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RESEARCH NETWORK SUSTAINABLE SUPPLY CHAINS

# **Human Rights and Environmental Due Diligence in Global Value Chains: Perspectives from the Global South**

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# About the Research Network

The Research Network Sustainable Global Supply Chains was founded in 2020 by four German research institutes: the German Institute of Development and Sustainability (IDOS), the German Institute for Global and Area Studies (GIGA), the German Institute for International and Security Affairs (SWP), and the Kiel Institute for the World Economy (IfW). At this point, the network comprises around 100 internationally leading scholars from various disciplines and geographic backgrounds. The network seeks to bundle and process existing knowledge within the field of GVC research, initiate new research, and derive policy-relevant and evidence-based recommendations for political decision-makers and other stakeholders.

The project is funded by the German Ministry for Economic Cooperation and Development (BMZ). For more information, please visit [www.sustainablesupplychains.org](http://www.sustainablesupplychains.org).

# 1. Conference Overview

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The international debate on the governance of global value chains (GVCs) is dominated by the efficiency logics of the participating firms and the proposals of voluntary or mandatory due diligence regulations. The Research Network Sustainable Global Supply Chains held a conference on “*Human Rights and Environmental Due Diligence in Global Value Chains: Perspectives from the Global South*” in Berlin, Germany, in order to hear the perspectives and experiences from the Global South regarding due diligence in GVCs. This working paper recaps the discussions from the conference and embeds them in the wider scientific debate on the role and impact of due diligence legislation in GVCs. The conference consisted of three panels: 1) on the potential impact of due diligence legislation on development through social and economic upgrading in GVCs, 2) on lessons learnt from the experience with existing due diligence legislation, and 3) on the European Union (EU) Mandatory Due Diligence Law and its implications for the Global South.

## **Mandatory due diligence**

Due diligence legislation requires companies to apply due diligence in the monitoring of their supply chains with respect to certain aspects that are stated in the respective laws, and to be able to prove the implementation of such due diligence. The objectives of due diligence laws are usually to ensure human rights, such as preventing child labour, slavery and forced labour, as well as to empower labour unions and ensure the free negotiation of labour conditions by workers, improve working conditions and sometimes to increase wages, and to prevent environmental damage. Before due diligence laws, countries either relied on voluntary due diligence and/or regulations in trade and investment agreements. Depending on the specific legislation, the teeth of due diligence legislation come in the form of the legal right to remedy for the rights holders, penalty fines, and/or exclusion from public tendering (Shaping Sustainable Supply Chains 2021). There are already different such laws in place, for example the United Kingdom’s 2015 Modern Slavery Act, the French 2017 Duty of Vigilance Law, the Netherlands’ 2019 Child Labour Due Diligence Act, as well as Germany’s 2021 Act on Corporate Due Diligence in Global Supply Chains. There are also the 2010 EU Timber Regulation as well as the 2017 EU Conflict Minerals Regulation, which have due diligence elements (Marzano 2021). In addition to that, the EU is currently in the process of putting forward a Mandatory Due Diligence Law, the so-called Sustainable Corporate Governance proposal.

In summer of 2021, Germany passed a national law on due diligence (the so-called *Lieferkettensorgfaltspflichtengesetz*); meanwhile, in February 2022, the European Commission tabled a Proposal for a Directive on corporate sustainability due diligence and annex. It was also raised during the discussions that due diligence will be a relevant concept beyond human rights and environmental aspects in GVCs in the future. If due diligence is understood as “doing your best”, then it is also an essential concept for tackling climate change. In April 2021, for example, the German Constitutional Court judged that the then

existing German Climate Protection Act was insufficient and that the German government was not doing enough to achieve the 1.5°C target and therefore compromising the complainants' "fundamental right to a future in accordance with human dignity and a fundamental right to an ecological minimum standard of living" (Bundesverfassungsgericht 2021). Some of the complainants were residents of Bangladesh and Nepal. In response to this ruling, the German government had to revise and intensify the measures specified in the Act to do its best to tackle climate change.

The main purpose of the discussions was to engage the perspectives from the Global South on such due diligence legislation for GVCs. Obviously, the countries in the Global South care about economic development, for example as measured through social and economic upgrading in GVCs. The question of what impact due diligence legislation can have on the opportunities for social and economic upgrading in GVCs was the focus of one dedicated panel. It was generally emphasised that due diligence (DD) laws matter, but there was also a call for some modesty. DD laws are only one instrument of many, and they alone certainly do not constitute a development strategy. Economic upgrading in GVCs is understood as the upgrading from low value-added products to high value-added products, while social upgrading looks at wages, increases in household incomes, and labour conditions. Both economic upgrading and social upgrading are affected by two sets of factors: value chain governance (Gereffi et al. 2005) and institutional factors, such as labour laws, public institution capacities, industrial policies, innovation policies, and access to justice. Mandatory DD legislation, trade rules, and intellectual property regimes are institutional factors, often set in the Global North, that affect the upgrading chances of workers, firms, and countries in the Global South.

## **Due diligence legislation can have good, bad, and ugly effects on economic development**

The East Asian experience has shown that integrating with GVCs and upgrading within them can deliver powerful progress in terms of economic development. But integration with GVCs should not be an objective per se. The objective must be to use GVCs for learning how to innovate and for economic transformation (Kaplinsky 2005; World Bank 2020). Economic upgrading cannot automatically be equated with social upgrading (Barriontos et al. 2012). Nevertheless, economic growth has historically been the central indicator of the improvement of people's well-being (Pritchett 2019). How then do DD laws feature in this context? Can DD laws help facilitate economic and social upgrading in GVCs? The panel discussed this question at length and ended up categorising the potential effects of DD laws into the good, the bad, and the ugly, emphasising that much more scientific research is needed to gather empirical evidence on the effects that existing DD laws have had and that future DD laws will have.

