

<sup>46</sup> German Civil Code promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the statute of 27 July 2011 (Federal Law Gazette I page 1600 available at [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html))

<sup>47</sup> *See, e.g.*, BÜRGERLICHES GESETZBUCH [BGB] [Civil Code] Aug. 8, 1896, BUNDESGESETZBLATT, Teil I [BGBL] at 1600, § 823, as amended (Ger.), available at [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p3341](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3341) (“A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.”).

<sup>48</sup> United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41.

<sup>49</sup> Council of Europe, Civil Law Convention on Corruption art. 4, Apr. 11 1999. C.E.T.S. No. 174 (emphasis added).

<sup>50</sup> Brazilian Código Civil, Art. 927 § ún. CC/2002.

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<sup>51</sup> Directive 85/374/EEC of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States concerning Liability for Defective Products Council Directive 85/374/EEC, 1985 O.J. (L 210), *available at* [http://europa.eu/legislation\\_summaries/consumers/consumer\\_safety/132012\\_en.htm](http://europa.eu/legislation_summaries/consumers/consumer_safety/132012_en.htm).

<sup>52</sup> Council Directive 85/374/EEC, art. 1, 1985 O.J. (L 210).

<sup>53</sup> Council Directive 85/374/EEC, art. 7, 1985 O.J. (L 210).

<sup>54</sup> Council Directive 85/374/EEC, 1985 O.J. (L 210).

<sup>55</sup> Combating Trafficking in Human Beings for Labour Exploitation 85 (Conny Rijken ed. 2011).

<sup>56</sup> An Act to Amend the Criminal Code (Westray Bill), S.C. 2003, c. 21 (Can.), *available at* <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=981232>; *see also* Canadian Centre for Occupational Health and Safety, What is meant by due diligence? (January 15, 2008), *available at* <http://www.ccohs.ca/oshanswers/legisl/diligence.html>.

<sup>57</sup> In 2012, China's Ministry of Commerce (MOFCOM) estimated that the government's policy of promoting overseas direct investment by Chinese businesses, known as "Going Global," had resulted in a total of 18,000 Chinese enterprises investing overseas, and a total of approximately 1.2 million Chinese people working overseas for either Chinese or foreign firms. Transcript of News Conference, MOFCOM, (March 14, 2012) *available at* <http://english.mofcom.gov.cn/aarticle/newsrelease/press/201203/20120308015346.html>

<sup>58</sup> Jingwai Zhong Zi Qiye Jigou He Renyuan Anquan Guanli Guiding (境外中资企业机构和人员安全管理规定) [Regulation on Safety Management of Overseas Chinese-Invested Enterprises, Institutions and their Personnel] (promulgated by 7 ministries including MOFCOM, MFA, SASAC & MPS, Aug. 13, 2010, effective Aug. 18, 2010) Ministry of Commerce (China), *available at*: [http://www.gov.cn/gzdt/2010-08/18/content\\_1682340.htm](http://www.gov.cn/gzdt/2010-08/18/content_1682340.htm)

<sup>59</sup> Wet Arbeid Vreemdelingen [WAV][Aliens Employment Act], Stb. 1996, p. 66 (Neth.), *available at* [http://wetten.overheid.nl/BWBR0007149/geldigheidsdatum\\_08-10-2012](http://wetten.overheid.nl/BWBR0007149/geldigheidsdatum_08-10-2012).

<sup>60</sup> Employees from within the member states of the EU, Switzerland, Norway, Iceland and Lichtenstein, may work in the Netherlands without a work permit (with exception for Bulgarians and Romanians). Third-country nationals however are only allowed to work when they are in the possession of a valid residency permit with the note "labor freely allowed," a valid passport with an official residency sticker with the note "labor freely allowed," or when the employer of the alien employee is in the possession of a work permit for his employee. *Id.*

<sup>61</sup> Recently, following Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, the WAV has been revised to require an employer to pay any back payments to an illegally employed third-country national. Council Directive 2009/52/EC, 2009 O.J. (L168) 24; Wet tot Wijziging Van de Wet Arbeid Vreemdelingen [An Act Amending the Aliens Employment Act], Stb. 2012, p. 143 (Neth.), *available at* <http://zoek.officielebekendmakingen.nl/behandelddossier/21109/stb-2012-143.html>. The level of remuneration and duration shall be in accordance with established practice in the relevant occupational branches. *Id.*

<sup>62</sup> Charles M. Kersten, Note, *Rethinking Transboundary Environmental Impact Assessment*, 34 Yale J. Int'l L. 173 (2009) (*citing* James Rasband et al., *Natural Resources Law and Policy* 253 (2d ed.

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2004) (“In addition to inspiring numerous ‘little NEPAs’ within the states of the United States, it has served as a template for domestic EIA legislation in over 130 nations around the globe.”).

<sup>63</sup> Loi 2008-757 du 1 août 2008 relative à la responsabilité environnementale et à diverses dispositions d’adaptation au droit communautaire dans le domaine de l’environnement [Law 2008-757 of August 1, 2008 on Environmental Liability and Various Provisions for Adaptation to European Law in the Environmental Field], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 2, 2008, p. 12361, *available at* <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019277729>.

<sup>64</sup> 42 U.S.C. §§ 9601-9675 (2012).

<sup>65</sup> The public’s fear of waste chemicals at contaminated sites (akin to a growing sense that chemicals in drinking water, food, children’s garments, the atmosphere, lakes and rivers and the ocean were a serious threat to public health) has been described as “chemophobia.” In part, public apprehension was aroused by early press reports of “leaking” waste disposal areas, such as the ones appearing shortly after CERCLA was enacted describing sites given such names as “Love Canal” and “the Valley of the Drums.”

<sup>66</sup> Under CERCLA, potentially responsible parties include all owners, operators, transporters, and disposers of hazardous waste. 42 U.S.C. §§ 9601-75 (1994).

