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HRDD and International Investment Law: Past, Present and Future (Stephanie Triefus)

Abstract: The concept of human rights due diligence has yet to make a strong impact on the field of international investment law, however it has the potential to contribute to the project of bringing human rights considerations into the investment law paradigm. This presentation considers the past, present and future of the interaction between human rights due diligence and international investment law from both directions. Firstly, I set out how human rights were excluded from the development of international investment law, and how this exclusion continues to impact investment treaties and arbitration today. Secondly, I consider three emerging possibilities for how human rights due diligence could be used in investment treaties and arbitration to ensure that foreign investors comply with their human rights responsibilities. These include the potential for human rights due diligence obligations to be included in investment treaties; for existing references in investment treaties to the UN Guiding Principles to incorporate human rights due diligence into investor obligations; and for strengthening of the requirement for investors to comply with domestic law, including national mandatory human rights due diligence mechanisms. Finally, I argue that a company's engagement with investor-state dispute settlement under investment treaties and contracts should be scrutinised as part of its human rights due diligence processes due to the potential negative human rights impacts of this mechanism

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Mandatory Human Rights Due Diligence: The French Model (Virginie Rouas)

Abstract: The Act on the Duty of Vigilance, enacted by France in 2017, is a pioneering piece of legislation. It is the first national law to translate the soft-law concept of human rights due diligence, developed in the context of the UNGPs, into legally binding standards. The Act, which comprises several aspects, requires parent companies and contractors to develop a 'vigilance plan' that identifies the risks of human rights violations and environmental pollution in their group activities and supply chains. As part of their vigilance plan, companies must also plan and effectively implement measures to prevent these risks. Furthermore, the Act provides for both citizen-based and access to justice, its implementation has been complicated thus far. The French government has systematically refused to disclose how many companies are actually subject to the Act and have obligations in this respect. There is no concrete official monitoring mechanism in place, leaving victims and NGOs as the only law enforcers. So far, it appears that many of the companies subject to this Act are not meeting their obligations, as the first vigilance plans are either incomplete or insufficient, or have simply not been published. Initial litigation has also been slowed by procedural issues, specifically whether the civil or commercial courts have jurisdiction to hear claims based on the Act on the Duty of Vigilance. Eventually, the legislator decided that such claims should be heard by the Judicial Court of Paris. However, in one of the first claims heard by the Judicial Court of Paris, the parties were ordered to participate in mediation, a process that has previously been criticized by NGOs for slowing efforts to hold companies accountable and failing to provide victims with remedies. Nonetheless, 2023 should be a pivotal year, with courts expected to issue the first decisions on the merits. Ultimately, there are several important lessons to be drawn from the French experience that should inform legislative developments in other countries, in the EU, and in the context of the business and human rights treaty negotiations in the UN.

Virginie Rouas is a Researcher in Business and Human Rights and EU Environmental Law at the T.M.C. Asser Institute and a Research Associate at the School of Oriental and African Studies (SOAS), University of London. Dr. Rouas holds a PhD in Law from SOAS and an LLM in Environmental Law from the University of Strasbourg in France. Her principal areas of expertise include access to justice, business and human rights, global environmental law, and EU law and policy. Dr. Rouas has previously worked for the United Nations Environment Programme (UNEP), the International Union for Conservation of Nature (IUCN), Global Witness, the Centre for International Sustainable Development Law, and Frank Bold, among others. Prior to joining the T.M.C. Asser Institute, she worked as a Legal Advisor at Milieu, a Brussels-based legal consultancy, where she managed and carried out research and legal compliance projects for the EU institutions on environmental, fundamental rights, justice, and financial markets issues. She has also taught international human rights law and international environmental law at SOAS.

The EU Corporate Sustainability Due Diligence Draft Directive: Ambitions and Reality of Regulating Corporate Human Rights-Related Conduct (Klara Polackova Van der Ploeg)

Abstract: A proposal for an EU Directive on Corporate Sustainability Due Diligence is currently making its way through the EU legislative process. Following the publication of the initial proposal by the Commission this February, the European Parliament's legal committee published its draft report in November, and on 1 December, the European Council adopted its general approach and authorized the Council Presidency to enter into negotiations with the Commission and the Parliament. The EU legislation aims to lay down rules on obligations for companies regarding actual and potential adverse human rights and environmental impacts, with respect to their own operations, the operations of their subsidiaries and other business partners. It follows a line of domestic laws that have sought to foster sustainable and responsible corporate behaviour in global value chains including by imposing human rights and environmental due diligence and other obligations on certain business corporations, such as those in France, the Netherlands, Switzerland, Germany and Norway. The ambition for the directive has been to introduce a comprehensive and widely applicable piece of legislation. However, the legislative process reveals significant points of disagreement between the Commission, the Council, the Parliament, but also other stakeholders. These have included questions of which companies should be covered in terms of their size and industry as well as whether and to what extent both upstream and downstream operations should be included and what business relationships should be considered to form a part of the value chain. For example, The Council's common negotiating position leaves it to the discretion of each EU member state whether to include financial institutions within the domestic implementations of the directive. A design of a human rights due diligence legislation involves significant regulatory choices regarding not only the target entities but also the nature of any obligations and the parameters of any enforcement mechanism—all made within a complex network of interests. At the same time, these regulatory efforts have been continuously subjected to more foundational criticisms on both procedural and substantive grounds due to its extra-territorial nature. The EU draft directing thus provides yet another lesson in the ambitions and reality of regulating corporate human rights-related conduct.

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Mandatory Human Rights Due Diligence: Experiences and Perspectives from the Business Sector (Lorena Muñoz Carmona)

Abstract: In July 2022, the Transparency Act (Åpenhetsloven) entered into force in Norway, one of the latest examples of the worldwide momentum for mandatory human rights due diligence. The new law promotes enterprises' respect for fundamental human rights and decent working conditions taking as a reference the OECD Guidelines for Multinational Enterprises. The law applies to larger enterprises, both based in Norway and offering goods and services nationally or internationally, as well as large foreign enterprises liable to tax in Norway. The law provides clear guidance on how to determine which companies should be categorised as "large enterprises" and addresses directly the relationship between parent company and subsidiaries for this matter. The new law codifies the duty to carry out due diligence, but also a right to information ensuring the general public access to a company's human rights impacts and measures to address them. Almost half a year after its entry into force, it is relevant to take stock of the experiences of the Norwegian private sector implementing the new due diligence requirements. In order to complete this exercise, key stakeholders such as the UN Global Compact Network in Norway and human rights due diligence practitioners have been consulted. This has helped identify some key challenges experienced by numerous businesses, including lack of clarity about the legal expectations imposed on them as well as prioritization issues. Beyond the challenges, there are also multiple opportunities for businesses to embrace the new regulation and lead the implementation of human rights due diligence. Furthermore, civil society and academia can play a fundamental role and work side-by-side with business to promote respect for human rights. These experiences can be of relevance to identify trends among businesses in other countries and support the adoption efforts of new mandatory human rights due diligence regulation worldwide.

Lorena Muñoz Carmona is an experienced business and human rights professional. After a Master in Theory and Practice of Human Rights at the University of Oslo, her work has focused on the intersection between business, human rights and sustainable development. Lorena currently works as a partnership manager at BRIGHT and conducts independent research in such areas.