### *The good*

DD laws have the potential to introduce and standardise regulation, to bring new, safe, and clean technologies into countries, and even to spur innovation in production processes. Firms in developing countries can use buyers' DD efforts or certifications as an opportunity to upgrade their own processes. For example, Gabriel Felbermayr argues that DD laws might have mixed results in the sense that some suppliers will not be able to comply with the new standards and requirements and might exit GVCs, but that the ones

that remain will likely have better conditions for their workers (Sustainable Global Supply Chains 2021).

### *The bad/the neutral*

Even if there are such positive effects for individual firms in the GVCs, that is economic and social upgrading, this does not necessarily mean that there are positive effects for the sector as a whole or for the respective nation (Ponte 2019, p. 140). Ponte provides the example of the South African wine industry, where major economic and environmental upgrading processes did not lead to positive economic outcomes for most domestic players, and environmental outcomes are likely to have been limited (p. 158). Firm-level economic upgrading is only one aspect of structural economic development (Whitfield et al. 2021). It was acknowledged during the discussion that DD requirements could be perceived as a barrier to trade for developing countries. It has also been empirically observed that high standards in GVCs will favour the large and established players in the supply chain. They already know the sustainability standards and they have the resources to comply with them (Shaping Sustainable Supply Chains 2021). Ponte (2019) also argues that sustainability is often applied as a product differentiation and marketing strategy by lead firms in GVCs, while the burden is shifted onto suppliers who have to comply with further certificates, standards, audits, and traceability requirements without being paid higher prices. In the context of additional certification and standards, there is also a risk of governance overload for developing countries, which might lead to situations where private standards and private certifiers take over and weaken local regulatory institutions.

### *The ugly*

The truly damaging effects of DD laws would be what is referred to as leakage or deviation effects, meaning that buyers will just avoid sourcing from very poor countries to ensure that they comply with DD legislation. Buyers could also potentially mechanise processes and substitute capital for labour to avoid risks. In such cases, small or informal firms as well as smallholders would become “uncertified” and be abandoned. They would fall out of the realm of DD legislation because they are simply neglected by buyers. It was argued that pushing the private sector into a situation where their only or best response is divestment from what are perceived risky environments, is the opposite of human rights diligence and must be avoided when designing DD legislation. Companies must be nudged by the legislation towards remedy instead of leaving. That is a delicate balance to strike, and further thought and research is needed to find this balance in current and future legislation.

In the interest of the countries of the Global South, it is imperative for DD legislation to maximise the good effects and minimise or avoid the bad and ugly effects. Just implementing DD laws is not enough. There must be both financial and technical support for the supplier firms from poorer countries to comply with and make the most of DD legislation for their own upgrading. This is also where development cooperation could assist, and both the EU as well as the German Federal Ministry for Economic Cooperation and Development (BMZ) acknowledged that they have to support the implementation in this regard. It is also essential that DD regulation is embedded in a wider set of instruments that facilitate economic and social development. Trade rules in the Global North need to be adjusted to favour more value addition in the Global South instead of vice versa. The innovative design of rules of origin can also be a useful complementary instrument (Kommerskollegium

2020). Intellectual property regulation is important as well. The panel called for an integrated approach, as for example in Rudloff and Wieck (2020). Part of such an integrated approach or a “smart mix” of instruments would also have to be the local enforcement of domestic regulation.

An open question in this regard is: How will governments in the Global South be held to account but also supported in enforcing existing environmental regulations and labour laws? In the context of a broad set of instruments, becoming aware of what DD laws cannot achieve helps to identify what else is needed: industrial policy, education policy, trade policy, and institutional change. Throughout the conference, it was emphasised that the international standardisation of DD legislation would help to minimise leakage effects. National laws are always subject to the worries of national firms about incurring competitiveness costs. The EU-wide law is a step in the right direction. It has been empirically shown that the global impact of EU legislation is large (Bradford 2020). Ideally, however, standardisation would even happen at the global level, for example through the World Trade Organization.

## **Panel 2: Experiences with existing due diligence legislation**

A second panel at the conference discussed some specific experiences with DD laws already in place. One was about the use of the French Duty of Vigilance Law to file a complaint against a French energy company that was starting to build allegedly the biggest wind farm in Latin America in the south of Mexico. The second one was about the experience with the EU Timber Regulation in the case of Indonesia. These two experiences represent two different approaches to due diligence regulation that are both quite common. The EU Timber Regulation is not a DD law. It is due diligence in the form of a vetting or certification process. This is a common approach in other EU regulations and in trade rules. The focus is not on due diligence actions, but on identifying risk and on traceability via transactional certification. It is less binding than mandatory DD laws. The French law and other laws like that, in contrast, focus more on the companies’ role in conducting due diligence as a preventative measure, which is commonly called the “duty of care”.

In the case of the wind farm in Mexico, the complainants argued that the French company had not gotten prior consent from the affected indigenous communities. It is, however, very difficult to show that the vigilance plans of the company were inadequate and that there is a commercial link between the French company and local sub-contractors. The burden of proof falls on the complainant. According to the experience of the complainants, the French law does not provide any guidance on how to go about this. The indigenous communities affected do not have the resources to seek legal support, and there is also the problem of translation from and into French. It is good that the law exists, as it provides another legal avenue for rights holders to pursue in addition to national legislation, but the main concern with the French Duty of Vigilance Law is that it does not attempt to even the playing field between the rights holders and the firms.

The EU Timber Regulation (EUTR) was adopted in 2010 and came into force in 2013. It is an outcome of the EU’s Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. The main objective is to contribute to sustainable forest management and to prevent illegal deforestation. It is a form of voluntary due diligence cooperation, and currently there are 15 partner countries outside of the EU that are participating. Indonesia is the only partner country that has implemented the FLEGT licence, while the other countries

are still in the process of implementation. Indonesia implemented a government-led Timber Legality Assurance System (SVLK) in 2009, which ensures buyers that they can purchase sustainably managed forest products with a traceable chain of custody. Local Indonesian NGOs have pointed out that illegal logging has been prevented because of the SVLK and that both free, prior, and informed consent of indigenous people and human rights as well as environmental conservation have been recognised through the system's active involvement of civil society organisations. It was emphasised that the certification system gives Indonesia's forest industry an international competitive edge, as it serves as a selling point in the international market. But at the same time, it is crucial that local actors in Indonesia are supported to comply with the regulations.