<sup>67</sup> This due diligence activity can also extend to an examination of all waste disposal sites to which an enterprise sent waste in the past, since “generator” liability also passes to the merger partner or acquitting entity.

<sup>68</sup> *See* About ASTM, <http://www.astm.org/ABOUT/aboutASTM.html> (last visited on Nov. 27, 2012).

<sup>69</sup> The Reserve Bank of India (RBI) introduced Know Your Customer (KYC) guidelines for all banks in 2002. The Prevention of Money Laundering Act, 2002, No. 15, Acts of Parliament, 2003 (India), *available at* <http://fiuindia.gov.in/pmla2002.htm>. In 2004, RBI directed that all banks ensure that they are fully compliant with the KYC provisions before December 31, 2005. The purpose was to prevent money laundering, terrorist financing and theft. *Id.* South Africa enacted Financial Intelligence Centre Act 38 of 2001 (S. Afr.), *available at* <https://www.fic.gov.za/SiteContent/ContentPage.aspx?id=14>. The United States, pursuant to the USA Patriot Act of 2001, the Secretary of the Treasury was required to finalize regulations before October 26, 2002, so KYC is now mandatory for all U.S. banks. 31 U.S.C. § 5318(l) (2012). New Zealand updated their KYC laws in late 2009, and the rules entered into force in 2010. Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (N.Z.), *available at* <http://www.legislation.govt.nz/act/public/2009/0035/latest/DLM2140720.html>. The KYC is mandatory for all registered banks and financial institutions (the latter being given an extremely wide meaning). *Id.*

<sup>70</sup> *See, e.g.*, Fed. Fin. Inst. Examination Council, Bank Secrecy Act Anti-Money Laundering Examination Manual, Core Examination Overview and Procedures for Regulatory Requirements and Related Topics Customer Identification Program Overview *available at* [http://www.ffiec.gov/bsa\\_aml\\_infobase/pages\\_manual/OLM\\_011.htm](http://www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_011.htm). In October 2012, the Reserve Bank of India imposed a penalty of Rs 30 lakh on ICICI Bank and Rs 55 lakh on ING Vysya Bank for violating certain norms related to KYC and anti-money laundering, among others. *RBI fines ICICI Rs 30L, ING Vysya Rs 55L*, Times of India, Oct. 10, 2012,

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available at [http://articles.timesofindia.indiatimes.com/2012-10-10/india-business/34362046\\_1\\_rbi-fines-anti-money-icici-bank-and-rs](http://articles.timesofindia.indiatimes.com/2012-10-10/india-business/34362046_1_rbi-fines-anti-money-icici-bank-and-rs).

<sup>71</sup> PRICEWATERHOUSE COOPER, KNOW YOUR CUSTOMER: A QUICK REFERENCE GUIDE (2012) available at <http://www.pwc.co.uk/forensic-services/issues/anti-money-laundering-know-your-customer-quick-reference-guide.jhtml>.

<sup>72</sup> Financial Action Task Force, International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations (2012) at 17, available at <http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardscombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html>. The FATF has 34 states and 2 regional organizations, the European Commission and the Gulf Cooperation Council as members, and has other regional organizations as cooperating members.

<sup>73</sup> FATF rules call for CDD in the following circumstances: “(i) establishing business relations; (ii) carrying out occasional transactions: (i) above the applicable designated threshold (USD/EUR 15,000); or (ii) that are wire transfers in the circumstances covered by the Interpretive Note to Recommendation 16; (iii) there is a suspicion of money laundering or terrorist financing; or (iv) the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.” *Id.*

<sup>74</sup> According to the FATF Standards: The CDD measures to be taken are as follows:

- (a) Identifying the customer and verifying that customer’s identity using reliable, independent source documents, data or information.
- (b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions understanding the ownership and control structure of the customer.
- (c) Understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship.
- (d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution’s knowledge of the customer, their business and risk profile, including, where necessary, the source of funds.

*Id.*

<sup>75</sup> Basel Committee on Banking Supervision Customer Due Diligence for Banks (2001) available at <http://www.bis.org/publ/bcbs85.htm>.

<sup>76</sup> Press Release, Bank for International Settlements, Customer due diligence: a new level of commitment among bank supervisors (Sept. 19 2002) available at <http://www.bis.org/press/p020919a.htm>.

<sup>77</sup> OFFICE OF FOREIGN ASSETS CONTROL (“OFAC”), SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (Nov. 16, 2012). available at <http://www.treasury.gov/ofac/downloads/t11sdn.pdf>.

<sup>78</sup> See OFAC, GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED (Feb. 14, 2008), available at [http://www.treasury.gov/resource-center/sanctions/Documents/licensing\\_guidance.pdf](http://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf).

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<sup>79</sup> See U.S. Dep't. of the Treasury Resource Center, Frequently Asked Questions and Answers, available at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#116>.

<sup>80</sup> Id.

<sup>81</sup> See U.S. Dept. of the Treasury Resource Center, When should I call the OFACHotline?, available at <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/directions.aspx>.

<sup>82</sup> OFAC Economic Sanctions Enforcement Guidelines, 31 C.F.R. § 501, App. A. (2012), available at [http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title31/31cfr501\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&tpl=/ecfrbrowse/Title31/31cfr501_main_02.tpl).

<sup>83</sup> The consultations also revealed, however, that governments need to commit proper resources and implement regulatory requirements properly, in order for due diligence requests to be effective and useful. Legal experts cautioned that environmental impact assessments and other types of paper compliance reports are often not properly reviewed by government entities, and some states lack the institutional staff and resources to properly assess the nature of company submissions.

<sup>84</sup> *Guiding Principles*, *supra* note 4, ¶ 17 (“Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship . . .”).

<sup>85</sup> Some examples of approval processes which require due diligence in domestic projects:

- Canada: The Environmental Assessment Act 2012
- Democratic Republic of the Congo: The Mining Code
- Ghana: The Mining Act
- India: The Environmental Protection Act
- India: The (Proposed) Land Acquisition Practices
- India: The 73<sup>rd</sup> Constitutional Amendment Act 1992
- Japan: Environmental Impact Assessment
- Nigeria: The Environmental Impact Statement and the Oil in Water Acts
- United States: The National Environmental Policy Act.

Doubtless there are many more potential examples to be examined. One source estimates that over 130 countries have adopted an environmental assessment regime of one sort or another. Kersten, *supra* note 66.

<sup>86</sup> Examples of due diligence requirements in overseas development include:

- The International Finance Corporation: The Multilateral Investment Guarantee Agency
- Canada: Export Development Canada
- China: Regulations and Guidelines on Safety Management of Overseas Enterprises and Personnel
- United States: The Export-Import Bank
- United States: Overseas Private Investment Corporation

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See also Equator Principles (2006) available at <http://www.equator-principles.com> (Where a private financial institution that is a member of the Equator Principles is involved in the financing of an overseas project, it, too, is required to implement the IFC Performance Standards before committing to the financing. This is private voluntary association of financial institutions in the developed world.).

<sup>87</sup> The Environment Protection Act, No. 29 of 1986, INDIA CODE (1986), vol. 20, available at <http://envfor.nic.in/legis/env/env1.html>.

<sup>88</sup> Environment Impact Notification, 2006, Gazette of India, Part 2, Section III(ii) (Sept. 14, 2006).

<sup>89</sup> See Env'tl. Prot. Agency, State of Ghana's Environment (undated), available at [http://www.inece.org/indicators/proceedings/04h\\_ghana.pdf](http://www.inece.org/indicators/proceedings/04h_ghana.pdf).

<sup>90</sup> *Id.*

<sup>91</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), June 25, 1998, 2161 U.N.T.S. 447.

<sup>92</sup> *Id.*, art. 5, ¶ 6

<sup>93</sup> Regulation 1367/2006, 2006 O.J. (L 264) 13, available at <http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:L:2006:264:0013:0013:EN:PDF>.

<sup>94</sup> Council Directive 2001/42/EC, 2001 O.J. (L 197) 30, available at <http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:L:2001:197:0030:0030:EN:PDF>.

<sup>95</sup> See, e.g., Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, available at <http://laws-lois.justice.gc.ca/eng/acts/C-15.21/index.html>.

<sup>96</sup> The Examples deal with all of these issues. See generally International Financial Corporation, *Performance Standards on Environmental and Social Sustainability* (Jan. 1, 2012), available at [http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES); California Environmental Quality Act, Pub. Res. § 21000 (West 2012), available at <http://www.leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=32380920108+0+0+0&WAISaction=retrieve>; Nat'l Env'tl. Policy Act of 1969, 42 U.S.C. §4321 (2012), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/pdf/USCODE-2011-title42-chap55.pdf>; EPA Audit Policy, *supra*note 20.

<sup>97</sup> For example, the International Financial Corporation ("IFC") policies require it to embed all performance agreements, including mitigation measures, operating parameters, etc. into project approval documents, and the IFC itself monitors compliance with such agreements throughout the life of the project. *Id.*

<sup>98</sup> Follow-up procedures should include, at a minimum: (1) loan documents that make non-compliance with mitigation measures events of default; (2) permit provisions for regular monitoring and reporting; (3) an open process for receiving and dealing with grievances from affected communities; and (4) adequate staffing and resources at the agency to review and investigate and follow up on instances of noncompliance. *Id.*

<sup>99</sup> The term is used in the IFC Guidelines, which have extensive provisions dealing with the need to obtain acceptance of the project by such communities.

<sup>100</sup> See OVERSEAS PRIVATE INV. CORP ("OPIC"), ENVIRONMENTAL AND SOCIAL POLICY STATEMENT, ¶ 5.7. ("5.7 For those projects with the potential for significant adverse impacts on Project Affected People, OPIC will confirm prior to project approval that: (1) the Appli-

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cant has engaged the affected groups and communities as required under Performance Standard 1 and (2) there is Broad Community Support (See Glossary) for the Project.”) (emphasis in the original).

<sup>101</sup> Ley del derecho a la consulta previa a los pueblos indígenas u originarios, reconocido en el convenio 169 de la Organización Internacional del Trabajo, [Law of the right to prior consultation with indigenous or native peoples, recognized in the Convention 169 of the International Labour Organization], El Peruano 449529 art. 4, 7 de Septiembre de 2011 (Peru), *available at* [www.congreso.gob.pe/ntley/Imagenes/Leyes/29785.pdf](http://www.congreso.gob.pe/ntley/Imagenes/Leyes/29785.pdf).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*, art. 2

<sup>104</sup> Nat'l Envtl. Policy Act of 1969 (“NEPA”), 42 U.S.C. §4321 (2012), *available at* <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/pdf/USCODE-2011-title42-chap55.pdf>.

<sup>105</sup> *Id.*; California Environmental Quality Act, PUB. RES. § 21000 (West 2012).

<sup>106</sup> The titles of the eight Performance Standards are illustrative of the subjects that the IFC takes into account in its due diligence regime:

2. Together, the eight Performance Standards establish standards that the client is to meet throughout the life of an investment by IFC:

Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts

Performance Standard 2: Labor and Working Conditions

Performance Standard 3: Resource Efficiency and Pollution Prevention

Performance Standard 4: Community Health, Safety, and Security

Performance Standard 5: Land Acquisition and Involuntary Resettlement

Performance Standard 6: Biodiversity Conservation and Sustainable Management of Living Natural Resources

Performance Standard 7: Indigenous Peoples

Performance Standard 8: Cultural Heritage

IFC, Performance Standards on Environmental and Social Sustainability, *supra* note 101.