With the kind of voluntary setups like in the case of Indonesia, where the focus is on risk identification and not on due diligence, companies are more likely to remove themselves from the risk – a potential problem already discussed above. Once the risk is identified, it is rather easy to remove yourself from the risk. The regulation basically requires you to do this. But when the focus is on mandatory due diligence instead, the companies will be more focussed on their activities to remedy. If the law is designed in the right way, it will incentivise the companies to reach out to the affected rights holders and mitigate the problem. Once there is a legal duty attached to it, companies will start taking the problems of the rights holders seriously and take action. This is why the “right to remedy” is essential (BHRRC 2020, pp. 51-54). It means that companies do not just get fined but must take tangible actions to improve the situation. In the German DD law, there is no straightforward provision for a right to remedy, but the rights holders can be heard through the statutory complaints process.

### **Panel 3: The upcoming EU due diligence law and research needs going forward**

In a third panel, the imminent EU DD legislation was discussed. There was an acknowledgement that in addition to the regulation, there must be support to local actors in the Global South, which is just as important as the legislation itself. There are several mechanisms at the EU level that can be used in this regard. The European Fund for Sustainable Development+ (EFSD+) can leverage public and private investment in partner countries for sustainable development. 56 per cent of all country programmes under the EU development cooperation scheme Global Europe already include supply chain sustainability among their objectives or results of proposed priority actions. There is an emphasis on capacity-building and training of local governments on implementation, under what is called the Team Europe approach. Given the importance of the private sector in supply chain sustainability, this assistance will have to also focus more on the private sector going forward. Via the EFSD+, the private sector can also be supported to go into more risky countries with currency uncertainties, less stable business environments, and weaker local institutions. This will help avoid the potential ugly outcome that some countries receive no investment because they are perceived as being too risky. In case partner countries do not implement existing laws, the EU has the option of applying the “stick” and suspending budget support, which it has done on occasions in the past.

Overall, it became clear that DD legislation for GVCs is generally welcomed, but that much depends on the actual design and implementation of such legislation. There are significant potential bad and ugly outcomes of DD legislation that must be mitigated. Concerns were expressed that actors and countries from the Global South have been disappointed before,

referring to the EU legislation on palm oil or backlash against REDD+ projects in Indonesia because of the lack of financial support for implementation. DD legislation might be perceived as a non-tariff barrier to trade for developing countries. Countries such as India have already made their opposition against measures such as the Carbon Border Adjustment Mechanism clear. All of this shows that the desire of countries in the Global South to grow their economies and improve the well-being of their populations must be prioritised.

The discussion of how DD legislation can be conducive rather than obstructive in this regard is therefore essential, and this is an important area for future research, for example by the Research Network Sustainable Global Supply Chains. Empirical evidence showing the impact of DD legislation and how actors and firms from the Global South can benefit is needed. This will also help identify where development cooperation can assist most meaningfully. One question that must not be forgotten in this regard is how middle-income countries that fall outside the realm of classic development cooperation but will also be affected by DD legislation can be supported, too.

## 2. The Potential Impact of Human Rights Due Diligence Regulation in the Global South: A Differentiation Between Two Models

*Lise Smit, Senior Research Fellow in Business and Human Rights and Director of the Human Rights Due Diligence Forum at the British Institute of International and Comparative Law (BIICL)*

We are currently witnessing a new wave of regulatory movements that build on the concept of human rights due diligence (HRDD) set out in the UN Guiding Principles on Business and Human Rights (UNGPs) (UN 2011). One recent example is the German 2021 Act on Corporate Due Diligence in Global Supply Chains, passed in 2021. The European Commission is also undertaking a legislative initiative to this effect, based on a study led by the British Institute of International and Comparative Law (BIICL) (BIICL 2020) and informed by a European Parliament (2021) report and Draft Directive. In order to consider the anticipated impacts of such mandatory human rights due diligence (mHRDD) regulation in the Global South, I distinguish between two ways in which the phrase “due diligence” is used in this context (whilst recognising that this is generally a simplification in the interest of brevity).

The first understanding of mHRDD is as a duty of care. The UNGPs describe the corporate responsibility to respect human rights as “a global standard of expected conduct” (Commentary to UNGP 1). Similarly, the mandate of the BIICL study for the European Commission mentioned above was set out in the 2018 European Parliament Report on Sustainable Finance, which called for an “overarching, mandatory due diligence framework including a duty of care” (para 6), and refers to the French Duty of Vigilance Law, which contains a duty of vigilance coupled with a civil remedy for victims, as the basis for a “pan-European framework” (para 11).

This concept aligns with the four components of HRDD as described in the UNGPs of 1) identifying and assessing the actual or potential human rights risks of the company, 2) then taking actions to address these impacts, whilst 3) tracking and monitoring the effectiveness of the actions taken, and 4) communicating how impacts are addressed. It is an ongoing process that goes beyond the tracing or mapping of risks to ask what the company is actually doing about these adverse impacts, and whether this is a reasonable or appropriate action in the specific context. In this way, it resembles the tort law standard of

exercising reasonable or due care, rather than a once-off pre-transactional vetting process.

The second way in which the phrase “due diligence” is often used in the regulatory context is as a verification standard or a checklist-based procedural requirement. This framing is often used in import controls or certification standards, where once it can be shown that a due diligence procedure was done, the standard is deemed to be met and the product can proceed to the market. This model usually requires the identification of the risk, but it often stops there, without minimal deeper enquiry into how the risks were addressed on an ongoing basis.

These two forms of due diligence requirements ultimately necessitate different actions from companies. The distinction between them is important for impacts in the Global South for multiple reasons, but I will focus on two for current purposes – firstly, the different impacts that these two models have on the right to remedy. Despite the principle of “where there is a right there is a remedy”, the evidence shows that claimants in the Global South face overwhelming legal, procedural, and practical barriers to access remedy against Global North companies that are harming their human rights. We also often hear about the invisibility of opaque supply chains. And yet, we know that the victims of human rights harms know exactly how they are being affected, but they often have no avenue to seek recourse.

It has often been highlighted how a legal requirement based on a duty of care lends itself naturally to being the basis of a (statutory) civil remedy. Affected rights-holders could argue that the company has failed to exercise the care that was required, and companies could defend themselves by showing that they had done so. Moreover, companies are increasingly calling (Smit et al. 2020) for this kind of legal duty on the basis that it would harmonise and level the playing field by recognising their HRDD activities and requiring competitors to do the same.

In contrast, the checklist-based models of due diligence requirements are not usually accompanied by remedy for victims, but are instead formulated to facilitate an evaluation of the due diligence process on the face of it, and in the abstract. Sometimes compliance with this kind of law will be measured with reference to a blanket checklist that is not adapted based on the risks, needs, and realities of each specific operating context. In this way, the company could in theory comply with this legal checklist whilst still missing those adverse impacts happening in real life – unless it is also undertaking, in addition and voluntarily, an HRDD process in accordance with the UNGPs.

This brings us to the second point about potential impacts on the different models in the Global South, namely the risk of encouraging divestment. Divestment from Global South business relationships can have devastating effects on the human rights of affected workers and communities. The UNGPs explain that termination of a business relationship is a last resort: It should only take place if leverage has not worked and cannot be increased. And when a business considers ending a relationship, it should consider whether this would in itself lead to adverse human rights consequences. The new German 2021 Act on Corporate Due Diligence in Global Supply (BMAS 2021) reflects these principles by clarifying (in section 7(3)) that due diligence requires certain considerations before the company exits a risky relationship.

A model that evaluates due diligence with reference to a checklist may encourage – and even by implication require – the company to remove itself from the risk entirely in order to comply with the law. If it does not build in a defence for the company of having undertaken the due diligence required in the specific circumstances, there will be no legal basis for the company to learn about and address its real-life human rights risks. The company

might also want to avoid the costs of demonstrating that it is putting in place formal processes aimed at a list of risks that the company knows are not really its salient risks.

In contrast, a duty of care standard that inherently recognises the efforts that companies take to address their real risks to human rights thereby incentivises and even requires such action. HRDD, as described in the UNGPs, expects more and deeper engagement, and a company would not be able to meet the standard required by merely showing that it has removed itself from the risky situation. Even in cases where a law does not provide for a statutory remedy, it could overcome the potential shortcomings of the checklist-based model if the regulatory oversight body itself applies the standard of care principles set out in the UNGPs. This would include focussing on the actual or potential impacts on rights-holders as central to the enquiry. Similar to a judge, the competent authorities would need to be asking whether – on the facts of each individual circumstance – the relevant due diligence has been carried out in an appropriate and reasonable way to adequately prevent and address these human rights impacts.

This can never be a desk-based exercise grounded exclusively on evidence about the company's processes. Instead, it needs to depart from the point of evidence from the individuals and communities whose rights are being adversely affected. It needs to ask what steps the companies have taken to identify, assess, prevent, and mitigate these specific harms and others that have been identified as relevant to the company. Competent authority decision-makers should also bear in mind that rights-holders are more likely to participate in such oversight mechanisms if there is a possibility of a real outcome for them – for example in terms of remediation, ceasing of the harmful corporate activity, or compensation – rather than just a fine for the company.

As we approach a new era of mandatory human rights and environmental due diligence (mHREDD) regulation, we need to apply a human rights lens to ask what behaviour these laws will require of companies, and ultimately what effect this will have on rights-holders in the Global South. The actual or potential human rights harms to rights-holders must be at the centre of any legal test or oversight enquiry in order for the implementation of these laws to be human rights-consistent.

# 3. An Overview of the Impact of Global Supply Chain Constraints on African Countries and the Potential for the AfCFTA to Contribute to Greater Resilience

*Asmita Parshotam, independent consultant and international trade and development expert, South Africa*

This brief provides an overview of some of the critical challenges facing African countries' access to and participation in international supply chains as a result of the COVID-19 pandemic, and the potential that the African Continental Free Trade Area (AfCFTA) can play in assisting African countries to improve regional and domestic manufacturing to protect against future disruptions. It also examines the possible impact that the proposed new EU law on supply chain due diligence can have on Africa: What does compliance mean for African suppliers, how can the public and private sectors ensure successful implementation of supply chain due diligence across the continent, and what potential role can the AfCFTA play in helping African producers and exporters to meet increasingly stringent international standards requirements?

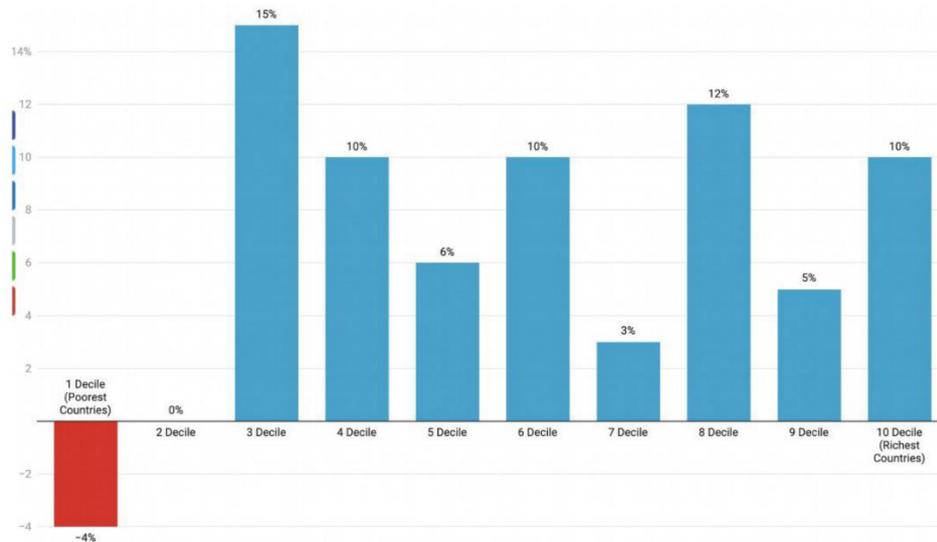
The pandemic's stop-start effects on international supply chains have had a significant impact on African countries, as supply chain constraints across the United States, the European Union (EU), and China have had knock-on effects for importing countries and for producers based in developing countries. Supply chain "contagion" has amplified the direct supply chain shocks for manufacturing firms based in developing countries, which are finding it harder and more expensive to acquire the necessary industrial inputs from their main supply markets in East Asia and the West (Castañeda-Navarrete et al. 2020).