<sup>107</sup> *Id.*

<sup>108</sup> IFC, *Environmental and Social Review Procedures Manual* (Versions: 1 (Mar. 17, 2010), 4 (Aug. 14, 2009), 5 (Sept. 15, 2010) and 6 (June 3, 2011)), *available at* [http://www1.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP\\_Manual.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/190d25804886582fb47ef66a6515bb18/ESRP_Manual.pdf?MOD=AJPERES).

<sup>109</sup> IFC, Guidance Notes: Performance Standards on Environmental and Social Sustainability, Guidance Note 44 to Performance Standard 1 (2012):

Business and Human Rights

GN44. The key human rights concepts can be found in the International Bill of Rights, consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). GN5 While states have the primary duty to implement the obligations contained in these instruments, private sector companies have a respon-

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sibility to respect these human rights in their operations. Several important business and human rights analyses recently examined the relevance of rights in the International Bill of Rights to projects, and concluded that, while the possibility that businesses can impact all human rights expressed in the International Bill of Rights cannot be ruled out, there are certain rights that are of particular relevance to the conduct of business.

<sup>110</sup> See IFC, Environmental and Social Review Procedures Manual, *supra* note 109.

<sup>111</sup> Multilateral Investment Guarantee Agency, Policy on Environmental and Social Sustainability (Oct. 1, 2007), *available at* [http://www.miga.org/documents/enviro\\_social\\_review\\_021507.pdf](http://www.miga.org/documents/enviro_social_review_021507.pdf).

<sup>112</sup> Export Development Canada, Environmental and Social Review Directive (2010), *available at* <https://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Documents/environment-social-review-directive.pdf>; Export Development Canada, Environmental and Social Risk Management Policy (2010), *available at* online: EDC <http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Documents/enviro-policy.pdf>; OPIC, Environmental and Social Policy Statement (U.S.), *supra* note 107 (Under this policy, applicants are required to submit an application that demonstrates their ability to comply with the Performance Standards throughout the life of the project.).

<sup>113</sup> Communication of the Commission on Corporate Social Responsibility: A business contribution to Sustainable Development, at 23, COM (2002) 347 final (March 7, 2002).

<sup>114</sup> Directive 2004/18/EC of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, 2004 O.J. (L 134) 114 (amended 2005).

<sup>115</sup> *Id.*, art. 46, Directive 2004/17/EC of the European Parliament and of the Council Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors of 31 March 2004, art. 55, 2004 O.J. (L 134) 1.

<sup>116</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L 303) 16; Council Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39) 40 (*as amended by* Directive 2002/73/EC of the European Parliament and of the Council, 2002 O.J. (L 269) 15) (*superseded by* Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation, 2006 O.J. (L 204) 23).

<sup>117</sup> Directive 2004/18/EC, *supra* note 114, art. 46; Directive 2004/17/EC, *supra* note 114, art 55.

<sup>118</sup> Kankyō buppin'nado no chōtatsu no suishin-tō ni kansuru hōritsu Kuni-tō ni yoru [Gurīn kōnyū][Green Procurement], Law No. 100 of 2000, art. 3, 12, and 13 (Japan), *available at* <http://www.env.go.jp/en/laws/policy/green/index.html>.

<sup>119</sup> Hwangyeong Chinhwajeog in Jepum-ui Gumae ui Gyeonglyeo e Ttala Haengdong

[Act to Promote the Purchase of Environmentally-Friendly Products], Act no. 10030, Feb. 4, 2010 (S. Kor.).

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<sup>120</sup> Zhèngfǔ cǎigòu fǎ [Government Procurement Act] 1999 (Taiwan).

<sup>121</sup> Pursuant to 48 C.F.R. § 22.1503 (2012) (“Absent any actual knowledge that the certification is false, the contracting officer must rely on the offerors’ certifications in making award decisions.”).

<sup>122</sup> Strengthening Protections Against Trafficking in Persons in Federal Contracts, Exec. Order No. 13627, 77 Fed. Reg. 60029 (Sept. 25, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>.

<sup>123</sup> *Id.*, § 2(a)(1)(A).

<sup>124</sup> *Id.* The Executive Order prohibits all contractors, subcontractors, and their employees from:

- Using misleading or fraudulent recruitment practices during the recruitment of employees, such as failing to disclose basic information or making material misrepresentations regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, living conditions and housing (if employer provided or arranged), any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work;
- Charging employees recruitment fees;
- Destroying, concealing, confiscating, or otherwise denying access by an employee to the employee’s identity documents, such as passports or drivers’ licenses; and
- Failing to pay return transportation costs upon the end of employment, for an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a U.S. Government contract or subcontract.

<sup>125</sup> *See generally* Davis-Bacon Act, 40 U.S.C.A. § 3141 (West 2012), 29 C.F.R. 5.5 (2012); Walsh-Healey Public Contract Act, 41 U.S.C.A. §§ 6501-6511 (West 2012), 48 C.F.R. 22.602 (2012); McNamara-O’Hara Service Contract Act, 41 U.S.C.A. §§ 6701-6707 (West 2012), 29 C.F.R. 4.110 (2012).

<sup>126</sup> Exec. Order No. 13627, *supra* note 113, § 2(a)(2)(B).

<sup>127</sup> 48 C.F.R. § 52.222-50 (2012).

<sup>128</sup> Exec. Order No. 13627, *supra* note 113, § 2(a)(3).

<sup>129</sup> *Id.*

<sup>130</sup> 40 U.S.C.A. § 3141 (West 2012).

<sup>131</sup> 40 U.S.C.A. § 3142 (West 2012).

<sup>132</sup> “Assisted” includes projects financed in whole or in part by loans, grants, or guarantees from the United States. 29 C.F.R. § 5.2(o) (2012).

<sup>133</sup> Services are covered by a similar act, the Service Contract Labor Act, 41 U.S.C.A. § 6702 (West 2012).

<sup>134</sup> 40 U.S.C.A. § 3142.

<sup>135</sup> *Id.*

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<sup>136</sup> 29 C.F.R. § 5.5 (2012).