In terms of participating in international supply chains, smaller economies (many of which are African) are also less likely to play a significant role in international supply

chains, which has weakened their post-pandemic recovery (Nicita, Peters, Razo 2021). Export levels among the poorest countries (many of which are African least-developed countries, LDCs) are lower than pre-pandemic levels, at an average of almost 5 per cent (Figure 1). Export recovery is significantly weaker for the smallest economies (regardless of region) – as much as 25 per cent below pre-pandemic levels (Nicita, Peters, Razo 2021). This means that the smaller a country’s economy (the result of a less diverse export basket or greater dependency on commodity exports), the weaker their export recovery. These countries generally have less industrial agility, and their economic recovery is contingent upon the dictates from international markets. For African countries, current estimates predict that the regional GDP per capita will not return – even in the best-case scenario – to its pre-pandemic level before 2024 (UNCTAD 2021c).

It does not appear that 2022 will offer any reprieve for countries that heavily depend on international trade for consumption and production. Existing supply chain constraints look to continue in 2022, as will rising freight rates and consumer costs. Consumer costs are likely to affect LDCs and small island developing states by 2.2 per cent and 7.5 per cent, respectively (UNCTAD 2021b). Many countries that participate in the production of lower-value added items (furniture, clothing, and textiles) could face an erosion in their comparative advantage as a result of higher freighting costs associated with being further away from consumer markets (UNCTAD 2021b). These challenges will be felt acutely by African countries in the coming year.

**Figure 1 – Trade growth in the first half of 2021 vs 2019, by GDP capita (in deciles)**



Note: (Calculations are made by arranging countries into deciles according to their economic size (as measured by GDP) and income level (as measured by GDP per capita), and then calculating average trade growth rates by comparing exports in the first half of 2021 with the pre-pandemic levels of 2019).

Source: Nicita, Peters and Razo (2021).

The pandemic raises real questions around Africa’s susceptibility to external supply chain shocks and the economic recovery of its main trading partners as a result of the continent’s largely upward participation in global value chains (i.e. forward linkages) (Banga et al. 2020). Two-thirds of African countries are net importers of food and medicine (Signé

and van der Ven 2020). This leaves them vulnerable to global shortages and export restrictions, increasing their costs in procuring these products (Signé and van der Ven 2020). Unless real steps are taken to implement meaningful recovery measures, African countries will continue to face a painfully long and slow recovery from the pandemic. Boom-and-bust cycles will likely continue for those countries whose participation in global markets are characterised by commodity exports, deterring efforts to enhance industrialisation, improve continental productivity, and grow participation in global supply chains. Ultimately, all of this will have negative spill-over effects for Africa's overall socio-economic development.

However, economic recovery measures have to be long-term and sustainable. Making this a reality requires assessing how production capacities can be made robust (i.e. improved management) while also enhancing their resilience (i.e. ability to quickly return to normal operations after a crisis) (Jean 2020). Prioritising regional value chains (RVCs) can offer some protection against disruptions in supply and production, as improved efforts at regionalising production will have a greater impact on development and sustainability for Africa (UNCTAD 2021a). The AfCFTA can provide an ideal platform to spur the creation of RVCs and manufacturing hubs if countries are willing to work together, collaborate on shared industrialisation strategies, and identify critical domestic strengths that can support the development of RVCs. In establishing a continent-wide free trade agreement (FTA), the AfCFTA can also play a critical role in standardising requirements around food safety and trade facilitation – such as simplified documentation, implementing e-processing facilities, one-stop border posts, and green trade lanes to facilitate the quicker movement of essential goods – as well as helping to regularise the rules and infrastructure required for investment and e-commerce. This will improve transparency and ultimately improve the continent's ecosystem for doing business – for domestic and foreign investors alike.

Within regional economic communities, countries will have to identify regional interventions to further the proximity of consumers to supply chains. Promoting greater local manufacturing capacity will require African countries to pay serious attention to digitisation, upgrading the skills of their workforces, and rethinking industrial policy development to build greater resilience (United Nations 2021). Achieving these measures requires African countries to be aware of their respective strengths and weaknesses, and relative positions in global value chains. While none of this is impossible, it will require strong political will and private-sector collaboration across countries to ensure its successful implementation.

### **The impact of the EU's new proposed supply chain due diligence law – what does this mean for African supply chains?**

The pandemic has reignited discussions around the need for sustainability and resilience in ensuring socio-economic development. The way in which supply chains are governed are a critical part of this green recovery. The newly proposed EU supply chain and due diligence law reflects an attempt at greater accountability for the private sector to report on the management of their supply chains and ensure that social, labour, and environmental standards are not transgressed during production activities. The new law proposes that all companies seeking to do business in the EU – even non-EU suppliers – will have to identify and confirm business practices of all sub-contractors, suppliers, and ensure their compliance with the new law (CBI 2021).

Historically, the EU's standards are among the most highly regulated and stringent. While the EU is a coveted market, many African producers, for example, face challenges in meeting the EU's food safety and standards requirements. The newly proposed law brings into question how companies will fulfil the new requirements against the reality that many resources and inputs used in the EU are sourced from African countries. From all African value-added exports, 62.8 per cent are embedded in EU exports, in terms of direct exports from Africa to the EU and in imports to the EU from third countries (Banga et al. 2020). Given the way in which African exports are found throughout import supply chains in the EU and as part of EU exports, the challenges around ensuring compliance with the proposed new EU law should not be underestimated.