<sup>137</sup> 29 C.F.R. § 5.5(a)(6).

<sup>138</sup> *E.g.*, 29 C.F.R. § 5.5(a)(6) (2012); *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1453 n.2 (D.C. Cir. 1994) (“As the prime contractor, Ball was equally responsible for the repayment of unpaid wages to Red Rock’s workers.”); *Northern Colorado Constructors, Ltd., WAB Case No. 86-31* (Dec. 14, 1987) (“the Davis-Bacon Act itself creates a contractual obligation on the part of the prime contractor to pay the sums which its subcontractor owes to the subcontractor’s employees”); *Nat’l Fire Ins. Co. of Hartford v. Fortune Const. Co.*, 320 F.3d 1260, 1276 (11th Cir. 2003) (Federal regulations applicable to contracts and subcontracts under the Davis-Bacon Act provide, “[t]he prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor. . .”).

<sup>139</sup> 29 C.F.R. §§ 5.5-6.

<sup>140</sup> John Kramer, *Removing Barriers to Opportunity: A Constitutional Challenge to The Davis-Bacon Act*. The Institute for Justice, available at <http://www.ij.org/davis-bacon-act-background-2>.

<sup>141</sup> Lov Statens pensjonsfond [Government Pension Fund Act] No. 123, Dec. 21, 2005 (Nor.).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Org. for Econ. Cooperation and Dev. [OECD], Recommendation on Common Approaches for Officially Supported Export Credits and Environment and Social Due Diligence, TAD/ECG (Jun. 28, 2012) 5, available at <http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=tad/ecg%282012%295&doclanguage=en>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> OECD, *Council Recommendation on Common Approaches on Environment and Officially Supported Export Credits*, TAD/ECG (June 12, 2007).

<sup>148</sup> An illustrative list of Category A projects is appended to the Common Approaches, and includes, among others, thermoelectric power plants, large dams, nuclear fuel production facilities, asbestos extraction and processing, oil refineries, large logging and mining projects, projects in sensitive areas and projects involving the involuntary resettlement of a significant number of affected people. *Id.*

<sup>149</sup> The Authors thank Matthias Sant’Ana for assistance in this section; The OECD published a review of member states’ practice in 2010, which concludes that “whilst Members” environmental review systems continue to vary and some Members have little or no experience of dealing with projects with potential adverse environmental impacts, the majority of Members have systems in place for reviewing applications for official support that are broadly compliant with the requirements of the 2007 Recommendation. However, some differences in systems still exist, e.g. with regard to screening applications, reviewing projects for their potential environmental impacts, benchmarking against host and international standards, and making project and environmental impact information publicly available.” OECD Working Party on Export Credits and Credit Guarantees, *Export Credits and the Environment: 2010 Review of Members’ Responses to the Survey on the Environment and Officially Supported Export Credits*, at 2, TAD/ECG (Dec. 10, 2010) 10.

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<sup>150</sup> OECD Working Party on Export Credits and Credit Guarantees, *Council Recommendation on Bribery and Officially Supported Export Credits*, TD/ECG (Dec. 18, 2006) 24.

<sup>151</sup> Bonnie Penfold, *Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities*, International Labour Office [ILO] Working Paper, No. 95.

<sup>152</sup> MARKUS KNIGGE ET AL., *THE USE OF ENVIRONMENTAL AND SOCIAL CRITERIA IN EXPORT CREDIT AGENCIES' PRACTICES* (2003) *available at* [http://www.ecologic.de/download/projekte/1800-1849/1809/1809wcd\\_ecas\\_en.pdf](http://www.ecologic.de/download/projekte/1800-1849/1809/1809wcd_ecas_en.pdf).

<sup>153</sup> Toelichting op het OS-bedrijfsleveninstrumentarium [Clarification on Trade & Industry Tools], May 1, 2012 (Neth.), *available at* <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2012/05/01/kamerbrief-over-bedrijfsleveninstrumenten-ontwikkelingssamenwerking/kamerbrief-over-bedrijfsleveninstrumenten-ontwikkelingssamenwerking.pdf>.

<sup>154</sup> This information was provided by L. van der Burg, Dutch Ministry of Foreign Affairs, Department of Sustainable Economic Development.

<sup>155</sup> Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 § 5 (amended 2008).

<sup>156</sup> 19 U.S.C.A. § 2701 (West 2000).

<sup>157</sup> 19 U.S.C.A. § 2703a(a)(3) (West 2008).

<sup>158</sup> Bilateral Textile Agreement, U.S.-Cambodia, 1999.

<sup>159</sup> Better Factories Cambodia, <http://www.betterfactories.org/>.

<sup>160</sup> Council Directive 84/450/EEC of 10 September 1984 Concerning Misleading and Comparative advertising, art. 2, 1984 O.J. (L 250) 17 (amended 1998).

<sup>161</sup> *Id.*, art. 3.

<sup>162</sup> *Id.*, art. 4 §1.

<sup>163</sup> *Id.*, art. 6.

<sup>164</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”), 2005 O.J. (L 149) 22.

<sup>165</sup> *Id.*, art. 2(f) (“Codes of conduct” are defined as “an agreement or set of rules not imposed by law, regulation or administrative provision of a Member State which defines the behavior of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors.”).

<sup>166</sup> *Id.*, art. 6(1)(b).

<sup>167</sup> Council Directive 84/450/EEC, art. 4, 1984 O.J. (L 250).

<sup>168</sup> *Id.*, at art. 2(g) (The “code owner” is “any entity, including a trader or group of traders, which is responsible for the formulation and revision of a code of conduct and/or for monitoring compliance with the code by those who have undertaken to be bound by it.”).

<sup>169</sup> *Id.* art. 10.

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<sup>170</sup> See Gesetz gegen den Unlauteren Wettbewerb [UWG] [The Act Against Unfair Competition], March 3, 2010, BUNDESGESETZBLATT, Teil I [BGBl. I] at 254 §5(a) (Ger.), available at [http://www.gesetze-im-internet.de/uwg\\_2004/index.html](http://www.gesetze-im-internet.de/uwg_2004/index.html).

<sup>171</sup> The case involved German discounter Lidl and its advertising of participation in the Business Social Compliance Initiative (BSCI); <http://www.ecchr.de/lidl-case/articles/lidl-retracts-advertisements.html>.

<sup>172</sup> Only consumer agencies have standing under the UWG. The VZ HH was supported by the European Center for Constitutional and Human Rights and the German Clean Clothes Campaign. <http://www.ecchr.de/index.php/lidl-case.html>.

<sup>173</sup> Consumer Protection from Unfair Trading Regulations 2008, S.I. 2008/1277 (U.K.), available at [http://www.legislation.gov.uk/uksi/2008/1277/pdfs/uksi\\_20081277\\_en.pdf](http://www.legislation.gov.uk/uksi/2008/1277/pdfs/uksi_20081277_en.pdf).

<sup>174</sup> *Id.*, § 17.

<sup>175</sup> OFFICE OF FAIR TRADING, THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS, 2008, available at [http://www.offt.gov.uk/shared\\_offt/business\\_leaflets/cpregs/oft979.pdf](http://www.offt.gov.uk/shared_offt/business_leaflets/cpregs/oft979.pdf).

<sup>176</sup> 15 U.S.C.A. § 45 (West 2012).

<sup>177</sup> *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

<sup>178</sup> *Nike, Inc. v. Kasky*, 539 U.S. 654; 123 S. Ct. 2554 (2003).

<sup>179</sup> See, respectively, Regulation (EC) No. 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Eco-label, 2010 O.J. (L 27) 1; Regulation (EC) No. 1221/2009 of the European Parliament and of the Council of 25 November 2009 on the Voluntary Participation by Organizations in a Community Eco-management and Audit Scheme (EMAS), 2009 O.J. (L 342) 1. See also Commission Decision 2011/832/EU of 7 December 2011 Concerning a Guide on EU Corporate Registration, Third Country and Global Registration Under Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the Voluntary Participation by Organizations in a EMAS, 2011 O.J. (L 330) 25.

<sup>180</sup> Regulation (EC) No. 1221/2009, Preamble, 8th Recital.

<sup>181</sup> See, originally, the Council Regulation (EEC) No 1836/93 of 29 June 1993 Allowing Voluntary Participation by Companies in the Industrial Sector in a Community EMAS, 1993 O.J. (L 168) 1.

<sup>182</sup> Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 Allowing Voluntary Participation by Organizations in a Community EMAS (“EMAS I” Regulation), 2001 O.J. (L 114) 1; Corrigendum to Regulation (EC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 Allowing Voluntary Participation by Organisation in a Community (“EMAS II” Regulation), 2002 O.J. (L 327) 10; Regulation (EC) No 1221/2009 of the European Parliament and of the Council on the Voluntary Participation by Organisations in a Community EMAS (“EMAS III” Regulation), 2009 O.J. (L 342) 1 (repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC of 25 November 2009).

<sup>183</sup> See Regulation (EC) No. 1221/2009, art. 4.

<sup>184</sup> Regulation (EC) No. 1221/2009, art. 15.

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<sup>185</sup> Regulation (EC) No. 1221/2009, art. 12(1)(a). In addition, registration into the EMAS scheme shall only be granted if “there are no relevant complaints from interested parties or complaints have been positively solved.” *Id.*, art. 13(2)(d).

<sup>186</sup> *See* Regulation (EC) No. 1221/2009, art. 20 & 28.

<sup>187</sup> Loi visant a promouvoir la production socialement responsable [An Act to Promote Socially Responsible Production] of Feb. 27, 2002, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Mar. 26, 2002 (further implemented by a Royal Decree (Arrêté royal) of 4 April 2003, *Moniteur belge*, 28.8.2003).

<sup>188</sup> This committee for socially responsible production comprises 8 members appointed by the relevant ministerial departments, 2 representatives of employers, 2 representatives of workers’ unions, 2 representatives of consumer organizations, and 2 representatives of development NGOs. *Id.*

<sup>189</sup> This auditing has two components, one ‘documentary’ component (research based on all available sources of information about the production process of the particular good or service) and one ‘visit’ component (based on site visits including interviews with employees or suppliers, for instance). *See* Arrêté ministériel du 7 avril 2003 approuvant le règlement d’ordre intérieur du Comité pour une production socialement responsable [Ministerial Decree of 7 April 2003 approving the rules of procedure of the Committee for socially responsible production], MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 28, 2003.

<sup>190</sup> CODE DE COMMERCE [C. COM.] art. L225-102-1 (Fr.), *available at* <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000022496405&cidTexte=LEGITEXT000005634379>.

<sup>191</sup> Law No. 2594, Dec. 6, 2007, B.O.C.B.A. 2859 (Arg.), *available at* [http://www.buenosaires.gov.ar/areas/leg\\_tecnica/sin/normapop09.php?id=113295&qu=c&ft=0&cp=&rl=1&rf=&im=&ui=0&printi=&pelikan=1&sezion=1094340&primera=0&mot\\_toda=&mot\\_frase=&mot\\_alguna=](http://www.buenosaires.gov.ar/areas/leg_tecnica/sin/normapop09.php?id=113295&qu=c&ft=0&cp=&rl=1&rf=&im=&ui=0&printi=&pelikan=1&sezion=1094340&primera=0&mot_toda=&mot_frase=&mot_alguna=).

<sup>192</sup> *Id.*, art. 13.

<sup>193</sup> *Id.*, art. 3.

<sup>194</sup> An unofficial translation of the reporting provision of the amended Financial Statement Act (section 99a) and the explanatory comments is provided at the Danish Government’s CSR website at <http://www.csrgov.dk/graphics/Samfundsansvar.dk/Dokumenter/Proposal Report On Social Resp.pdf>.