Unintended consequences of the supply chain due diligence law can include new market access barriers, which raise the risk for non-compliance. Implementation measures will have to factor the new supply law into both domestic industrial policymaking and related industry standards. Many governments may lack the mechanisms to ensure compliance from their private sectors with the new law, and the additional reporting, monitoring, and tracking mechanisms that would be required to ensure that third-country imports (using African inputs) into Europe are adequately accounted for could be critiqued for being overly burdensome.

The new law also raises questions around how, and to what extent, SMEs currently exporting to the EU will be able to adhere with the additional reporting and monitoring requirements. For countries that do not yet have the technical capacity or means to implement the requirements of the new EU law, a longer implementation period may be required. This raises questions as to whether, in the interim, exports from unvetted supply chains will be allowed into the EU or not. Lastly, the reality is that many raw materials – essential as inputs into manufactured goods and other products across the Global North – are sourced in developing countries. In the event that not every supply chain can be comprehensively accounted for, how will the European private sector account for potential supply shortages in their own production activities, and what will this mean for international supply chains?

Ensuring the successful uptake of the new EU law requires some creative thinking and public-private partnerships. Penalties, while necessary, should not be the primary basis for building compliance with the new law. Instead, there will have to be broad-based cooperation, implementation strategies will need to be designed, and capacity-building must be developed for a wide array of public- and private-sector actors to ensure that the new proposed law does not become a de-facto barrier to trade for African countries.

Some of these principles are present in the EU's Economic Partnership Agreements (EPAs) with African countries via the Trade and Sustainable Development (TSD) chapter. In many ways, the new EU law is arguably an extension of the TSD provisions that already exist in many FTAs signed with the EU. Generally, countries that have signed FTAs with the EU are more likely to enhance their environmental performance during the implementation phase. This is the result of the EU's cooperative approach towards domestic reforms in partner countries, and it is argued to yield greater results after ratification of such trade agreements (LSE 2021a). Equally important is technical assistance and capacity-building (for the public and private sectors and civil society alike), which are critical tools for ensuring labour and human rights provisions are fully met (Congressional Research Service 2020; Agustí-Panareda et al. 2014). Therefore, the role of civil society and international

organisations in enhancing cooperation on environmental, labour, and human rights provisions should not be underestimated.

Discussions to deepen the EU-ESA (Eastern and Southern African) EPA has witnessed strong views around the challenges of implementing the TSD chapter's provisions. Some of the learnings from here could be applied to the implementation of the proposed new EU law. For example, roadmaps or similar mechanisms that measure and track third countries' implementation of improved labour (such as the International Labour Organization's), human rights, and environmental concerns can be a key part of any FTA entered into with the EU (LSE 2021b). This will help ensure synergy between a trade agreement and also reduce the burden on African countries to have to abide by two sets of rules as may be contained in the proposed EU law and a separate FTA. Monitoring of compliance will also help in identifying where the private and public sectors alike may face challenges in fulfilling the obligations of the envisaged requirements.

Intergovernmental mechanisms, which are complementary to capacity-building and consist of institutional schemes that bring government departments together for the implementation of such TSD chapters (LSE 2021a), can play a critical role in helping African governments to establish the correct monitoring frameworks and implementation plans that can feed into broader compliance with the new EU supply chain law, while also meeting the existing requirements present in FTAs signed with the EU.

In addition, the AfCFTA can facilitate this coordination with the aim that all African countries involved in the chain adopt a coherent approach to the modification and development of supply chains (Banga et al. 2020). In this way, the AfCFTA can: (i) help producers to improve their export standards, standardising requirements for supply chain due diligence; (ii) ensure exporters' long-term competitiveness with international requirements; and (iii) raise standards of production around environmental, labour, and human rights issues on the continent. For example, under the EU-ESA EPA, Mauritius intends to pursue an overarching sustainability strategy for its textiles and apparel sector that includes the launch of a sustainability assessment for the textile and apparel industry as well as greening the industry's infrastructure vis-à-vis circular economy concerns, waste management, renewable energy, and digital facilities (LSE 2021b). Domestic efforts such as these can help meet AfCFTA supply chain requirements while also enhancing competitiveness internationally and ensuring compliance with the new EU law.

As one of the continent's largest trading partners, standards and supply chain requirements by the EU cannot be dismissed or brushed aside. Ending human rights abuses, slave and child labour, and ensuring against environmental transgressions are not only aspirational, they should be best practices for how doing business is conducted in the 21st century. However, the reality for many African countries is that abiding by these principles has been challenging for reasons that include insufficient resources to track the monitoring and implementation of international environmental, human rights, and labour standards as well as a lack of political will to implement international conventions and best practices. In order to ensure that these transgressions can finally be addressed, implementation strategies have to be achievable, time frames realistic, and an incredible amount of time, energy, and resources will have to be spent on building the private sector and public awareness as well as enhancing the role of civil society to pursue a triple helix approach that helps to raise social, labour, and environmental standards globally. Only then can such a law be successful for the EU and partner countries alike.

# 4. Promoting Climate Justice in Transnational Fora: The Case of Unión Hidalgo vs Électricité de France and the French Corporate Duty of Vigilance Law

*Alejandra Ancheita, Founder and Executive Director of ProDESC, Mexico*

In recent years, the issue of mandatory human rights due diligence (mHRDD) has been at the core of discussions in the human rights field. NGOs, politicians, philanthropic organisations, and corporations have advocated for or against these types of regulations. However, we have seen that a key stakeholder's voice missing is that of communities located in the Global South, which are now (and not in a distant future) suffering the biggest impacts on their lands and territories due to corporate activities. We also believe that any regulation is as good as its implementation – that can be done by presenting litigations and testing the regulations.

Even though the topic of due diligence has powerful precedents such as the UN Guiding Principles on Business and Human Rights (United Nations 2011), the French Corporate Duty of Vigilance Law (Légifrance 2017) excels due to the broad scope of its reach. Among other points, this law creates a duty of vigilance seeking the effective prevention of risks and human rights violations that result directly or indirectly from the activities of French transnational corporations and those of their subsidiaries and business partners. To that end, the law requires the establishment of “an effective vigilance plan” (Action Aid et al. 2018). This plan must identify and prevent human rights violations. Corporations can be held liable if they fail in their duty of vigilance.

Recent discussions have also highlighted the relevance of the energy transition, considering the (undeniable) climate crisis and the need to think of solutions that reach the problem from a preventive approach and centre human rights due diligence in the dignity of

people along with the responsibilities of corporations. By presenting the case of the indigenous community of Unión Hidalgo Oaxaca, this article discusses the impacts suffered in communities of the Global South by the activities of transnational corporations and reflects the importance of designing strong legal frameworks for preventing violations of human rights – including holding corporations accountable for their liability – in order to achieve climate justice.

The Isthmus of Tehuantepec – a specific region in southern Mexico with exceptional wind conditions – is highly attractive for the construction of wind parks. In recent years, 30 wind parks have been constructed in the region, mostly from Spanish, French, and German companies. The Isthmus of Tehuantepec is also home to a variety of indigenous peoples who have kept their culture and languages, among them the Zapotec (or “binnizá”) community. Even though Mexico ratified ILO Convention 169 in 1990 (ILO n.d.), these wind parks have been built without proper free, prior, and informed consent from these indigenous communities. Wind parks in Mexico disrupt communities: Unlike in Europe, the land in which the wind parks are built becomes highly militarised, the wind turbines are located close to urban areas, and the communities do not benefit from the generated energy.

Unión Hidalgo is one of the communities in the Isthmus that has seen a flux of corporations interested in building wind parks. In 2016, people from the community started hearing rumours of a new company interested in building what would be one of the biggest wind parks in Latin America, which would surround the community. ProDESC is a Mexican NGO that I founded in 2005, and for 11 years it has been supporting the defence of the community’s rights against a Spanish wind park that ultimately was built on their land. In this new case, and through a series of legal challenges in Mexican courts, we were able to identify that Électricité de France (EDF) was the corporation behind the project. More importantly, we were able to stop the construction of this new wind park before it had even begun, thanks to a series of litigations in Mexican courts. With this, we prevented further harm to the community.

These legal victories in Mexican jurisdictions did not stop EDF in its pursuit to advance the development of its “Gunaa Sicarú” wind park; we concluded that the case had to be taken to transnational tiers to safeguard the community. The community, alongside ProDESC, filed a complaint at the French National Contact Point in 2018; however, due to a lack of progress in that procedure, we decided to withdraw in July 2019.

During the following months, we worked on what would become the first lawsuit by an indigenous community in the Americas to be presented using the Corporate Duty of Vigilance Law in French jurisdiction. We have pointed out that EDF’s faulty vigilance plan led directly to the violation of human rights in Unión Hidalgo, particularly in two aspects: the violation of the right to free, prior, and informed consent; and the right to defend human rights, considering the physical risks that human rights defenders against the project have had to suffer from for years now. Up to this point, EDF has discredited the community’s representatives and argued that the responsibilities fall to Mexican authorities, even though they are obligated to the duty of vigilance in accordance with the French law.

As a result of our experiences testing this regulation since 2019, we can find positive aspects and challenges. As positive aspects, the following points can be mentioned:

1. It has been proven that “voluntary” or “corporate social responsibility” approaches fail to effectively promote and defend human rights and, ultimately, access to remedy should human rights violations occur. In this regard, transitioning to mandatory regulations is a good sign.
2. The goal of the French regulation is to prevent and promote respect for human rights, and not just to remediate when human rights violations occur. In that sense, the communities can set up preventative strategies.
3. Unlike the National Contact Points that are supervised directly by the Executive Branch, the lawsuits presented using this regulation are addressed by the Judicial Branch, which is theoretically independent in this case. The issue of independence is important since 84 per cent of EDF’s shares are owned by the French State.

Challenges, however, are important. Some of these challenges are:

1. The law sets the burden of proof directly on the complainant; that is, affected communities – most of them coming from the Global South, as the current French law cases portray – must prove that violations or abuses have occurred and that they are the responsibility of the corporation. This is a huge challenge, considering that affected communities lack access to substantial information and documentation on due diligence and corporate structures.
2. Most communities in the Global South do not have the resources to access these judicial instances, and there are no specifications to ensure a real engagement of communities, for example, with the issue of the translation of legal documents from French to other languages. There is a clear imbalance of power and resources between communities and big French transnational corporations, and the law does not provide tools to reduce these imbalances.
3. Holding accountable the financial and commercial partners of the French transnational corporations remains challenging. Corporations may hire different subcontractors, who themselves may be violating human rights in the communities in the Global South; however, proving that there is a commercial link between the French corporation and these local subcontractors is overwhelmingly difficult, and it takes time and resources that communities do not have – specially in urgent situations in which serious abuses are being committed. French corporations must be held accountable for any human rights violations committed by their subsidiaries and subcontractors.
4. The question of civil jurisdiction. French corporations hoped that these cases would be resolved by commercial courts, and NGOs vehemently opposed considering that commercial courts had never heard cases related to human rights. Recently, the French parliament explicitly stated that civil courts are competent to hear these cases, and we believe that this is a move in the right direction.
5. Finally, the case also demonstrates the serious risks of a narrow interpretation of mHRDD, meaning a constant obligation for measures that effectively prevent human rights violations. The tendency observed in the judicial system in France is a rather procedural interpretation of due diligence, considering the publication of the vigilance plans as the sole requirement that fulfils the duty of case.
6. It is necessary to establish a clear, comprehensive definition of the mHRDD in European law that is focussed on results rather than means in order to avoid ambiguity and restrictive interpretations based on procedural approaches instead of human-rights-based ones.