<sup>195</sup> Canada Business Corporations Act, R.S.C. 1985, c. C-44, § 155(1). Unlike any other major federation, Canada does not have a central securities regulatory authority. Provincial and territorial securities commissions work together through the Canadian Securities Administrators.

<sup>196</sup> CAN. SEC. ADM’R, NATIONAL INSTRUMENT 52-107 ACCEPTABLE ACCOUNTING PRINCIPLES AND AUDITING STANDARDS, B.C. Reg. 382/2010, *available at* <http://www.ocs.gov.on.ca>.

<sup>197</sup> Financial statements are to be prepared in accordance with “Generally Accepted Accounting Principles” (GAAP) in accordance with the handbook of the CICA. Canadian Institute of Chartered Accountants, Accounting Handbook, *available at* <http://www.cica.ca/publications/cica-handbook/index.aspx>.

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<sup>198</sup> CAN. SEC. ADM’R, NATIONAL INSTRUMENT 51-102 CONTINUOUS DISCLOSURE REQUIREMENTS, § 6.1, *available at* <http://www.osc.gov.on.ca/en/13342.htm>.

<sup>199</sup> CAN. SEC. ADM’R, NATIONAL INSTRUMENT 43-101 STANDARDS OF DISCLOSURE FOR MINERAL PROJECTS, § 19(g), *available at* <http://www.osc.gov.on.ca>.

<sup>200</sup> Form 51-102F2, especially, §§ 5.1(1)(k), 5.1(4) and 5.2.

<sup>201</sup> Sustainable Economy Law (B.O.E. 2011, 2) (Spain). Suggested for further information: Inst. For Responsible Inv., Current Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges (2012).

<sup>202</sup> Prime Minister Yab Dato' Seri Abdullah Bin Haji Ahmad Badawi, 2007 Budget Speech (Sept. 1, 2006) (Malay.).

<sup>203</sup> InSight at Pacific Community Ventures & The Initiative for Responsible Investment at Harvard University Case Study 15: Corporate Responsibility Disclosure: Impact Investing: A Framework for Policy Design and Analysis” Jan. 2011).

<sup>204</sup> Financial Services Reform Act 2001 (Cth) (Austl.), *available at* <http://www.comlaw.gov.au/Details/C2004A00891>.

<sup>205</sup> A company that is covered by the California Supply Chain Transparency Act must disclose whether it:

- (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if a third party did not conduct the verification.
- (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
- (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
- (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
- (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

In the event the Company does not have an Internet Web site, consumers shall be provided the written disclosure within 30 days of receiving a written request for the disclosure from a consumer.

California Transparency in Supply Chains Act, Civ. § 1714.43 (West 2012), *available at* [http://www.leginfo.ca.gov/.html/civ\\_table\\_of\\_contents.html](http://www.leginfo.ca.gov/.html/civ_table_of_contents.html).

<sup>206</sup> *Id.*

<sup>207</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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<sup>208</sup> *Id.*, at § 1502(e)(4) (“conflict mineral” is defined as: “(A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten is extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country. The term does not include minerals that were outside of the Covered Countries prior to January 31, 2013, nor to any minerals that are derived from scrap or recycled materials.”).

<sup>209</sup> *Id.*, § 1502 (e)(1) (“adjoining country” or “covered country” is defined as “a country that shares an internationally recognized border with the DRC, which presently includes Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.”).

<sup>210</sup> SEC, Disclosing Use of Conflict Minerals, 17 C.F.R. 240 and 249b (2012), *available at* <http://www.sec.gov/rules/final/2012/34-67716.pdf>.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*, § 13(p) (requires the information disclosed by the issuer to be available to the public on its Internet Web site).

<sup>213</sup> The final rule requires that an issuer’s due diligence follow a nationally or internationally recognized due diligence framework. The OECD’s “Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas” [see the accompanying Example in this Appendix] satisfies the SEC’s criteria and may be used as a framework for purposes of satisfying the final rule’s requirement that an issuer exercise due diligence in determining the source and chain of custody of its conflict minerals. *See*, OECD (2011), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing. <http://dx.doi.org/10.1787/9789264111110-en>.

<sup>214</sup> The audit’s objective, as expressed in the preamble, is “to express an opinion or conclusion as to whether the design of the issuer’s due diligence framework as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is in conformity with, in all material respects, the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and whether the issuer’s description of the due diligence measures it performed as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the issuer undertook.”

<sup>215</sup> Guiding Principles, *supra* note 4.

<sup>216</sup> U.N. Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights – An Interpretive Guide*, § 3.6 HR/PUB/12/02, at 22 (2012).

<sup>217</sup> As explained in the Commentary to the *OECD Guidelines for Multinational Enterprises*, *op. cit.*, ¶ 43, “Business relationships include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services.”

<sup>218</sup> *Id.*, at Commentaries to ¶¶ 21-23. With respect to leverage, or the ability to influence suppliers and other business partners, the OECD Guidelines on Multinational Enterprises provides concrete examples of possible responses:

21. The *Guidelines* recognise that there are practical limitations on the ability of enterprises to effect change in the behaviour of their suppliers. These are rela-

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ted to product characteristics, the number of suppliers, the structure and complexity of the supply chain, the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain. However, enterprises can also influence suppliers through contractual arrangements such as management contracts, pre-qualification requirements for potential suppliers, voting trusts, and licence or franchise agreements. Other factors relevant to determining the appropriate response to the identified risks include the severity and probability of adverse impacts and how crucial that the supplier is to the enterprise.

22. Appropriate responses with regard to the business relationship may include continuation of the relationship with a supplier throughout the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation; or, as a last resort, disengagement with the supplier either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. The enterprise should also take into account potential social and economic adverse impacts related to the decision to disengage.

23. Enterprises may also engage with suppliers and other entities in the supply chain to improve their performance, in cooperation with other stakeholders, including through personnel training and other forms of capacity building, and to support the integration of principles of responsible business conduct compatible with the *Guidelines* into their business practices. Where suppliers have multiple customers and are potentially exposed to conflicting requirements imposed by different buyers, enterprises are encouraged, with due regard to anti-competitive concerns, to participate in industry-wide collaborative efforts with other enterprises with which they share common suppliers to coordinate supply chain policies and risk management strategies, including through information-sharing

<sup>219</sup> Arbeitnehmer-Entsendegesetz [AEntG] [Workers Act], Feb. 26, 1996, Bundesgesetzblatt, Teil I [BGBl. I] at 227, last amended by Gesetz [G], April 20, 2009, BGBl. I at 799 (Ger.)

<sup>220</sup> An Act to Amend the Criminal Code (Westray Bill), S.C. 2003, c. 21 (Can.), available at <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=9812322>.

<sup>221</sup> Indeed, various human rights bodies have noted that States should “prevent third parties from violating [human rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.” See, e.g., Comm. on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health* (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000), ¶ 39; or Comm. on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water* (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (26 November 2002), ¶ 31, specifically in regard to corporations, the Committee on Economic, Social and Cultural Rights has further stated: “States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant.” Comm. on Economic, Social and Cultural Rights, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, ¶ 5 U.N. Doc.

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E/C.12/2011/1 (May 20, 2011); Comm. on the Elimination of Racial Discrimination, Canadian Report, ¶ 17 U.N. Doc. CERD/C/CAN/CO/18 (May 25, 2007).

<sup>222</sup> Trail Smelter Case (*United States v. Canada*), 3 R.I.A.A. 1905 (1941); *see also* dissenting opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice on the *Legality of threat or use of nuclear weapons* in which, referring to the principle that “damage must not be caused to other nations,” Judge Weeramantry considered that the claim by New Zealand that nuclear tests should be prohibited where this could risk having an impact on that country’s population, should be decided “in the context of [this] deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law.” *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 103 (July 8).

<sup>223</sup> In the *Corfu Channel* Case, while accepting that an activity cannot be imputed to the State by reason merely of the fact that it took place on its territory, the International Court of Justice nevertheless noted that “a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation:” where the State knew or ought to have known that activities unlawful under international law (i.e., activities that would constitute a violation of international law if they were imputed to the State in question) are perpetrated on its territory and cause damage to another State, the first State is expected to take measures to prevent them from taking place or, if they are taking place, from continuing. *Corfu Channel (U.K. v. Alb.)*, 1949, I.C.J. 4, 18 (April 9). The fact of territorial control also influences the burden of proof imposed on the claiming State that the territorial State has failed to comply with its obligations under international law. Although “it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors,” nevertheless “the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.” *Id.*

<sup>224</sup> Ian Brownlie, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* 165 (1983). *See also* Nicola Jägers, *CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY* 172 (2002) (deriving from “the general principle formulated in the *Corfu Channel* case – that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States – that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control.”).

<sup>225</sup> *See supra* note 57.

<sup>226</sup> *See supra* note 58.

<sup>227</sup> *Id.*

<sup>228</sup> Bribery Act 2010, c. 23 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/2010/23/contents>.

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<sup>229</sup> *Id.*

<sup>230</sup> Council Regulation 44/2001, 2001 O.J. (L 12) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?%3Furi%3DOJ:L:2001:012:0001:0023:en:PDF>. That regulation applies in all the Member States, except Denmark, for actions brought on or after 1 March 2002.

<sup>231</sup> See H. GAUDEMET-TALLON, *COMPÉTENCE ET EXÉCUTION DES JUGEMENTS EN EUROPE*, Règlement no 44/2001, Conventions de Bruxelles et de Lugano, (3rd ed. 2002); Wendy Kennett, *The Brussels I Regulation*, 50 *Int'l & Compl. L.Q.* 725 (2001); Droz and Gaudemet-Tallon, *La transformation de la Convention de Bruxelles du 27 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale* [The transformation of the Brussels Convention of 27 September 1968 Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial], 90 *Revue Critique de Droit International Prive* 601 (2001); A. Nuyts, *La communautarisation de la Convention de Bruxelles* [Communitarisation of the Brussels Convention], 6035 *Journal des Tribunaux* 913 (2001); Guus E. Schmidt, *De EEX-Verordening: de volgende stap in het Europese procesrecht* [The Brussels I Regulation: the Next Step in European Procedural Law], *NEDERLANDS INTERNATIONAAL PRIVAATRECHT* 150 (2001); N. Watté, A. Nuyts and H. Boularbah, *Le règlement 'Bruxelles I' sur la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale* [Regulation Brussels I on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters], *Journal des Tribunaux Droit Europe* 161 (2002).

<sup>232</sup> *Rechtbank 's-Gravenhage* 30 december 2009, *JOR* 2010, 41 m.nt. Mr. RGJ de Haan (Nigerians/Shell) (Neth.).

<sup>233</sup> *Motto v. Trafigura*, [2011] EWHC (QB) 90206, available at [www.gwslaw.co.uk/wp-content/uploads/2011/07/Trafigura-v-Motto.doc](http://www.gwslaw.co.uk/wp-content/uploads/2011/07/Trafigura-v-Motto.doc).

<sup>234</sup> See Gerrit Betlem, *Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 283, (M.T. Kamminga and S. Zia-Zarifi eds., 2000).

<sup>235</sup> 42 U.S.C.A. § 12112(c)(2)(A) (West 2012).

<sup>236</sup> 42 U.S.C.A. § 12112(c)(2)(B) (West 2012).

<sup>237</sup> This Section draws on due diligence procedures outlined in domestic statutes described in Section II and in examples received by the Authors.

<sup>238</sup> Examples of such efforts include the Fair Labor Association (textiles), the Voluntary Principles on Security and Human Rights (extractive industries) and the process that led to the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (also extractive industries).