We are in a defining moment in which firm steps need to be taken in order to hold back the negative impacts of the climate crisis. A preventative approach is key to advancing such an objective. However, climate change has proved its negative impact on socio-economic rights, and once again the most disadvantaged communities are carrying the burden of the climate emergency. Human rights ought to be put at the centre in order to deliver climate justice. That implies that communities such as Unión Hidalgo have effective access to preventative mechanisms and remediation whenever companies are responsible for serious abuses when trying to advance adaptation efforts such as renewable energy projects.

As the European Coalition for Corporate Justice already identified, States must ensure robust enforcement of mHRDD obligations (Action Aid et al. 2020). By doing so, they will advance in meeting their obligations in relation to the climate crisis – including those of climate justice. However, if laws do not adequately set the scope of mHRDD obligations for corporations and its implementation is reduced to formalistic approaches, climate justice will not be delivered for those aiming to be protected.

# 5. System Integrity: The Key to Sustainable Forestry

*Abu Meridian, Campaign Leader at Kaoem Telapak, Indonesia*

The global trend towards sustainability is compelling timber producers to employ credible certification to meet exporting requirements. We have witnessed the regulations being imposed by major wood importers as a means to enhance timber trade accountability: from the US Lacey Act Amendment (2008), which bans all trade on illegally sourced wood, to the European Union's Timber Regulation (2010), which stipulates that no illegal timber or timber products can be sold in the EU.

We understand well that similar rules were also conceived and implemented in Australia (Illegal Logging Prohibition Act, 2012), Japan (Clean Wood Act, 2016), South Korea (Revised Act on the Sustainable Use of Timbers, 2018), China (Measures on Strengthening the Legality of Imported Timber, 2019), Vietnam (VNTLAS, 2020), and Malaysia (MYTLAS, 2013). This presents an opportunity and challenge for exporting countries, as buyers may – and most likely will – put a great level of attention on the credibility and accountability of risk assessment tools, which serve as one of the pivotal factors in ensuring a sustainable supply of timber products.

Given the circumstances, Indonesia is well-positioned to fulfil the need for low-risk timber products, as the country has been supported with the presence of a government-led Timber Legality Assurance System (SVLK) since 2009. The system works to ensure buyers purchase forest products with a traceable chain of custody and that are sustainable forest management (SFM)-friendly. But the road to sustainable forestry is not always easy. Internationally, forest governance and law enforcement still face substantial challenges, as certification integrity and credibility are often challenged by the perception that businesses are greenwashing.

Nonetheless, to date, forest certification remains one of the most important tools for enforcing sustainable forest management. Through certifications like SVLK, we acknowledge the role of forest management in improving community livelihoods, employment, and income generation. It is also a recognition of the free, prior, and informed consent of indigenous people and the great respect for property and land tenure rights as well as customary and traditional rights. Moreover, the certification also implies the maintenance, conservation, and enhancement of ecosystem biodiversity as well as respect for human rights in forest operations.

As a government-led certification, SVLK's mandatory nature serves as an edge. However, the prevailing sentiment on the certification issue presents a challenge to the credibility and integrity of Indonesia's SVLK, both to its national and international stakeholders.

Hence, the system requires constant monitoring from independent and accountable parties to uphold transparency and good governance to itself and the SVLK.

### **Strengthening the role of civil society in enhancing SVLK's reputation and integrity**

This rigorous multi-stakeholder approach of SVLK adds unique values to SVLK, especially in how it embraces civil society involvement through its watchdog role. The process of awarding an SVLK certificate involves various stakeholders, as mandated by Law 41/1999 on Forestry, which gives room for the community to become part of the monitoring process of forestry operations.

An SVLK certification awarded to a specific forest product means it has undergone three stages of the assurance/verification process, which are: annual external evaluations to assess the system's proper design and functioning; verification by auditors; and monitoring by CSOs, which can at any time file a complaint to the Certification Accreditation Bodies and/or Independent Accreditation Committee (KAN) regarding a group or company certificate. This system makes it an internationally recognised, nationwide chain of custody system from upstream to downstream.

As a group that has been involved with the system since 2010, the Forest Independent Monitoring Network (JPIK) works actively to boost the credibility and accountability of the Performance Assessment System for Sustainable Production Forest Management (PK-PHPL) and Timber Legality Verification (VLK). By having an independent monitoring system in place, SVLK minimises the risks of businesses overclaiming their products through a multi-layered monitoring system, while at the same time it contributes to more consistent policy implementation, reducing the risk of one party's ability to self-claim based on unilateral data.

Civil society's involvement is essential in building a more transparent system and providing better assurances for buyers in procuring low-risk products. On top of that, SVLK online risk assessment tools create wider possibilities for CSOs to ensure the possibility of V-Legal Document revocation led by non-compliance cases by wood producers, whilst importers can re-check the chain of custody of their imported Indonesian products.

### **Towards a more trustworthy system**

Civil society's active role in SVLK certification is strong evidence of successful collaboration and partnership for better forest management. From 2011 to Q1 2020, JPIK conducted monitoring in 107 forest management units, which consisted of 46 concession holders and 61 industries. The activities resulted in 119 reports that we submitted to Certification Bodies, the National Accreditation Committee (KAN), the Ministry of Environment and Forestry, the Ministry of Trade, the Ministry of Industry, Indonesia's Customs, as well as the National Police. From 2015 to April 2020, Indonesian law enforcers managed to confiscate a total of 37,619 m<sup>3</sup> of wood through 526 counter-illegal logging operations, in which 373 cases were taken to court.

From the buyers' perspective, this system helps them to rely on credible risk assessment tools as a means to meet the company's/country's regulations. The development of SVLK,

which opens wider possibilities to importers to check the chain of custody of their imported products, indeed has strengthened the system significantly.

But with all its current achievements, SVLK still needs to maintain and improve its accountability and strengthen on-ground implementation to minimise illegal activities. It also remains a joint effort to make the system as inclusive as possible to all stakeholders in Indonesia's forestry, and thus create a more trustworthy system to sustain our forests. The positive testimonies from the importers in relation to the good quality of Indonesia's timber, combined with continuous efforts in improving its sustainability performance, can serve as the ultimate selling point that differentiates Indonesia's timber positioning in the market.

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